IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KOOME & MURGOR, JJ.A)

CIVIL APPEAL NO. 43 OF 2018

BETWEEN

ACCREDO AG.....1ST APPELLANT

SALAMA BEACH HOTEL LIMITED.....2ND APPELLANT

HANS JUEGEN LANGER..... 3RD APPELLANT

ZAHRA LANGER..... 4TH APPELLANT

AND

STEFFANO UCCELLI.....1ST RESPONDENT

ISAAC RODROT..... 2ND RESPONDENT

(An appeal from the Ruling of the High Court of Kenya

at Malindi (Korir, J.) dated 20th March, 2018

in

H. C. C. C. No. 118 of 2009)

****

JUDGMENT OF THE COURT

1. Before us is an interlocutory appeal challenging a Ruling dated 20th March, 2018 by the High Court (Korir, J.) wherein the respondents preliminary objections with regard to the propriety of an application filed on 8th January, 2018 (the Application) at the instance of the appellants were upheld. As a result, the said Application by the appellants was struck out with costs which gave rise to the instant appeal.

2. In order to place the appeal in context, a brief background of the salient facts is necessary. The genesis of the dispute between the parties can be traced to rent arrears allegedly owed to Adinos AG (Adinos), a Swiss company by Viaggi Del Ventaglio (Viaggi), an Italian company. The arrears were in respect of premises which were leased out by Adinos to Viaggi in Switzerland. In a bid to recover the rent arrears, Adinos instituted court proceedings against Viaggi in Milan, Italy.

3. Thereafter, for some reason or another, Adinos by a cession agreement assigned all its rights under the lease agreement to **Accredo AG** (1st appellant). According to the 1st appellant, the Milan court entered judgment in favour of Adinos on 14th December, 2001 for the sum of 825,000 Euros. However, the 1st appellant was unable to execute the judgment against Viaggi since it had become insolvent.

Undeterred, the 1st appellant went after Viaggi's subsidiary, **Salama Beach Hotel Limited** (2nd appellant), a company incorporated in Kenya. In particular, the 1st appellant had its sights on the 2nd appellant's Plot No. 9890 Watamu Grant No.11576 and the hotel erected thereon as a means of meeting the judgment amount.

4. Towards that end, the 1st appellant instituted a suit against the 2nd appellant being **H.C.C. C. No. 118 of 2009** on 15th December, 2009 seeking the following orders:

> ***a) An order that the judgment of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest and costs of Euros 2470 be enforced against the defendant (2nd appellant herein).***
>
> ***b) A warrant of attachment before judgment do issue against the defendant's plot no. 9890 Grant no. 11576 pending the hearing and determination of suit****(sic).*
>
> ***c) An injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/or agents from selling, disposing off, alienating and/or wasting plot 9890 Grant no. 11576 Watamu or in any other manner howsoever or whatsoever dealing with the said plot and the developments therein standing in a manner prejudicial or likely to defeat the process of execution of the judgment of the court of Milan given on the 14th December, 2001 pending the leaving*** *(sic)* ***and final determination of the suit*** *(sic).*
>
> ***d) An order that the plaintiff be allowed to take over the ownership, management, running, operation and control of the defendant and the business carried on plot known as Grant no. 11576 plot no. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgment and decree of the court of Milan dated 14th December, 2001.***
>
> ***e) Costs of the suit and interest thereon at court rates.***

Contemporaneously, the 1st appellant also filed an interlocutory application, which marked the beginning of a plethora of applications in the suit, seeking similar orders as the plaint.

5. On 18th December, 2009 a statement of admission of the claim was filed on behalf of the 2nd appellant and in addition, **Steffano Uccelli** (1st respondent), a director of the 2nd appellant company, also swore an affidavit to that effect. Subsequently, the interlocutory application was allowed and orders thereunder issued pursuant to a consent order dated 21st December, 2009. About a month later, on 21st January, 2010 a further consent was executed by the 1st and 2nd appellant which gave rise to a decree compromising the suit. The terms of the decree were as follows:

> ***a) THAT the judgement of the court of Milan given on the 14th December, 2001 for Euros 825,000 plus interest thereof at annual commercial rates of 25% and costs of Euros 2470 plus interests at annual court rates of 12% be and is hereby ordered to be enforced against the defendant.***
>
> ***b) THAT a warrant of attachment do issue against the defendant's plot No. 9890 Watamu Grant No. 11576.***
>
> ***c) THAT an injunction do issue restraining the defendant by itself, directors, shareholders, attorneys, servants and/or agents from selling, disposing off, alienating, and/or wasting Grant No. 11576 Plot No. 9890 Watamu or in any other manner howsoever and whatsoever from dealing with the said plot and the hotel establishment and developments therein standing in a manner prejudicial and/or likely to defeat the execution of the judgement and decree of the court of Milan given on the 14th December 2001 or prejudicial to the judgement and decree of the court issued herein.***
>
> ***d) THAT the plaintiff company by itself, directors and shareholders namely HANS JUERGEN LANGER and ZAHRA LANGER be and are hereby allowed and ordered to take over the shareholding, directorship, ownership, management, running, operation and control of the defendant company and the business carried out on Grant No. 11576 Plot No. 9890 Watamu for such period and time as shall be sufficient to satisfy the judgement and the decree of the court of Milan dated 14th December, 2001 and for such a time and period as the plaintiff company shall recover all related and consequential costs and expenses properly incurred while owning and managing the defendant company.***
>
> ***e) THAT the Registrar of Companies be and is hereby mandated to transfer all the shares held by the defendant shareholders to the directors of the plaintiff company, namely HANS JUERGEN LANGER and ZAHRA LANGER on equal number (50% 50%) basis.***
>
> ***f) THAT a one STEPHANO UCCELLI the current resident Director of the Defendant company shall continue to be in the board of directors of the defendant company for the purposes of ensuring that the judgement and decree of this court is fully satisfied and for the interest of the defendant company's previous shareholders and directors without being a shareholder.***
>
> ***g) THAT this suit be and is hereby marked as settled with each party bearing its own costs.***

6. By no means did the decree bring the matter to a conclusion. As we stated in the preceding paragraphs of this judgment, applications upon

applications were filed in the suit. It is instructive to note that through one such application dated 8th September, 2010, **Hans Juegen Langer** (3rd appellant) and **Zahra Langer** (4th appellant) both of whom are directors of the 1st appellant were enjoined to the suit. Likewise, the 1st respondent and **Isaac Rodrot** (2nd respondent) were also joined as parties.

7. Of relevance, is that the 1st respondent despite executing the consent decree on behalf of the 2nd appellant had a change of heart. In that regard, he filed an application dated 20th November, 2014 seeking *inter alia* setting aside of the decree. His application was premised on the grounds that firstly, he had discovered that the alleged Milan judgment which was the backdrop of the decree was non-existent. Secondly, he lacked the authority to compromise the suit on behalf of the 2nd appellant. This is because he was neither a shareholder nor was he authorized by the shareholders to compromise the suit. In turn, the 2nd respondent who happened to be the majority shareholder of the 2nd appellant was unlawfully divested of his shareholding without being heard. Thirdly, he imputed that the 3rd and 4th appellants had coerced him into executing the consent decree. Accordingly, as far as he was concerned, the consent decree had been obtained through fraud, misrepresentation and coercion. On his part, the 2nd respondent supported the application whilst the appellants strenuously opposed the same.

8. Upon considering the rival arguments as well as the law, the High Court (Chitembwe, J.) in a Ruling dated 30th April, 2015 allowed the application. In doing so, the High Court found that the alleged Milan judgment dated 14th December, 2001 did not exist. In point of fact, the High Court expressed that from the evidence tendered with respect to the proceedings in Milan, the suit therein was finalized and judgment entered on 16th September, 2013. Therefore, by the time the High Court suit was instituted and decree issued there was no judgment strictly speaking capable of being enforced in favour of the 1st appellant. As such, the High Court found that the decree was procured through fraud and misrepresentation which it believed the 3rd appellant was party to. In the end, the High Court issued the following orders:

> ***1) As indicated hereinabove, the application by the 4th defendant (the 1st respondent herein) dated 20th November, 2014 is granted as prayed.***
>
> ***2) The Registrar of Companies shall remove the names of the 2nd and 3rd respondents (3rd and 4th appellants herein), that is to say, Hans Jürgen Langer and Zahra Langer, as directors of Salama Beach Limited and shall ensure that the status of the company in its registry is restored to the position as at 14th December, 2009.***
>
> ***3) The 2nd and 3rd defendants to hand over all the properties belonging to Salama Beach Hotel Ltd within seven (7) days hereof to the 4th and 5th defendants (the 2nd respondent herein). Counsel for both parties to participate in the transfer process.***
>
> ***4) The 2nd and 3rd respondents' names to be removed as signatories to all bank accounts of Salama Beach Hotel Limited and to be replaced by the original signatories as at 14th December, 2009.***
>
> ***5) In view of previous disobedience of court orders by the parties herein, the Officer Commanding Watamu Police Station to ensure that the court order is effected as hereinabove.***
>
> ***6) Costs of the application to the applicant.***

9. The above outcome did not go down well with the appellants who preferred an appeal in this Court being **Civil Appeal No. 36 of 2015** (the Appeal). Similarly, this Court in a judgment dated 15th December, 2017 found that the consent decree was obtained through fraud and dismissed the Appeal with costs. In its own words, this Court stated as follows:

> ***"On his part, the learned trial Judge addressed his mind** (sic) **that aspect and found that the proceedings instituted by the 1st appellant in HCCC 118 of 2009 were therefore founded on fraud and mistake, and cannot stand. That the 3rd appellant knew very well that there was no judgment from the court of Milan and yet he knowingly misrepresented to the 1st respondent and to the court that such judgment existed. Consequently, the learned Judge found the application for review to be merited and proceeded to set aside the consent. This Court can find no reason to interfere with that finding."***

10. Later on, the appellants filed the Application on 8th January, 2018 praying for the following orders:

> ***1) The application be certified urgent, admitted for hearing during the present vacation and service be dispensed within the first instance.***
>
> ***2) The Honourable Court be pleased to grant an interim injunction against the 4th and 5th Defendants (1st and 2nd respondents herein), their agents, or any other person whatsoever from taking possession of, altering, removing, selling, disposing of, alienating or in any other way dealing with the 1st Defendant's (2nd appellant herein) properties or status pending the hearing of***

this application inter parties** (sic) **and further directions.

3) The Honourable Court be pleased to grant an injunction against the 4th and 5th Respondents, their servants or agents, or any other person whatsoever from taking possession of, altering, removing, selling, disposing of, alienating or in any other way dealing with the 1st Defendant's properties pending the hearing and determination of this suit.

4) The Honourable Court be pleased to grant clear and concise directions as to the execution of the various conflicting orders in this suit.

5) The Honourable Court be pleased to grant judgement to the Plaintiff (1st appellant herein) on the admission of the 1st Defendant and order and/or direct the Registrar of Companies to ensure that the shareholding of the 1st Defendant shall revert and/or be restored to the status/position that it was in as per the order dated 21st December 2009.

6) The Honourable Court be pleased to give directions as to the hearing and expeditious determination of this matter.

7) The Costs of this Application be awarded to the Applicant.

11. In response, the 2nd respondent filed a preliminary objection dated 9th January, 2018, the outcome of the same is what gave rise to the instant appeal. We deem it necessary to reproduce the pertinent extract as herein under:

"1) The application is res-judicata on review, appeal and execution in that:

a) Following the delivery of the ruling on 30/4/2015, a stay was granted by the court for a period of 14 days.

b) The plaintiff, 1st, 2nd and 3rd defendants obtained stay of execution in the Court of Appeal, Civil Application No. 19 of 2015 (Malindi) pending the hearing and the determination of their appeal, Court of Appeal Civil Appeal No. 36 of 2015 (Malindi).

c) The Court of Appeal on 15/12/2017 dismissed Civil Appeal No. 36 of 2015 (Malindi).

d) This court lacks jurisdiction to further stay, amend and or vary the orders of 30/4/2015.

2) The doctrine of finality has set in.

3) The application to stay, amend or vary the order of 30.4.2015 should be struck out with costs".

Similarly, the 1st respondent lodged a preliminary objection on 13th January, 2018 which was more or less the replica of the 2nd respondent's objection.

12. The objections were heard first since they touched on the High Court's jurisdiction to entertain the Application. Upholding the objections, the learned Judge (Korir, J.) in the impugned ruling held:

"I agree with the submission by counsel for the 1st Respondent that in seeking to stop the execution of the orders of 30th April, 2015, the applicants are asking this court not only to superintend the decision of a Court (Chitembwe, J) of coordinate jurisdiction but to overturn the decision of the Court of Appeal which is mandated to hear appeals from this Court. Such action would be anathema to Articles 165 (6) and 164 of the Constitution. It will amount to an overthrow of the constitutional order.

Unless the applicants seek review before the Court of Appeal or move the Supreme Court, the only clear message is that this matter as it relates to the orders of 30th April, 2015 has completed its journeys** (sic) **in the corridors of the High Court. The issues have been determined and what remains is the execution of the decision delivered by Chitembwe, J on 30th April, 2015 as confirmed by the Court of Appeal on 15th December, 2017. There is nothing more to litigate in respect to the decision of 30thApril, 2015. Those orders are so clear that there is no need to seek any directions as regards the implementation of the same…

For avoidance of doubt, I direct that the orders issued on 30th April, 2015 be complied with in full before other issues, if any, can be addressed in this matter. I thus uphold the 1st and 2nd respondents' preliminary objections and strike out the application dated 8th January, 2018 in so far as it seeks to interfere with the implementation of the orders of 30th April, 2015. The respondents will have the costs of the objections from the 1st, 3rd and 4th applicants. The directors and shareholders of the 2nd Applicant cannot be saddled with costs considering that the 3rd and 4th applicants are not directors of the 2nd Applicant."

13. Aggrieved with that decision, the appellants preferred this appeal which is premised on rather long winded and repetitive 25 grounds. ***Rule 86 (1)*** of the ***Court of Appeal Rules*** clearly prescribes the format which grounds of appeal should take, that is, they should be concise

and not contain evidence or arguments, as the appeal herein does. Nonetheless, those grounds can be aptly summarised as follows:

The learned Judge erred in law by-

a) Failing to appreciate that the preliminary objections raised contentious issues of fact as opposed to pure points of law.

b) Finding that the appellants were seeking to stop the execution of the orders dated 30th April, 2015.

c) Relegating all other orders issued in the High Court to the orders dated 30th April, 2015.

d) Making substantive findings on the basis of the preliminary objections.

e) Granting the orders he did based on the preliminary objections.

f) Awarding costs of the Application to the respondents.

14. At the plenary hearing, the appellants were represented by Mr. Ndegwa while the 1st and 2nd respondents were represented by Mr. Munyithya and Mr. Kibunja respectively. Counsel opted to rely on the written submissions on record and in addition, they made some oral highlights.

15. Addressing us on the appeal, Mr. Ndegwa stated that a preliminary objection must raise purely points of law. Therefore, whenever any evidence is required to substantiate an objection, then such a preliminary objection must fail. In that regard, reliance was placed on the Supreme Court decision in **Independent Electoral & Boundaries Commission vs Jane Cheperenger& 2 Others [2015] eKLR**. According to the appellants, the respondents' preliminary objections were based on disputed facts. Whether the Application was *res-judicata* was a point in contention between the parties and could only be ascertained by a merit consideration of the evidence as well as rival arguments by the parties.

16. Elaborating further, counsel argued that it was common ground that the respondents' objections were not founded on the fact that the suit was finalized thus rendering the High Court *functus officio*. Rather the preliminary objections were premised on the misconceived notion that the Application was *res-judicata* as far as it allegedly raised issues dealt with in the ruling dated 30th April, 2015. Counsel maintained that none of the prayers in the Application had been sought by any other party or in any of the other interlocutory applications pending determination before the High Court.

17. Mr. Ndegwa claimed that the setting aside of the decree envisaged a rehearing of the suit on merits. It was urged that the 2nd respondent's application dated 19th January, 2018 seeking the amendment of the 1st appellant's plaint and leave to file a statement of defence and counter-claim evidenced that the dispute had not been substantially addressed or determined. In light of the foregoing, the learned Judge was faulted for allowing the preliminary objections as opposed to directing the Application to be heard on its merits.

18. Criticizing the learned Judge for what the appellants termed as relegation of all other orders issued by the High Court to the orders dated 30th April, 2015, Mr. Ndegwa enumerated the other orders in question as follows:

a) Order dated 21st December, 2009 which granted the 1st appellant company ownership, management and control of the 2nd appellant company.

b) Ex-parte orders dated 8th January, 2010 by Ojwang, J., as he then was, which not only enjoined the 3rd and 4th appellants as well as the respondents to the suit but directed the maintenance of status quo as at 7th July, 2010 be restored.

c) Order dated 24th June, 2015 by Chitembwe, J. directing the re-issue of the orders dated 21st December, 2009.

d) Judgment of the High Court dated 24th August, 2015 directing that the 2nd appellant's status be determined by this Court.

19. As far as counsel was concerned, the ruling dated 30th April, 2015 only set aside the decree leaving the above mentioned orders intact and valid. Similarly, he submitted, that this Court's decision as it pertained to the Appeal was limited to the ruling dated 30th April, 2015 and had no effect on the other orders.

20. Contending that the Application was properly before the High Court, Mr. Ndegwa posited, the subsisting orders, set out herein above, were contradictory hence the need for directions. It was also asserted that since the orders dated 21st December, 2009 were re-issued by the High Court on 24th June, 2015 the shareholding of the 2nd appellant should reflect that position. Furthermore, the respondents having failed to file their respective defences, the

appellants were within their rights to seek entry of judgment on admission as they did in the application.

21. Rising to his feet, Mr. Munyithya submitted that the 2nd respondent's opposition to the appeal was two-fold. Firstly, that the appeal was incompetent, frivolous and vexatious. Expounding further, Mr. Munyithya made reference to persuasive decision of the High Court in ***Teachers Service Commission vs Kenya National Union of Teachers & 2 Others [2013] eKLR*** and urged that court orders must be obeyed by all parties. He went on to state that the appellants were yet to comply with the orders issued on 30th April, 2015 by the High Court and confirmed by this Court on 15th December, 2017.

22. It was therefore abominable for the appellants who had blatantly disobeyed court orders to turn around and seek assistance from the same court. We were urged to pay regard to the maxim, he who comes to a court of equity must do so with clean hands. In any event, counsel added, the Application did not meet the principles of granting an injunction as discussed in the often quoted case of ***Giella vs Cassman Brown and Company Limited [1973] E. A. 358.***

23. Secondly, that the learned Judge correctly found the Application as *res-judicata*. In support of that line of argument, Mr. Munyithya submitted that the main issue both in the orders dated 30th April, 2015 and in the Application was the shareholding and management of the 2nd appellant as well as its assets. He stated that the ruling dated 30th April, 2015 interfered materially with the management and ownership of the 2nd appellant company. Likewise, the said ruling gave the respondents rights and/or power to take over the possession, management and control of the 2nd appellant and its assets. The above state of affairs was affirmed and/or confirmed by this Court in the Appeal.

24. He went on to argue that the effect of the orders sought by the appellants in the Application would have been to bar the respondents from taking possession, management and shareholding of the 2nd appellant company. As such, counsel urged that the learned Judge could not be faulted for invoking the doctrine of *res-judicata* and finding that he had no jurisdiction to entertain the Application. Equally, Mr. Munyithya submitted, this Court cannot delve into the consideration of the Application by dint of the Appeal. To bolster that line of argument we were referred to this Court's decision in ***Uhuru Highway Development Limited vs Central Bank of Kenya [1996] eKLR***.

25. In the alternative, the respondents contended that the High Court could not issue the injunctive orders as invited by the appellants to stop the execution of lawful orders of the same court which had not been set aside.

26. On his part, Mr. Kibunja simply associated himself with the submissions made by Mr. Munyithya without adding more.

27. Having considered the record, submissions by counsel and the law, we find that the appeal turns on whether the matters raised in the preliminary objections were merited. The other concomitant issue that falls for consideration is whether the learned Judge erred in issuing the orders he did in the impugned ruling.

28. As to what constitutes a preliminary objection has been the subject of several judicial pronouncements and is well settled. The Supreme Court addressed its mind on this issue in the case of **Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR** and stated:

> ***"Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts." [****Emphasis added]*

More recently, this Court in ***J E N vs D O K [2018] eKLR*** restated the above position.

29. Were the preliminary objections raised by the respondents founded on pure points of law or on disputed facts as claimed by the appellants? The answer to this question lies with the nature of objection raised, that is, the assertion that the Application was *res-judicata* and the facts relied on. The doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the Supreme Court's decision in the case of **Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR**.

30. Expounding further on the essence of the doctrine this Court in ***John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR*** pronounced itself as follows:

> ***"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of***

concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

31. In the case before us, the respondents' stand was that the Application raised similar issues which had been considered and determined in the ruling dated 30th April, 2015. To the contrary, the appellants advanced that the orders sought in the Application had neither been raised by any party nor determined by the High Court.

32. The test for determining the application of the doctrine of *res-judicata* in any given case is spelt out under ***section 7*** of the ***Civil Procedure Act***. In **Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others [2017] eKLR**, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(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."

The foregoing elements apply in equal measure to applications.

33. Looking at the record, we cannot help but note that the consent decree, which is set out in the preceding paragraphs of this judgment, dealt with the enforcement of the

Milan judgment allegedly issued on 14th December, 2001 against the 2nd appellant; transfer of the ownership, shareholding and/or management of the 2nd appellant company to the 1st appellant as well as attachment of the 2nd appellant's property in fulfilment of the Milan judgment.

34. Further, the High Court vide the ruling dated 30th April, 2015 addressed and made determinations with respect to the alleged Milan judgment, the shareholding and management of the 2nd appellant and its assets. Specifically, the High Court in that ruling made definitive findings to the effect that the statement of admission as well as the decree were anchored on a non-existent Milan judgment dated 14th December, 2001. It was for that reason that the High Court set aside the decree and directed the restoration of the 2nd appellant's shareholding, management and control prior to 14th December, 2009 (Basically before any orders were issued in the High Court suit). It is also common ground and it is important to emphasize that the ruling dated 30th April, 2015 and the orders thereunder were subsequently, confirmed by this Court in the Appeal by a judgment dated 15th December, 2017.

35. Likewise, addressing our minds on the orders sought in the Application, we concur with the learned Judge, that regardless of the terms or words employed thereunder, the same were touching on the shareholding, management and control of the 2nd appellant company which, in our view, had been conclusively determined by the ruling dated 30th April, 2015 and the judgment of this Court dated 15th December, 2017. In other words, the injunctive orders and the prayer for transfer of the shareholding back to the 3rd and 4th appellants were tantamount to the appellants seeking both a review and an appeal against the orders dated 30th April, 2015 and this Court's judgment in dated 15th December, 2017, which jurisdiction the learned Judge correctly appreciated he lacked.

36. Therefore, the issue of the 2nd appellant's shareholding and management was directly and substantially in issue in the ruling dated 30th April, 2015 hence could not be raised again, even with the use of judicial craftsmanship, as we find was the case in the Application whose ruling gave rise to the instant appeal. Our position is fortified by this Court's sentiments in ***Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR*** thus**,**

"To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."

37. Accordingly, we find that the elements set herein above which give rise to the application of the doctrine of *res-judicata* could be discerned from the record and were not uncertain or unclear as the appellants alluded to. It follows therefore, that the preliminary objections raised by the respondents were based on pure points of law, that is, jurisdiction and the doctrine of *res-judicata*, and did not require

additional evidence to substantiate the objection. See *locus classicus* case of ***Mukisa Biscuits Manufacturing Ltd. vs West End Distributors Ltd. [1969] E. A. 696.***

38. In our view, this Court's judgment dated 15th December, 2017 in the Appeal which confirmed the High Court orders dated 30th April, 2015 superseded any other orders which were issued in the High Court, more particularly the orders enumerated by the appellants, with regard to the decree, shareholding and management of the 2nd appellant company.

39. The next issue for consideration is whether having found that the preliminary objections were meritorious, the learned Judge acted within his mandate in issuing orders in the manner he did in the impugned ruling. It is not in dispute that the orders dated 30th April, 2015 had not been complied with, at least at the time the learned Judge was considering the preliminary objections. As such, we see no reason to fault the learned Judge for directing compliance of those orders. We say so because in the persuasive English authority that has been quoted with approval severally by this Court, Romer, L. J. in **Hadkinson vs Hadkinson [1952] ALL ER 567** while discussing the significance of obedience of court orders expressed himself as follows:

> ***"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."***

See also this Court in ***Shimmers Plaza Limited vs National Bank of Kenya Limited*** ***[2015] eKLR.***

40. Last but not least, we are cognisant that the issue of costs lies within the discretion of the court. Nothing has been placed before us to warrant a finding that the learned Judge did not properly exercise his discretion in imposing costs against the 1st, 3rd and 4th appellants.

41. The upshot of the foregoing is that we find the appeal lacking merit and is hereby dismissed with costs to the respondents. The 1st, 3rd and 4th appellant shall bear the costs.

Dated and delivered at Mombasa this 21st day of August, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR