IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 325 OF 2017

BETWEEN

AFRICAN COMMUTERS SERVICES LIMITED.....1ST APPELLANT

ESMAEL MOHAMED JIBRIL.....2ND APPELLANT

AND

EUSTACE GAKUI GITONGA.....1ST RESPONDENT

KENYA CIVIL AVIATION AUTHORITY..... 2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (B. J. Thuranira, J.) dated 2nd March, 2017

in

HCCC No. 148 of 2012)

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JUDGMENT OF THE COURT

This is an interlocutory appeal from a ruling of the High Court (B.J. Thuranira, J.) delivered on 2nd March, 2017 in which the appellants' application to strike out the suit giving rise to this appeal was dismissed with costs.

The brief facts leading to the appeal relate to two suits instituted by the 1st respondent in the High Court being **HCCC No. 127 of 2009** and **HCCC No. 148 of 2012,** the appellants as well as the 2nd and 3rd respondents. By a plaint dated 13th March, 2009 the 1st respondent filed **HCCC No. 127 of 2009** against the appellants seeking orders that; "*the defendants either by themselves, their agents, servants, employers, advocates or in any manner however be restrained from accessing, receiving, disposing of, utilizing or in any other way however dealing with the sum awarded in HCCC No. 1208 of 2003; the defendants be ordered to pay a sum equivalent to 20% of the award/ judgment made in HCCC No. 1208 of 2003 on 18/12/2008 to the plaintiff with immediate effect; and that costs and interest thereof be met by the defendants."* The appellants countered the suit by filing an application dated 9th December, 2011 to strike out the same with costs for being an abuse of the court process. The application was successful and the suit was dismissed with costs by **Khaminwa, J**. The 1st respondent then filed a fresh suit being **HCCC No. 148 of 2012** dated 28th March, 2012 against the appellants and the 2nd & 3rd respondents and sought orders that; "*a declaration that the plaintiff is entitled to 20% of the judgment/ award in HCCC No. 1208 of 2003 as per the terms and conditions of the Consultancy Agreement dated 16th February, 2007; and the payment of 20% of the judgment/ award in HCCC No. 1208 of 2003."*

Once again the appellants filed a Notice of Motion application whose ruling is the subject of this appeal to strike out the suit on grounds that it was *res judicata* as the issues in **HCCC No. 148 of 2012** had been directly or substantially in issue in **HCCC No. 127 of 2009** between the same parties. Further that the agreement which formed the basis of the suit offended the provisions of Section 16 of the Government Proceedings Act and was thus unenforceable. Finally, the appellants asserted that in any event the summons to enter appearance served on the appellant had expired.

The application was opposed in a replying affidavit sworn by the 1st respondent in which it was deposed that **HCCC No. 148 of 2012** was not *res judicata* and that **HCCC No. 127 of 2009** was struck out on the basis of technicalities and not that it had been heard and determined on merit. The technicality was that the suit was filed by an advocate who did not have a practicing certificate. That even though the court used the term dismissal and not struck out, the appellants had prayed that the suit be struck out. It was further deposed that the consultancy agreement between the 1st respondent and the 2nd appellant was enforceable and in any event the illegality of the contract was a triable issue that could only be determined at the hearing of the suit. The suit did not offend Section 16 of the Government Proceedings Act or Order 29 rule 2 of the Civil Procedure Rules.

The learned Judge in her considered ruling made the following observations; that it was conceded that **HCCC No. 127 of 2009** sought similar reliefs as **HCCC No. 148 of 2012.** However, **HCCC No. 127 of 2009** was not heard and determined on merits as no proceedings or judgment was shown to the court. That in the context of the application, the court in **HCCC No. 127 of 2009** interchangeably used the terms dismissal and struck out but it did not mean that the 1st respondent could not file a fresh suit. The issue of whether the contract was illegal or not was a triable issue to be determined at a full hearing since it was not clear how the said contract undermined administration of justice or was contrary to public policy. On whether summons to enter appearance had expired the court took the view that the appellants were not prejudiced at all since the purpose of summons is to inform the defendants of the suit against them. In this case, they were duly notified and thereafter fully participated in the suit. The court was also bound to administer justice without undue regard to technicalities of procedure. As regards Section 16 of the Government Proceedings Act, the learned Judge noted that though the court cannot issue an injunctive relief against the government, it could make declaratory orders and given that only one out of the seven prayers sought injunctive orders against the 2nd and 3rd respondents, it did not render the entire plaint incompetent. Consequently, the appellants' application was dismissed with costs.

Aggrieved, the appellants filed the present appeal seeking to set aside the ruling and order in **HCCC No. 148 of 2012,** and costs of the appeal. They raised eight grounds of appeal to wit, that the learned Judge erred in law and in fact in failing to: appreciate that **HCCC No. 148 of 2012** instituted by the respondent against the appellants was *res judicata*, and offended the provisions of Section 7 of the Civil Procedure Act. The issues raised in the present suit were substantially and directly the same issues raised by the respondent against the appellants in the earlier suit which suit had been heard and dismissed on merits by **Khaminwa**, **J.**; appreciate that there was in existence a decree of the High Court in **HCCC No. 127 of 2009** dismissing the suit which decree had not been appealed against, reviewed and or set aside; appreciate that under Order 2 Rule 15 of the Civil Procedure Rules a court of law has powers to strike out a suit and enter judgment for a party or dismiss the suit or allow a party to amend its pleadings**;** she was faulted for; erroneously proceeding on a frolic of her own in taking into account bizarre and extraneous extrapolations in arriving at a conclusion that the words struck out were used interchangeably with the word dismissed when there was no basis for so finding; not finding that the suit had abated as the summons to enter appearance served on the appellants had expired and the respondent had not applied for extension of the validity of the same; failing to appreciate that the contract, the subject matter of the suit was illegal and unenforceable as it was a contract that undermines the administration of justice and was contrary to public policy and finally, making a strange finding contrary to the law and the evidence placed before her, in a biased and prejudicial manner.

At the plenary hearing of the appeal, **Mr. Masese,** learned counsel appeared for the appellants while **Mr. Lusi,** represented the 1st respondent. There was no appearance by the 2nd and 3rd respondents though served. By virtue of the directions taken during case management parties canvassed the appeal by way of written submissions with limited oral highlights.

Mr. Masese submitted that the suit giving rise to this appeal was *res judicata* and the learned Judge disregarded the decree in **HCCC No. 127 of 2009** thus misdirecting herself. Counsel took the view that the issues directly and substantially in issue in **HCCC No. 148 of 2012** were the same issues that were heard and determined by a court of competent jurisdiction in **HCCC No. 127 of 2009,** which was between the same parties, raising the same matters and there was a judgment on the merits in favour of the appellants. Pursuant to the judgment, a decree was issued that is yet to be appealed against nor reviewed and or set aside. He further submitted that a judgment dismissing a suit on merits has the effect of a final determination of a suit contrary to the 1st respondent's submissions that the issues had not been substantially heard and determined. The learned Judge erred in finding that the court interchangeably used the words dismissal and struck out. With regard to the summons, counsel submitted that the court had no jurisdiction to purport to re-issue expired summons. On the contract sought to be enforced by the suit, it was his submission that it was illegal and unenforceable as it undermined the administration of justice and was against public policy since the 1st respondent was contracted to procure a judgment in favour of the appellants.

In response, Mr. Lusi submitted that the earlier suit was not heard on merit hence r*es judicata* could not apply. There was no previous judgment and no other court of competent jurisdiction had previously heard and determined the matters in dispute on merits. Counsel submitted further that a party is bound by its pleadings. The appellants' prayer in the application in the earlier suit was for the suit to be struck out and not for dismissal. Therefore, the trial court was right in finding that the two words had been used interchangeably by Khaminwa, J. On the validity of summons, counsel submitted that the appellants cannot challenge the suit on that ground having actively participated in the subsequent proceedings and benefited from the orders therefrom. Though summons had been applied for, it was not until 2014 that they were issued and that the same were never re-issued hence the allegation should be disregarded. As regards the alleged unenforceability of the contract, counsel argued that the allegation was premature and misconceived as it was a triable issue which ought to be determined at a full trial.

We have considered the record of appeal, submissions by counsel and the law. The appeal arises from a decision of the High Court made on an interlocutory application in exercise of its judicial discretion. The circumstances in which this Court can interfere with the exercise of discretion by the court below are circumscribed. This Court may only interfere with the exercise of such discretion when, in the words of the predecessor of this Court in **Mbogo and Another v Shah [1968] EA 93,** it is satisfied that the decision of that court is clearly wrong:

> ***"…because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

To succeed, the appellants must demonstrate that the learned Judge took into account matters that she should not have, or that she failed to take into account matters that she should have, or that her decision is clearly wrong. We do not discern such misgivings. In the circumstances

of this appeal, the Judge carefully considered the material placed before her before reaching her determination. She considered what was relevant for her determination and did not at all misdirect herself.

The main ground in the application to strike out the suit was that the said suit was *res judicata.* The essence of the doctrine of *res judicata* was expounded in the case of **William Koross v Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** where this Court stated as follows:

> ***"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go…The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit."***

Res judicata is anchored on section 7 of the Civil Procedure Act. It 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 can 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."* Thus the following elements must all be satisfied for the doctrine of *res judicata* to apply; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised. See also **Gichuki v Gichuki [1982] KLR 285.**

It is common ground that the 1st respondent filed two suits seeking more or less similar prayers against the same parties and over the same cause of action. It is common ground that the earlier suit being HCCC No. 129 of 2009 was dismissed on account of it having been initiated by an advocate who had no valid practicing certificate. It was then that the 1st respondent filed HCCC No. 148 of 2012. The bone of contention then is whether the court by dismissing HCCC No. 127 of 2009 on a technicality had heard and determined the said suit on merits. The simple answer is an emphatic no. The court did not have the opportunity to hear the parties on the merits of their respective claims in the suit.

The learned Judge held, and rightly so in our view, that there being no copy of proceedings or judgment in HCCC No. 127 of 2009 before her, she was unable to hold that the dispute between the parties was heard and determined on merits despite there being a decree for dismissal. The trial Judge took into consideration the context of the application which sought to have the 1st respondent's suit struck out and not dismissed and reasoned, and rightly so again in our view, that the learned Judge Khaminwa in her ruling had used the term dismissal interchangeably with struck out. The court could not have granted prayers not sought for. The appellants were bound by their pleadings. (See: **David Sironga Ole Tukai v Francis Arap Muge & 2 Others (2014) eKLR).** The appellants had in their application sought for the striking out of the suit and not dismissal. The appellants cannot therefore cling on the inadvertent error, by Khaminwa, J. in ordering the dismissal of the suit, instead of striking it out as had been prayed for, and claim that the suit was heard on merit and dismissed. The record speaks for itself. The doctrine of *res judicata* was inapplicable in the circumstances as the issues raised in the suit had not been addressed and finally determined by the court on merits but as a result of a technicality. (See: **Michael Bett Siror v Jackson Koech [2019] eKLR).** Accordingly, the 1st respondent was perfectly entitled to bring a fresh suit.

As regards expiry of summons to enter appearance, we note that the appellants were duly served with the same. They thereafter actively participated in the proceedings by entering unconditional appearance, filed a statement of defence and participated in several applications some of which ended in their favour. We discern no prejudice occasioned to the appellants even if the summons had expired as they claim. The purpose of summons is to notify the defendant of the suit against him. We entirely agree with the sentiments expressed in the case of **Anglican Church of Kenya ACK Guest House v Alfred Imbwaga Musungu [2014] eKLR** as follows:-

> **"I agree with the approach adopted by Sergon, J. in the Hussein Mohamed Awadh Case (supra), that the purpose of summons is to inform the defendant of the case and to invite him to enter appearance. Once the Defendant enters unconditional appearance within the time stipulated in the summons, files defence and even participates in the proceedings, as was the case herein, the defendant is estopped from seeking to set aside such proceedings unless it is demonstrated that the defendant suffered some prejudice occasioned by the invalidity of the summons… the Summons to Enter Appearance issued for the 2nd Appellant was invalid but the proceedings, order, judgment and/or decree made subsequent thereto remain valid since the 2nd Appellant entered unconditional appearance, filed defence and participated in the proceedings leading to the judgment. In summary, the 2nd Appellant acquiesced in the process and has not demonstrated that it suffered any prejudice."**

With regard to the contentious contract and or consultancy agreement, it is a serious issue that requires a full hearing to determine its validity. This Court sitting in its capacity as an appellate court cannot go into the merits of the same bearing in mind it will be one of the issues to be determined by the trial court.

The upshot is that the appeal lacks merit and is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 22nd day of November, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR