



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME J.J.A)

CIVIL APPEAL NO. 122 OF 2018

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

AND

COSMAS MROMBO MOKA.....1ST RESPONDENT

LEGACY AUCTIONEERING SERVICES.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Mombasa (Otieno J.) delivered on 10th July, 2018

in

Malindi High Court Case No. 7 of 2018)

JUDGMENT OF THE COURT

[1] The question that implores an answer in this appeal is whether, a matter dismissed for want of prosecution can give rise to application of the doctrine of *res judicata* if it is filed afresh in a new suit by the same parties. The background of the case that gave rise to this appeal is that Cosmas Mrombo (1st respondent) filed Malindi High Court **Civil Suit No. 7 of 2018** (*the latter suit*) seeking an injunction to restrain an impending sale of land described as Kilifi/Mtwapa/3104 (*the suit land*). The sale was by the Cooperative Bank of Kenya Ltd (appellant) to realize the security regarding an outstanding loan facility advanced to the 1st respondent and secured by the suit land. Given the date of the intended sale was fast drawing near, the 1st respondent moved court under a certificate of urgency, vide a notice of motion dated 4th July, 2018 seeking temporary orders of injunction against the sale, pending the hearing and determination of the main suit.

[2] The 1st respondent was nonetheless directed to serve the rest of the parties and the matter was fixed for hearing *inter parties*. At the hearing, the application was opposed vide the appellant's replying affidavit sworn on 5th July, 2018. In addition, the appellant simultaneously filed a notice of Preliminary Objection. Given that by their nature, Preliminary Objections can determine a suit to finality on points of law, the court opted to rule on the objection before delving into the merits of the application. The gist of the objection was that the application as well as the entire suit ought to be dismissed on a point of law on the grounds that:-

'The present suit is *res judicata* and should be struck out *in limine* since the issues herein have been decided in *Malindi HCC No. 6 of 2015; Cosmas Mrombo Moka v- Cooperative Bank of Kenya Limited* and the suit dismissed on 24th July, 2017.'

[3] In support of that contention, the appellant furnished copies of the pleadings in *Malindi HCC No. 6 of 2015 (the former suit)* and pointed out that since that suit had been dismissed for want of prosecution, the 1st respondent was barred by the doctrine of *res judicata* from re litigating the matter again based on the same set of facts and against the same parties. The appellant, through their learned counsel, **Mr. Kongere** submitted that since the purported sale had been challenged in the former suit and resisted by the appellant, and since that suit was dismissed albeit for want of prosecution, the 1st respondent had extinguished his right to sue the appellant over the same issue. The appellant urged the Court to find that the matter was *res judicata* and to accordingly dismiss the latter suit with costs.

[4] In rebuttal, learned Counsel **Mr. Matini** appearing for the 1st respondent submitted that even though there were indeed previous proceedings over the same subject matter, involving the same parties, it was never determined on merit and could thus not fall within the

ambit of the doctrine of *res judicata*. Counsel added that the sums claimed by the appellant in the two suits were different and as such, the appellant could not claim that the two suits related to the same subject matter and consequently, the doctrine of *res judicata* did not apply.

[5] By a ruling delivered on 10th July, 2018, the learned trial Judge (**Otieno J**) found the Preliminary Objection without merit and dismissed it with costs. As per the Judge, the former suit was never heard on merit and as such, a cardinal ingredient of the doctrine of *res judicata* was missing. In order for a matter to be deemed *res judicata* the Judge posited, all the ingredients of the doctrine as enumerated under **Section 7 of the Civil Procedure Act** must be present. In this case, since the former suit was never heard and determined on merit, then the doctrine of *res judicata* did not apply. That is the ruling which has provoked the present appeal.

[6] The appellant contends that the learned Judge erred by; finding that the dismissal for want of prosecution of *Malindi HCCC No. 6 of 2015* did not render *Malindi HCCC No. 7 of 2018 res judicata*; relying on the decision in; **The Tee Gee Electricals & Plastics Co. Ltd v. Kenya Industrial Estates, Kisumu CACA No 333 of 2001 (unreported)** which decision was *per incuriam*; failing to accord the parties an opportunity to comment on the applicability of that decision; treating the Preliminary Objection as a matter which called for the exercise of his discretion and then erroneously exercising that discretion and; awarding costs of the Preliminary Objection to the 1st respondent.

[7] At the hearing of the appeal, there was no representation or appearance for the respondents despite the date having been taken by consent of parties. On his part, learned Counsel for the appellant **Mr. Kongere** reiterated the appellant's points of arguments as presented before the trial court. He added that in deciding the matter as he did, the learned Judge misapprehended the spirit of the law and precedence. Counsel conceded that under **Section 7** of the Civil Procedure Act, in order for the doctrine *res judicata* to arise, the matter must be one which *inter alia*; has been '**heard and finally decided**'. He however hastened to add that the phrase 'heard and finally determined' does not necessarily mean that the matter must have been heard on merits because suits are disposed of by summary judgments and even dismissals including for want of prosecution.

[8] Counsel faulted the trial court for relying on the decisions in **State of Maharashtra & another v. National Construction Company, Supreme Court of India Civil Appeal No. 1497 of 1996** and this Court's decision in **Kenya Commercial Bank Limited v. Benjoh Amalgamated Limited (2007) eKLR**, on the basis that the two decisions were cited out of context. He added that dismissal for want of prosecution was as good as a final judgement and that as per the principle laid out by this Court in **Njue Ngai v. Ephantus Njiru Ngai & another (2016) eKLR**, disposal of a suit in such a manner amounts to judgment. By extension that since such judgment was entered in the former suit then the latter suit was bad for *res judicata*. In any event he added, there are instances when the court may deem a matter to have been heard and determined even though judgment therein was a default judgment; such as when it is judgment in default of appearance or following the abatement of suit. By contrast counsel urged us to find that a suit dismissed for want of prosecution was finally settled as parties would always vex the courts by filing matters over and over to abuse the court process. In his view, a default judgment such as the one issued in respect of the former suit also constitutes a determination of the matter within the meaning of **Section 7**.

