IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 243 OF 2010

BETWEEN

CHRISTOPHER KINYUUTI MAONDU T/A

MASAKU EAST END SERVICES STATION ……..…..…….APPELLANT

VERSUS

SHELL & BP (MALINDI) KENYA LIMITED ……RESPONDENT

(Being an Appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Waweru J) dated 16th July, 2010

in

HCCC No. 81 of 2007)

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JUDGMENT OF THE COURT

The respondent company was the registered owner of Title Number **Machakos Town/Block 909/410**, the suit premises, which it used as a service station for the marketing, distribution and sale of petroleum products. On 1st March, 2002, it entered into a dealer license agreement with the appellant to operate the service station for a period of 2 years under the name and style of Masaku East End Service Station.

On 26th May, 2003, while the licence was still operational, the respondent threatened to suspend it claiming that the appellant owed it Kshs. 1,045,725.03. The appellant for his part denied this, arguing that the dealer license was still in force and no notice to terminate it had been served upon him.

Due to threats to terminate the licence, the appellant moved the trial court at Machakos in **SPMCC No. 526 of 2003,** seeking an injunction to restrain the respondent from harassing him or his agents and from interfering with his operations at the service station until expiry of the contract. The court granted an injunction on 29th July, 2003 but subsequently, the respondent took possession of the suit premises.

The appellant filed a second suit against the respondent in the subordinate court, being **SPMCC No. 562 of 2004** challenging the eviction from the premises and its subsequent denial of access to the premises by the respondent. The appellant contended that the respondent did not issue notice of intended take over and he was not given time to wind up his operations in accordance with the agreement. Because of the manner the eviction was carried out, the appellant contended that it did not have the opportunity to take inventory of the assets in the premises; and that he incurred damages. He accused the respondent of conversion and sought to recover Kshs. 2,170,580 from it.

Both **SPMCC No. 562 of 2004** and **SPMCC No. 526 of 2003** were settled by consent of the parties through a letter dated 30th August, 2007, the respondent having paid the appellant a sum of Kshs. 3,196,797 in full and final settlement of the suits.

In 2007, the appellant filed a third suit, once more, against the respondent, **HCCC No. 81 of 2007,** claiming that under the aforesaid dealer licence agreement, he was required to supply petroleum products to specific consumers pointed out by the respondent with the express understanding that the latter would reimburse the appellant for the amount of petroleum products supplied. It was on this basis that the appellant contended in the third suit that, acting upon this arrangement, it supplied fuel to *matatus*, the Government, British American Tobacco (BAT) and was entitled to reimbursement from the respondent. The appellant further averred that the respondent had wrongfully debited amounts due on these accounts from its account claiming that the appellant had issued cheques that were dishonoured on

presentation. In the result, the appellant claimed Kshs. 4,123,969.

The respondent denied the claim and stated that the suit was *res judicata* as the issues in it were substantially the same ones in dispute between it and the respondents in the earlier suits which were fully and finally settled by the parties' consent.

Applying by chamber summons, the respondent sought to have the plaint struck out for being *res judicata.* It maintained that the appellant's claim ought to have been contemplated and brought in the two previous suits. The appellant in opposition to the application contended that issues raised were substantially different from those canvassed in the previous suits; that **SPMCC 526 of 2003** and **SPMCC 562 of 2004** were not heard and determined on merit but compromised by the parties.

After considering submissions from both parties, the learned Judge observed that all the claims in the three suits emanated from the Dealer Licence Agreement and that they ought to have been brought in a single suit. In allowing the application and declaring the suit *res judicata*, the learned Judge expressed himself as follows:

> **"The doctrine of *res judicata*, as already seen, contemplates not only such claims as are before the court but also all other claims that could have and should have properly been brought before the court in the same action. When several claims accrue to a party out of the same cause of action, it is not open to him to bring multiple suits to pursue those claims. He ought to bring one single suit in which all of those claims will be adjudicated. It is certainly an abuse of the process of the court to bring multiple suits where one single suit would have sufficed…"**

Aggrieved once more, the appellant has lodged this appeal on nine grounds, which can be summarized and argued broadly as one, that the trial Judge erred by holding that the suit was *res judicata.*

Counsel, having filed and exchanged written submissions, opted to adopt them fully without orally highlighting them.

To demonstrate that the appeal should be allowed, the appellant consolidated and argued all the 9 grounds as one issue; that is, whether the suit was *res judicata.* The appellant argued that *res judicata* was not applicable in the circumstances of the case because the matters in **SPMCC No. 526 of 2003** never proceeded to full hearing; that the special damages prayed for in the struck out suit was the money deposited in the respondent's account as security to cover any future orders for petroleum. This claim was settled by consent and a refund made. In regard to **SPMCC No.562 of 2004**, the appellant submitted that it was a claim for special damages arising from the detention of his property in the suit premises by the respondent; that in contrast, the issues in **HCCC No. 81 of 2007** arose from an arrangement with the respondent where the appellant supplied petroleum products to BAT, and some Government agencies and *matatus,* constituting a new cause altogether. According to the appellant, for an application brought under **Section 7** of the Civil Procedure Act to succeed, it must be demonstrated that the matter in the former suit was alleged by one party and either denied or admitted expressly or impliedly by the party on the opposite side. In support of this argument, the cases of **Rashid Allarakha Jan Mohammed & Co. Ltd V. Jethalal Valabhdas & Co. Ltd** (1956) EACA 255 and **Hawkesworth V Attorney General** (1974) E.A 406 were cited. In opposing the appeal, on the other hand, the respondent relied on the case of **John Florence Maritime Services Limited & Anor V. Cabinet Secretary for Transport and Infrastructure & 3 Others,** Civil Appeal No. 42 of 2014, and submitted that the two dimensions of the doctrine of *res judicata*, cause of action *res judicata* and issue *res judicata* applied to the third suit (HCCC No. 81 of 2007) as the single cause of action was identical in the three suits, namely, the alleged breaches of the Dealer Licence Agreement. It maintained that all the claims in the second and third suits should have been raised and dealt within the first suit as the time the second and third suits were being filed the grievances in question had already arisen; that all the three suits were between the same parties; based on the same suit property, with the basis being the dealer agreement.

We reiterate that the single issue in the appeal is whether **HCCC 81of 2007** was *res judicata* the two previous suits. *Res judicata* is a doctrine of judicial creation fully expressed in Latin as *"Res judicata pro veritate accipitur," (*a matter adjudged is taken for truth). Its rationale is based on public policy, the finality of litigation; barring a litigant who seeks to reopen in a fresh action an issue which was previously raised and decided on the merits by a competent court in an earlier action between the same parties. It is an all pervading concept present in most jurisdictions of the world. In Kenya, for instance, it is enacted in **Section 7** of the Civil Procedure Act as follows:

> **"7. 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."**

One of the earliest English cases to elucidate this principle was **Henderson V Henderson** (1843-60) ALL E.R.378, where it was observed 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 under 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 case, not only to points upon which the court was actually required by the 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."**

This reasoning, is a replica of **section 7** aforesaid. Its rationale has been explained in a number of cases. For example in **John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others** (supra) the Court reiterated those principles thus;

> **"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".**

It is common factor that the relationship between the appellant and respondent was governed by the Dealer License Agreement which the respondent alleged had been breached by the the threats of the appellant to evict him from the suit premises. The first suit to be filed by the appellant in response to those threats was **SPM Civil Case No. 526 of 2003**. The plaint was amended two times. The re-amended plaint introduced very comprehensive grounds which we shall turn to shortly. Suffice, however, to state that the appellant subsequently instituted another suit, **CMCC No. 562 of 2004** against the respondent based on the aforesaid Dealer License Agreement. This plaint was also extensively amended. Both suits were settled by consent of the parties through two letters of the same date, 30th August, 2007.

One month after this, the appellant once more filed HCCC No. 81 of 2007 hinged on the very same Dealer License Agreement. It is this suit that was sought to be struck out by the respondent's chamber summons on the ground that it was *resjudicata.* The Judge agreed.

In the struck out suit, the appellant prayed to be reimbursed Kshs. 4,123,969 for fuel supplied to *matatus*, Government agencies, BAT and others. This claim, as we have said, arose out of the Dealer License Agreement. At paragraphs 6, 8 and 9 of the plaint the appellant expressly deposed that the two of them were bound by the**"….terms and conditions contained in the in the said Dealer License Agreement. The plaintiff will at the hearing of this suit refer to the said Dealer License Agreement for its full meaning and purport……**

> **And the plaintiff avers that under the Dealer License Agreement aforesaid, the plaintiff was under a duty and condition to supply petroleum and petroleum products to certain categories of consumers pointed out to him by the defendant under and arrangement between the defendant and the said consumers after which the plaintiff would claim reimbursement from the defendant for the amount of petroleum and petroleum products supplied.**
>
> **Acting pursuant to the arrangement outlined in paragraph 8 above, the plaintiff supplied fuel to *matatus* and the Government and was entitled to reimbursement from the defendant."**

It is not denied that the other two suits that were compromised also arose out this very Dealer License Agreement.

Consents recorded in the two earlier suits brought a conclusive end to all the issues arising from Dealer License Agreement without any reservations whatsoever and it is immaterial that the suits did not proceed to hearing. A consent order can be relied upon by a party to argue that a matter or an issue subsequently raised is *res judicata.* That is what this Court said in **Kamunge & Others V. Pioneer General Assurance Society Ltd** (1977) EA 263 at pg. 265, that;

> **"It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.."**

As *res judicata* applies, except in special case, not only to points upon which the court was actually required 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, we come to the ultimate conclusion that the appellant had several chances to include the claim in HCCC No. 81of 2007. He amended the plaint in the first suit two times and brought a second suit which he also amended. It is established that cause of action *res judicata,* extends to a point which might have been made but was not raised and decided in the earlier proceedings. The bar is absolute unless fraud or collusion is alleged and no such allegation has been made.

All the appellant has been doing is to submit different prayers as three separate suits. The consent brought to a conclusive end the litigation in the first and second suits. Unless varied or set aside, the parties are bound by their terms.

The learned Judge properly directed himself on the law and facts of the case by striking out HCCC No. 81 of 2007.

The appeal fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 4th Day of May, 2018.

W. OUKO

…….……..

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

…….……..

JUDGE OF APPEAL

K. M'INOTI

……...……...

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR