



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: VISRAM, KARANJA & SICHALE (J.J.A))**

**CIVIL APPEAL NO. 46 OF 2018**

**BETWEEN**

1. JOSEPH TAMA NDUWA
2. ELIJAH MASHA THOYA
3. SAMUEL MWANGI KIAMBATI
4. DAVID KIMONDIU
5. CATHERINE K. MUNGANIA
6. GETRUDE ANGWENYI NYANTARO
7. RONGOMA BERNARD JAMBO
8. CONSTAINE ODHIAMBO BALA
9. CAROLINE WAMBUI NJURUBA
10. PETER KIARII
11. ALBERT ABEDI MAGOMERE
12. FRANCIS TUMUTI ..... APPELLANTS

**AND**

**JACARANDA HOTELS (MSA) LIMITED T/A**

**JACARANDA INDIAN OCEAN BEACH RESORT.....RESPONDENT**

*(Being an appeal from the Ruling and Order of the Employment and Labour Relations Court at Mombasa (Rika, J.) delivered on 27th June, 2016*

*in*

***Mombasa Industrial Court Cause No. 271 of 2013)***

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**JUDGMENT OF THE COURT**

1. This is an appeal against the Ruling of the Employment and Labour Relations Court (ELRC) delivered on 27th June, 2016. The appellants were

employees of the respondent who were on the verge of being declared redundant. They had lodged a claim before the said court, seeking to have the redundancy process declared flawed and tantamount to unfair termination. Accordingly, they sought injunctive and prohibitory orders against the respondent in respect of the said redundancy or in the alternative, damages for wrongful termination as well as terminal dues amounting to Kshs.11,530,117.53/- The claim was opposed, but before the matter could be heard *inter partes*, parties reached a partial consent on the terminal dues payable; which was recorded and adopted as an order of the court. This left wrongful termination as the sole issue for determination by court.

2. However, contrary to expectation, the respondent failed to honour the terms of the consent, which prompted the appellants to commence execution proceedings. This in turn spurred the respondent to file a motion on notice, dated 18th August, 2015, seeking *inter alia*; orders of stay of execution as well as restraining injunctions against the impending execution by the appellants. The ruling delivered in respect of that application forms the subject of this appeal.

3. According to the impugned ruling, the learned Judge **Rika J**, recognized that the consent was yet to be complied with and ordered the parties to meet and renegotiate afresh taking into account all the issues that had arisen after the original consent and arrive at a consensus. Irked by that outcome, the appellants lodged the present appeal, in which they contend that the learned Judge erred by; failing to find that the respondent failed to comply with the terms of the consent dated 2nd April, 2014; holding that the appellants owed various institutions a sum of Kshs. 7,967,848/- yet there was no evidence supporting such a finding; failing to find that the remedy of injunction as sought by the respondent was unavailable given the concluded claim; failing to find that the issues raised by the respondents were *res judicata*; holding that the consent was incapable of execution; directing the parties to re -draft the consent; failing to rule on issues placed before him and lastly; failing to dismiss the respondent's notice of motion dated 18th August, 2015.

4. The appeal was ventilated through written submissions with oral highlights at the hearing. Appearing for the appellants, learned counsel **Mr. Mutubia** submitted that the respondent was supposed to comply with the consent dated 2nd April, 2014 within 30 days of its execution. Having failed to do so, the appellants filed an application for execution, which went unopposed and was thus allowed. When the appellants commenced execution, the respondent then filed the application dated 18th August, 2015; seeking stay of execution, which saw the parties being ordered back to the negotiating table. It was counsel's contention that in so doing, the learned Judge failed to render a determination on the application. To begin with, he asserted that the said application was *res judicata*, in view of the application dated 4th November, 2014. In connection to this, he stated that the orders issued on 17th March, 2015 were still in force, having never been challenged. Further, that the grant of stay of execution was thus erroneous, since the respondent never sought to set aside the orders issued pursuant to the application dated 18th August, 2015. On the whole, that the application dated 18th August, 2015 was *res judicata* in view of the appellants' application dated 4th November, 2014 and the orders issued thereon.

5. In addition, counsel opined that the consent in question was still live and unless it was amended, the parties continued to be bound by it; and that this rendered the respondents' application a non-starter. He added that though the respondents had claimed albeit belatedly, to have paid the appellants, that allegation was never proven and in any event, any payments effected prior to the consent were irrelevant to the matter at hand. In conclusion, counsel submitted that the application dated 18th August, 2015 ought to have been dismissed.

6. Appearing for the respondents was learned counsel **Mr. Ayisi**, who began by submitting that all owing monies were duly paid to the appellants. He urged the court to dismiss this appeal, saying the consent is incapable of execution and that in the event the orders of stay of execution are lifted, the respondent shall be exposed to double payment; having already settled all the dues owed to the appellants. On the issue of *res judicata*, counsel asserted that the respondent's application raised different issues that had not been determined; and is thus not *res judicata*. Counsel wound up his submissions by stating that the application was duly determined by the trial court and that this appeal is devoid of merit and should be dismissed.

7. As this is the first appeal, the responsibility of this Court is to re analyse and re-evaluate the evidence on record afresh and reach its own conclusions (See **Selle v Associated Motor Boat Co. [1968] EA 123**). In **Kiruga v Kiruga & Another [1988] KLR 348**, the Court of Appeal observed that:-

***“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”***

As stated earlier, at all material times, the appellants were engaged in the respondent's employ. Desirous of terminating the said employment, the respondent commenced the redundancy process which the appellants disputed. The parties failed to agree on whether or not the redundancy process was flawed. They however reached consensus as regards the terminal dues payable to each of the appellants. A written consent to this effect was duly executed.

8. According to the consent, which is dated 2nd April, 2014, judgment in respect of the appellants' terminal dues was entered as per the schedule thereto and was to be payable within 30 days. There are rival contentions as to whether this decretal sum was ever paid in time or at all. The consent was duly adopted as an Order of the court and continues to subsist to date. According to the appellants, the respondents defaulted in effecting the payments as per the consent or at all, prompting them to file an application dated 4th November, 2014 (*the previous application*); in which they sought leave to commence execution proceedings against the respondents. The said application was unopposed and was thus allowed as prayed vide a ruling delivered on 17th March, 2015. It was that execution process which in turn prompted the filing of the application dated 18th August, 2015 (*the subject application*) by the respondents and delivery of the subsequent impugned ruling thereon.

9. From the grounds of appeal and the submissions by respective counsel, the issues for determination in this interlocutory appeal are therefore three:

(a) Whether the application dated 18th August, 2015 was *res judicata* and;

(b) If not, whether the trial Judge failed to give a determination on the application dated 18th August, 2015 and;

(c) whether the application dated 18th August, 2015 was merited;

On the first issue, the subject application as presented before the trial court was premised primarily on the ground that the payments due under the consent had been fully settled, subject to deductions of any loan arrears owed to various institutions by the appellants. The respondents' contention therefore, was that the appellants had no right to execute over settled monies and on that note, they urged the trial court to stall the impending execution.

10. That application was however opposed, vide the appellants' replying affidavit sworn on 16th September, 2015 by one Francis Tumuti; who deposed that the subject application was unwarranted and *res judicata*; the issues therein having been canvassed in the previous application. Further, that in the circumstances, the question of deduction of loans from the outstanding dues failed to arise and that such deduction was unlawful, unwarranted and subjected the appellants to grave prejudice.

11. The doctrine of *res judicata* is provided for in our jurisprudence by dint of section 7 of the Civil Procedure Act which provides that;

***“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.”***

Therefore, in order for *res judicata* to arise, the following elements must be present:

- (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.

For avoidance of doubt, the term 'suit' in this case includes interlocutory proceedings before a competent court of even jurisdiction. As expounded by this court in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others** (2017) eKLR,

***“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”***

12. The appellants' argument in this case was that the issues raised by the respondents in the subject application constituted issues that were already substantially determined in the previous application. Looking at the previous application, the appellants sought leave to commence execution proceedings; on the basis that the respondents had failed to honour the terms of the consent order. For the sake of clarity, the consent order stated in part as follows:

***‘We shall be obliged if the following consent is recorded: BY CONSENT of the parties, judgment in respect of the claimants' terminal dues as at 30th September 2013 be entered as follows:.....’***

(schedule attached).

13. Undoubtedly, the consent was in respect of terminal dues payable, meaning the issue of wrongful termination was the only matter left pending determination. The same was said to have been dealt with in separate proceedings but the judgment rendered therein is the subject of an appeal pending before this Court. The appellants' stand is that the consent was adopted as an order of court and was thus enforceable as such. Unimpressed by the respondent's failure to honour the terms of the consent, the appellants pursued execution proceedings through the previous application as earlier intimated. That application went unopposed and was allowed vide the ruling delivered on 17th March, 2015. That ruling was never challenged and continues to be in force. It goes without saying that the doctrine of *res judicata* applies not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time (See **Henderson v. Henderson** (1843) 67 All ER 313). In other words, any issue that should have been raised in the previous proceedings is also covered under the doctrine; notwithstanding the fact that the issue was never raised. This was stated with even greater clarity in **Mburu Kinyua v Gachini Tutu** (1978) KLR 69 (cited with approval by this court in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited** [2017] eKLR) where the following words of **Wilgram V.C.** in **Henderson v Henderson** (supra) were adopted. He stated in part, that:

**“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time”** (Emphasis added).

14. Having set out the law as above, the issue we now wish to address is whether the application dated 18th August, 2015 was res judicata on account of the earlier application dated 4th November, 2014. The earlier application sought a singular order that the appellants be granted leave to execute the consent. It was not opposed and the order was granted. Following the success of the application, the appellants proceeded with proclamation of the respondent’s property hence the filing of the latter application. The orders sought in this application were for injunction to stop the proclamation and attachment of its properties. This prayer in our view arose following subsequent events and could not therefore have been raised in the earlier application. It is also in this application that the respondent averred that the appellants had already been paid their dues, less statutory and other deductions. Could this have been raised in the earlier application? We think not. The issue of the statutory dues and bank and Sacco loans could not have been raised in the earlier application. We appreciate that the consent had not mentioned the issue of the Bank loan repayments and the trial court could not have dealt with the issue.

15. We agree with the learned Judge that the said issues were extraneous to the consent order filed in court, and equally agree with him that the respondent had a legal obligation to deduct statutory dues before settlement of the claim. The learned Judge after considering the issues arising from the latter application arrived at the conclusion that the ‘consent judgment’ was not capable of execution as wide areas of divergence had emerged post adoption of the consent. The learned Judge did not however set aside the said consent not having been moved to do so. Instead, the court directed the parties to go back to the drawing board and craft another consent that would cater for those other issues which had been identified by the parties subsequently. Instead of doing so, they opted to move to this court on appeal blaming the Judge for failing to either dismiss or allow the application in question. The only reason the Judge did not give a conclusive order allowing or dismissing the application is because his court was still seized of the matter.

16. We cannot either allow or dismiss the application as entreated do by the appellants. Our view of the matter is that the appellants moved to this court prematurely before allowing the trial court to conclude the same and if dissatisfied move to this Court against the final orders of the trial court. For the foregoing reason, we find this appeal devoid of merit and dismiss it accordingly with no order as to costs to allow the parties move back to the trial court for final disposal of the matter. Orders accordingly.

**Dated and delivered at Mombasa this 14th day of February, 2019.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**