[9] In further arguments Mr Kongere went on to point that the Judge was wrong by placing reliance on the decision in **The Tee Gee case (supra)**, since at the time that decision was delivered, the operational Rules were the repealed Civil Procedure Rules, whose **Order XVI rule 6** allowed a re-institution of a suit that had been dismissed for want of prosecution. Counsel argued that under the current **Civil Procedure Rules**, no such allowance was made and therefore, re institution of a dismissed suit automatically attracts the operation of the doctrine of *res judicata*.

[10] Turning to the host of conflicting authorities on the matter, Mr. Kongere submitted that when the Judge realised that there were two conflicting decisions by the Court of Appeal over the matter, he should have followed the latter decision. In this regard, counsel submitted that once he realised that the **Njue Ngai case (supra)** was in conflict with the decision in **The Tee Gee case (supra)**; he ought to have followed the position in the **Njue Ngai case**, as that is the latest decision on the issue. Further, counsel faulted the Judge for failing to accord the parties an opportunity to comment on the authorities that the court relied upon.

[11] In conclusion, it was contended that *res judicata* is a jurisdictional issue of law that does not invite the exercise of discretion. In addition, given that the 1st respondent had failed to prosecute the former suit expeditiously, he should have been disentitled to costs in any event. All in all, we were urged to find that *res judicata* was designed to ensure that litigation comes to an end at a certain point, and once brought to an end as it had in this case, a party is not allowed to exasperate the other side by re-instituting the same suit. Consequently, by giving litigants a leeway to re institute dismissed suits; courts would be allowing a vicious cycle of unending litigation, thereby countenancing abuse of the court process.

[12] We have considered the record, grounds of appeal and submissions made before us as per the preceding summary of the matter. This is a first appeal and in the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** the duty of this Court as a first appellate court was stated to be as follows:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

[13] That said, we discern two issues for determination in this appeal being whether the former suit was 'heard and determined' within the meaning of **Section 7** of the Civil Procedure Act. The law relating to *res judicata* is as outlined by **Section 7** of the **Civil Procedure Act** which provides that:

Res judicata

‘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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.’

[14] Undeniably the doctrine of *res judicata* is founded on public policy, which is aimed at achieving two objectives, namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation. In the present appeal, it is not in dispute that both the former and the latter suit had the same parties in common. Also not disputed in this appeal, is the finding by the learned Judge that the subject matter in the two matters was one and the same; namely the recovery of monies owed in respect of an outstanding loan. What the appellant has laboured to contest is the finding that the former suit was not heard and decided within the meaning of **Section 7** aforesaid.

[15] The appellant has strongly contended that the dismissal of the former suit constituted a full and final determination thereof, meaning no fresh proceedings could be instituted in respect of the same cause of action. As per *Mulla’s Indian Civil Procedure Code, 13th Ed Vol 1 p 798* says:

“Judgment” means the statement given by the judge on the grounds of a decree or order; “Judgment - in England, the word judgment is generally used in the same sense as decree in this code.”

Consequently, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit. A dismissal of a suit, under Order 12 Rule 6 (2) of the Civil Procedure Rules, is a judgment for the defendant against the plaintiff. A case in point is a decision of this Court in the **Njue Ngai** case, even a matter dismissed for want of prosecution still constitutes a matter that was heard and decided within the meaning of **Section 7** of the Act. In that case, such a matter was held to be *res judicata* and no fresh proceedings could be entertained based on the same cause of action and by the same parties. The court stated as follows:

‘Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. There can be no doubt therefore that Njue’s appeal to the High Court was decided by a competent court. The dismissal also meant that the decision of the Appeals Committee stood unchallenged and final, wart (sic) and all. The fresh suit filed by Njue was christened a ‘Declaratory Suit’ which he contended was an alternative to ‘Judicial Review’. By whatever name called, it was a new suit and, as earlier stated, he was time barred in filing a Judicial review application to quash the decision of the Appeals Committee made 12 years earlier. The semantic change was merely a clever turn (but that legal ingenuity was within a cul-de-sac).’ (Emphasis added)

[16] In the present case, the Judge definitely fell in error by failing to appreciate this aspect and when he stated in a pertinent paragraph of the Ruling as follows:-

‘The current suit is therefore a dispute between the same parties on a matter on the same dispute which was litigated upon in the previous suit which stands dismissed for want of prosecution and has not been sought to be reinstated. To this court it falls in all fours with what the court set as the ingredients of *res judicata* in *Uhuru Highway Developers vs Central Bank of Kenya [1996] eKLR....*

I understand the law to be that a matter is heard and determined after the court has delved into the merits. Where, like in this case, the suit was dismissed for want of prosecution, before the parties ventilate their grievances, I am hesitant and very reluctant to hold that the matter has been heard and finally determined.’

[17] As stated hereinbefore, this Court has already addressed its mind as to whether a matter dismissed for want of prosecution could be

resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on four with the Njue Ngai matter, we find no justifiable reason to allow a party who had litigated on the same issues to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter suit was *res judicata* and cannot stand. The 1st respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant this would be contrary to public policy that litigation must come to an end and the best the 1st respondent could do was to invoke the appellate process and not filling a fresh suit.

Accordingly we find this appeal has merit and it is hereby allowed with costs against the respondents.

Dated and delivered at Mombasa this 4th day of April, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M.K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR