Njogu & 2 others v Kenya Airports Authority & 3 others (Civil Appeal 2 of 2013) [2019] KECA 1041 (KLR) (25 January 2019) (Judgment)

Paul Mungai Njogu & 2 others v Kenya Airports Authority & 3 others [2019] eKLR

Neutral citation: [2019] KECA 1041 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 2 OF 2013

PN WAKI, DK MUSINGA & JO ODEK, JJA

JANUARY 25, 2019

BETWEEN

PAUL MUNGAI NJOGU ..... 1ST APPELLANT

JAMES KIMANI ..... 2ND APPELLANT

NEW JAMBO TAXIS ..... 3RD APPELLANT

AND

KENYA AIRPORTS AUTHORITY ..... 1ST RESPONDENT

JULIUS NJOROGE ..... 2ND RESPONDENT

MWENDE ..... 3RD RESPONDENT

FREDRICK MURUNGA ..... 4TH RESPONDENT

(Being an appeal from the ruling and decree of the High Court of Kenya at Nairobi (Mwera, J.) delivered on 22nd March, 2011 in H.C.C.C. No. 2543 of 1996)

JUDGMENT

1. The appellants were the plaintiffs in HCCC No. 2543 of 1996. The appellants sought to challenge their exclusion from operating their taxis at the Jomo Kenyatta International Airport (JKIA) by the 1st respondent, Kenya Airports Authority, (KAA). The appellants averred that their exclusion from JKIA was a breach of an existing lease between them and KAA, which was done in a discriminatory manner for the reason that they were from the Kikuyu community.

2. The appellants sought the following orders:

> " (a) A declaration that a taxi business like that operated by members of the third plaintiff is property within the meaning of section 75 of the *Constitution*.
>
> b. A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff from Jomo Kenyatta International Airport on grounds of their ethnic origin is in breach of the plaintiff's right under section 82 of the *Constitution* of Kenya not to be subjected to discriminatory practices.
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> c. A declaration that the removal of the taxis of the first and second plaintiffs and of the members of the third plaintiff from Jomo Kenyatta International Airport was in breach of the plaintiffs' right under section 75 of the *Constitution* of Kenya not to be deprived of property.
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> d. A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff was a contravention of their right under section 77, to the protection of the law.
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> e. A declaration that the removal of the taxis of the first and second plaintiffs and those of the members of the third plaintiff is a contravention of their right under sections 78 and 82 of the *constitution* to hold such opinions and views including political as persuades their consciences.
>
> d. A permanent and perpetual injunction to restrain the first defendant from further excluding the plaintiffs' taxis from the said Airport.
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> e. A mandatory injunction to compel the first defendant to allow the return of the excluded taxis of the third plaintiff.
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> f. A permanent and perpetual injunction to restrain the defendants from trespassing to the plaintiffs' offices.
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> g. A mandatory injunction to remove the second, third and fourth defendants from the plaintiffs' office.
>
> h. Mesne profits for trespass against the defendants.
>
> i. Damage for breach of contract against the first defendant.
>
> j. Costs of this suit.
>
> k. Interest."

3. Pending hearing and determination of the suit, the appellants filed an application seeking an interlocutory mandatory injunction to compel KAA to allow the appellants to continue operating their taxi business at JKIA.

4. KAA opposed the application on the following grounds:

> " 1. That no statutory notice has been served upon the 1st defendant as required by S.34(a) of the *Kenya Airports Authority Act* (cap. 395).

2. That the provisions of S.33(1) of cap. 395 which provide for statutory arbitration have not been followed by the plaintiffs.

3. That in the premises, the present proceedings are wholly misconceived, incompetent and bad in law.

4. That the present application does not satisfy the tests in Giella –v- Cassman Brown Ltd; in that;

   a. - the plaintiffs have not established a prima facie case with any probability of success;

   b. - the plaintiffs do not stand to suffer any irreparable loss or damage if an injunction is not granted.

   c. - the balance of convenience favours a refusal of an injunction.

5. That the application does not meet the conditions for the granting of a mandatory injunction;

6. That the application is frivolous, vexatious and an abuse of the court process."

5. In a ruling delivered on 24th January 1997, Hayanga, J. held, inter alia:

> " In my judgment a denial of one's constitutional right is a very grave deprivation and I believe that the interpretation of S.75 of the Constitution indicates that the applicants may be made to suffer unduly if mandatory injunction requested here is not granted. I do not think that reinstating these taxi operators to operate their taxis until this matter is heard will in any way involve the Authority in any abnormal expense and I do grant prayers 3 and 5 of the application."

6. Being aggrieved by the said ruling, KAA appealed against the decision. This Court, in its judgment delivered on 27th November, 2009 set aside the orders made by Hayanga, J.

7. Subsequently, upon resumption of the hearing in the High Court, by a Preliminary Objection dated 23rd August, 2010, KAA sought to have the appellants' suit struck out on grounds that:

> " 1. The Plaintiff's suit and the entire proceedings herein have been filed in contravention of the mandatory provisions of section 33 and section 34(a) of the *Kenya Airports Authority Act*, Cap. 395, ("the Act").
>
> 2. By reason of the aforesaid provisions of the Act, the suit and the entire proceedings herein are premature, misconceived, incompetent and a complete nullity;
>
> 3. Further, by reason of the aforesaid provisions of the Act, this Hon. Court has no jurisdiction to entertain the suit and the proceedings herein, which should therefore be struck out with costs to the 1st Defendant."

8. Mwera, J. upheld the preliminary objection and struck out the appellants' suit with costs to the respondents. That is the decision that gave rise to this appeal. The memorandum of appeal raises ten (10) grounds, which may be compressed as follows:

   i. Whether the Preliminary Objection was res judicata.

ii. Whether the learned judge erred in both law and in fact in upholding the application of Sections 33 and 34 of the *KAA Act*.

iii. Whether the learned judge erred in fact and law in entertaining the Preliminary Objection made 15 years after the suit was filed.

iv. Whether the Preliminary Objection constituted a pure point of law.

v. Whether the learned judge erred in failing to appreciate the suit was for enforcement of fundamental rights under Section 84 of the *Constitution*.

9. When the appeal came up for hearing on 23rd October, 2018, Mr. G.K. Kuria, S.C. appeared for the appellants. There was no appearance for the respondents, though a hearing notice had been served upon their advocates, M/S Tobiko, Njoroge & Company. Both parties had however filed written submissions pursuant to directions given on 23rd November, 2016. Dr. Kuria, SC. briefly highlighted his submissions and urged the Court to allow the appeal. We shall proceed to determine the appeal on the basis of the record of appeal and the submissions on the record.

10. Did the learned judge err in failing to hold that the preliminary objection raised by KAA was res judicata? Dr. Kuria argued that in view of the ruling delivered on 24th January, 1997 by Hayanga, J., Mwera, J. (as he then was), erred in law in failing to find that the preliminary objection was res judicata, since the same issues had earlier been raised and decided upon.

11. The respondents were therefore barred from raising them a second time, counsel submitted. He added that in the appeal against the decision of Hayanga, J, this Court did not uphold the objections raised by KAA; in any event, that was an interlocutory appeal and this Court could not have had jurisdiction to effectually determine the issues raised in the preliminary objection. The substantive issue that was decided upon by this Court was whether Hayanga, J. had considered the appropriate principles for grant of an interlocutory mandatory injunction, counsel submitted.

12. In response, KAA submitted that the preliminary objection was not res judicata, firstly, because both the rulings by Hayanga, J. and this Court were on interlocutory applications; secondly, this Court did not agree with the position taken by Hayanga, J. regarding section 33 of the *KAA Act* and ruled that it was one of the issues to be determined in the suit; and lastly, neither the High Court nor this Court dealt with section 34(a) of the *KAA Act* with finality or at all.

13. Section 7 of the *Civil Procedure Act* states as follows:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

14. It is not in dispute that the preliminary objection that was raised by KAA on 23rd August, 2010 partially consisted of grounds that it had earlier raised before Hayanga, J. A perusal of the ruling by Hayanga, J. reveals that the learned judge considered the provisions of section 33(1) of the *KAA Act* which states as follows:

> " 33

(1) in the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Authority, or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice."

15. Without making any express determination as to whether the said provision was a bar to the appellant's suit, the learned judge held:

> " Whether this arbitral clause can stop a claim for injunction is not settled. I had occasion to rule in HCCC No. 1219 of 1996, *Birds Paradise Tours And Travel v Kenya Airports Authority* that an injunction application is not a suit for compensation or a suit analogous to or in generis with "compensation" to be conditioned to that section."

16. The learned judge did not, however, address himself at all to the provisions of section 34(a) of the *KAA Act* which states as follows:

> " 34. Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect-
>
> a. the action or legal proceedings shall not be commenced against the Authority until at least one month after a written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent;
>
> b. the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of continuing injury of damage, within six months next after the cessation thereof."

17. This Court, in its judgment from the ruling of Hayanga, J. stated as follows regarding the provisions of section 33:

> " Mr. Nganga submitted that this section is unconstitutional as in his view it limits free access to the courts. In our view, we find nothing unconstitutional or ultra vires the constitution in the section. The Arbitration Act Cap 49 of the Laws of Kenya makes provision for contracting parties referring their disputes concerning their contractual obligations to an arbitrator acceptable to both sides. The respondents voluntarily entered into the lease agreement. Prima facie, they are held to have chosen the manner of dealing with disputes between them. It is important to recall that the suit between the parties is still pending and this is one of those issues which have yet to be determined. We say no more on it."

18. Commenting on the provisions of section 33(1) of the *Act* in the impugned ruling, Mwera, J. held that:

> "....the plaintiff lessees should not run away from the conditions on which they got contracts to operate at JKIA, by instituting suits as this one. That the plaintiff should go by and exhaust the statutory course before coming to court and that was mandatory.... Accordingly, this suit was premature in the sense that the avenues provided to resolve disputes leading to suits had not been exhausted in the first place."

In other words, the learned judge did not find that the said section was unconstitutional. He affirmed its provisions and said that the dispute should first have been referred to an arbitrator.

19. Regarding section 34, Mwera, J. held that the appellants contravened the said section in that they did not serve the requisite notice before filing the suit.

20. The learned judge held that the issues about sections 33 and 34 of the *KAA Act* were not res judicata. Hayanga, J's appreciation of section 33 was overturned by this Court, he stated. Further, since the suit was still pending before the High Court, this Court had held that the issue would be conclusively determined by the trial court, which he did. And with regard to section 34, neither Hayanga, J. nor this Court had dealt with the merits of the section, the learned judge added.

21. We have considered the ruling of Hayanga, J. and the judgment of this Court against the said ruling. We do not agree that Mwera, J. erred in finding and holding that the preliminary objection was not res judicata. An issue can only be considered *res judicata* when it has been finally determined and is no longer subject to an appeal. If a lower court determines a matter or pronounces itself on an issue and subsequently an appellate court reverses that decision or finding and thereafter the hearing proceeds before the trial court, it cannot be said that the issue that had been raised and determined by the trial court earlier is res judicata.

22. This Court did not agree with Hayanga, J's appreciation of section 33 and overturned his ruling. But more specifically it held that the issue of applicability and/or constitutionality of the section was "still pending and this is one of those issues which have yet to be determined". How then can the appellants argue that it was *res judicata*? In *Maithene Malindi Enterprises Ltd V Kaniki Karisa Kaniki & 2 Others* [2018] eKLR, this Court held that for the bar of res judicata to be effectively raised and upheld the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

> "a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

23. As regards section 34, Mwera, J. was right that neither the High Court nor this Court had previously pronounced themselves on the section in the course of the dispute. In the circumstances, the learned judge had to determine the issue of applicability of the said section.

24. We now turn to consider whether the learned judge erred in upholding the application of sections 33 and 34 of the *KAA Act* in striking out the appellants' suit. The appellants argued that the learned judge failed to appreciate that the constitutionality of the said sections was under challenge in the suit. The first prayer in the plaint was worded as follows:

> "(a) A declaration that section 33 of the *Kenya Airports Authority Act* is unconstitutional to the extent of its inconsistency with sections 75, 77 and 82 of the Constitution of Kenya."

25. As regards section 34, the appellant's counsel submitted that the section provides for a limiting condition, first, on one month written notice; and secondly, limitation period of one year; while section 84 of the repealed *Constitution* provided for unhindered and unlimited access to court. Counsel cited the case of *Dominic Arony Amolo v The Attorney General* [2005] eKLR. Counsel further submitted that section 3 of the repealed *Constitution* excluded the operation of the *Limitation of Actions Act* (Cap 22) with regard to claims under fundamental rights. By parity of reasoning, counsel stated, section 34 of *KAA Act* has to give way to enable the appellants pursue their claims for protection of fundamental rights and freedoms.

26. On the other hand, the 1st respondent's counsel submitted that there is nothing unconstitutional about section 33 of the *KAA Act*; and that the provisions of both sections 33 and 34 are mandatory; that neither the appellants nor the court could side step them.

27. Although the appellants' counsel submitted that the suit before the High Court was for enforcement of fundamental rights under section 84 of the repealed Constitution, that argument was twice rejected by this Court in its earlier decisions. In Civil Application No. Nai 29 of 1997, *Kenya Airports Authority v Paul Njogu Mungai, James Kimani & New Jambo Taxis*, (being an application for stay of execution of Hayanga, J's ruling pending appeal), the Court summarized the background of the dispute as follows:

> "Dealing with the first of these principles what emerged from the pleadings, affidavits and arguments before us is that some time in 1993 and 1994 KAA informed the respondents that it would allow only roadworthy vehicles (taxis) to operate from JKIA. KAA through its general manager referred to such taxis as those which were "of good and sound state and condition both mechanically and aesthetically." The minutes of the meetings held at JKIA between KAA and Taxi/Tour Operators on 29th September, 1993 and 4th October, 1994 point out KAA's concern about peace, reputation, security etc. of and concerning the airport areas in relation to the manner of operating the taxis, conduct of drivers, discipline etc. The question of inspection of taxis was also mooted. The respondents and other taxi owners agreed to submit to such inspection. It was agreed that owners of dented, old and mechanically unsound vehicles should remove such taxis from the airport areas.
>
> Subsequently older taxis were barred from operating from the airport area and some of the owners of these taxis are members of the third respondent. They were excluded from operating their taxis as from 23rd August, 1996. Mr. M'Inoti for these respondents complains that his clients were discriminated against as only seven digit number taxis, as opposed to older six digit number taxis were allowed to operate from the airport area. He invoked the provision of section 75 of the Constitution of Kenya to urge that his clients' property rights were being infringed. The long, verbose and inelegantly drafted plaint brings in the alleged factor of tribalism being practised by a Maasai general manager of KAA against members of Kikuyu community. This is obviously irrelevant and constitutes a red herring to detract attention from the real issue in dispute which is simply: was there a breach (if any)

of the contract (such as may have been on the part of KAA, the contract being one which allowed the members of the third respondent to operate their taxis from the airport?

28. In Civil Appeal No. 282 of 2001, *Kenya Airports Authority v Paul Njogu Mungai, James Kimani & New Jambo Taxis*, this Court again held that the alleged violation of fundamental constitutional rights did not lie. The Court held:

> " Clearly, there were neither special circumstances for the grant of an interlocutory mandatory injunction, nor a demonstrable breach or violation of any constitutional provisions relating to fundamental rights upon which an order of a mandatory nature would have been granted. It would prima facie, appear to us that the appellant imposed conditions which would regulate the taxis which would operate at the JKIA. If the respondents were not able to meet those new conditions, which appear to have applied across the board, they would not properly invoke constitutional provisions to their aid to deal with alleged contractual breaches."

29. This Court, having pronounced itself on the constitutionality of the appellants' claim, and particularly section 33(1) of the *KAA Act*, it is functus officio and cannot revisit it. We must therefore reject the appellants' contention that the learned judge erred in failing to appreciate that the suit before him was for enforcement of fundamental rights. As was held by this Court in *Republic v National Environmental Management Authority* [2011] eKLR, "It is for the court to undertake a proper scrutiny based on the pleadings before it to determine whether the dispute has a complete constitutional trajectory".

30. Was there unnecessary delay in filing the preliminary objection? The appellants argued that it was brought 15 years since the filing of the suit, whereas it ought to have been raised at the earliest time possible. The respondents countered that argument. They stated that the preliminary objection was raised in its defence that was filed shortly after the filing of the suit.

31. The record shows that the notice of preliminary objection that was filed on 23rd August, 2010 had first been raised in the 1st respondent's grounds of opposition dated 24th October, 1996 and repeated in its statement of defence dated 28th January, 1997. The ruling of Hayanga, J. that first dealt with some of the issues raised was delivered on 24th January 1997. Thereafter the respondents filed an appeal against the ruling. The appeal was finally decided by this Court on 27th November, 2009. When the hearing of the suit resumed, the 1st respondent took up the preliminary objection. In the circumstances, there is no basis for finding that there was inordinate delay in filing the preliminary objection.

32. In our view, the preliminary objection constituted a pure point of law as held in *Mukisa Biscuit Company V West end Distributors* [1969] EA 696 that:

> " So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispute of the suit."

33. In the same matter, it was also held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct; it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion.

34. The parties filed written submissions that were quite exhaustive. This is what the learned judge stated about the submissions:

> "…..the 1st defendant filed an 8- page script arguing why the preliminary objection should be sustained and referring to many authorities to that effect. The plaintiff on the other hand responded with a 19-page script containing 92 points and also referring to a myriad of authorities to persuade the court that the objection was unmerited. So the court is obliged to glean from all these and perusing the pleadings and past proceedings, determine the objection one way or the other."

35. The learned judge observed that all the grounds of the preliminary objection were legal in nature and had been raised in the 1st respondent's statement of defence; and that there was no denial by the appellants that they had not complied with sections 33(1) and 34 of the *KAA Act*. We agree with the learned judge and dismiss this ground of appeal.

36. Lastly, we shall consider whether the learned judge, in upholding the preliminary objection and thereby striking out the appellants' suit, disregarded the provisions of Article 159(2)(d) that obliges the court to administer justice without undue regard to procedural technicalities. In *Raila Odinga v I.E.B.C. & others* [2013] eKLR, the Supreme Court held that Article 159(2)(d) of the *Constitution* was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court.

37. In our view, given the true nature of the appellants' claim, we do not think that the 1st respondent's assertion that the mandatory provisions of sections 33(1) and 34 of the *KAA Act* had not been complied with was a mere technicality which the trial court ought to have disregarded. The parties' rights were contained in a lease which expressly incorporated the aforesaid provisions of the law. They had to be complied with.

38. All in all, we find this appeal lacking in merit and dismiss it in its entirety. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY, 2019.

P.N. WAKI

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR