IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 150 OF 2014

BETWEEN

AUTO SPRINGS MANUFACTURERS LIMITED ………. APPELLANT

AND

DAMISHA BUILDING CONTRACTORS LIMITED ..…. RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Machakos (Mutende, J.) dated 30th October, 2015

in

HCCC NO. 141 OF 2009)

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JUDGMENT OF THE COURT

1. On 25th January, 2005 the respondent filed a plaint against the appellant seeking an order that the appellant do remove forthwith its illegal fence from and vacate **L.R. No. Mavoko Municipality/Block 6/789** *(the suit property)* and in default be evicted therefrom; an injunction to restrain the appellant from entering into, remaining on, fencing or otherwise interfering with the suit property; damages for trespass and loss of user; and costs of the suit.

2. The appellant filed its statement of defence dated 28th February, 2005 denying the respondent's claim. The respondent also raised a counterclaim, contending, *inter alia*, that the respondent's title to the suit property was null and void and prayed for its cancellation.

3. The respondent filed a reply to the defence and defence to counterclaim. The respondent also filed an application dated 10th March, 2005 praying that the appellant's statement of defence and counterclaim be struck out and the defendant to vacate the suit property and in default be evicted therefrom. The respondent also sought costs of the application as well as costs of the entire suit.

4. In a ruling delivered by **Osiemo, J.** on 28th September, 2005, the orders sought by the respondent in the aforesaid application were granted. As per the order that was extracted thereafter, the costs of the application and the entire suit were to be certified by the court's Taxing Officer.

5. The respondent filed a bill of costs and when it came up for taxation on 5th July, 2006, by consent of the parties it was taxed at **Kshs.98,195/=.** A certificate of costs was issued and the appellant paid the costs in full.

6. After sometime, the respondent filed another application dated 7th November, 2008 seeking interlocutory judgment against the appellant and also requested that the matter be listed for formal proof.

7. On 21st November, 2008 an interlocutory judgment was entered by a Senior Deputy Registrar. On 5th May, 2009 the matter was placed before Osiemo, J. for formal proof and assessment of damages. The court ordered that the matter be transferred to Machakos as the suit property is located in Machakos District (County).

8. The appellant filed a preliminary objection stating that the matter was ***res judicata*** by virtue of **section 7** of the **Civil Procedure Act** in view of the orders issued by Osiemo, J. on 18th July, 2005. The preliminary objection was premised on the following arguments:

> **"1. (a) The suit was determined in its entirety when the defence and counterclaim were struck out on 18th July, 2005;**
>
> **(b) The issue of costs under section 27 of the Civil Procedure Code has been determined and settled;**
>
> **(c) The order dated 5th October, 2005 is a decree defined under section 2 of the Civil Procedure Act;**
>
> **(d) The order issued on 5th October, 2005 did not preserve any prayer in the plaint dated 25th January, 2005;**
>
> **(e) The bill of costs filed pursuant to the order was taxed, a certificate of costs issued and was paid to the plaintiff in full.**
>
> **2. The Defendant having paid the taxed costs of the entire suit, there is no provision in law for the suit to be heard on any other issue.**
>
> **3. Once the order of 18th July, 2012 was issued the entire suit was compromised and the plaint dated 25th January, 2005 was compromised and/or determined."**

9. The respondent filed grounds of opposition and contended that after the defence and counterclaim were struck out, in 2008 the respondent sought and obtained interlocutory judgment and the matter had been properly set down for formal proof on assessment of damages.

10. The respondent further argued that **"if any costs were awarded then the same was in relation to the plaintiff's application for injunction which was allowed … but the said costs did not extend to the main suit."**

11. In a ruling on the preliminary objection by Mutende, J. dated 30th October, 2013, the learned judge dismissed the preliminary objection.The court held, inter alia, that the ruling of 28th September, 2005 did not deal with the issue of damages for trespass and loss of user. The court further held that the matter was not ***res judicata*** because there was no former suit, it was the same suit that was transferred from Nairobi to Machakos.

12. Being aggrieved by the said ruling, the appellant preferred an appeal to this Court. It was contended, *inter alia*, that the High Court erred and misdirected itself on its interpretation of the propriety of the interlocutory judgment entered against the appellant on 24th November, 2008, long after the ruling of 28th

September, 2005 and payment of the entire costs of the suit; in failing to find that the respondent was estopped in law from re-opening a suit whose costs had been taxed and paid in full.

13. When the appeal came up for hearing, **Mr. Mutula Kilonzo Junior,** learned counsel for the appellant, mainly relied on his written submissions and made very brief oral submissions.

On the other hand, **Mr. Obat Wasonga,** learned counsel for the respondent, relied entirely on his written submissions. The arguments advanced in their respective submissions are more or less the same as those canvassed during the hearing of the preliminary objection whose ruling gave rise to thisappeal.

14. The main issues for determination in this appeal are whether the respondent's pursuit for damages was ***res judicata*** and whether the respondent was estopped from pursuing it more than three years after the ruling of Osiemo, J. granting the respondent's application for the striking out of the appellant's defence and counterclaim and awarding costs of the application and the entire suit.

15. The request for judgment by the respondent through the firm of Kelly & Company Advocates on 13th November, 2008 came long after Meenye & Kirima, the respondent's former advocates, had taxed their bill of costs for the entire suit and the costs settled in full by the appellant.

16. Regarding the line of argument that the matter was ***res judicata,*** **section 7** of the **Civil Procedure Act** provides as follows:

> **"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 or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

17. It is not in dispute in **HCCC NO. 79** of **2005** that was filed in the High Court at Nairobi was transferred to the High Court at Machakos pursuant to the provisions of **section 18** of the **Civil Procedure Act**. Thereafter it was assigned number **141** of **2009.** We therefore agree with the learned judge that there was only one suit and decision which struck out the statement of defense and counterclaim and granted the respondent the suit property; there was no former suit and a subsequent one. Strictly, the doctrine of ***res judicata*** was therefore not applicable.

18. We will now consider whether the respondent was estopped in law from re-opening the suit after filing and taxing its bill of costs for the entire suit. For starters, the respondent's contention that the costs that were taxed were in respect of its application for injunction only is without any basis.

19. The respondent's application dated 10th March, 2005 prayed for *"costs of this application and the entire suit."* Item 2 of the respondent's bill of costs was worded as follows:

> **"Instructions fees for acting for the plaintiff against the Defendant in an action for recovery of land illegally occupied by the Defendant, namely L.R. No. Mavoko Municipality/Block 6/789, and for injuctive reliefs, taking into account the complexity, urgency and importance of the matter and the value of the subject matter (Kshs.3 million) to include all attendances and advices throughout on a defended basis."**

Then item 18 of the bill of costs was for *"Drawing Chamber Summons application for striking out the defence and for mandatory order to vacate the plot and ejectment in default".*

Further, the certificate of taxation was in respect of the entire suit. We must therefore reject the respondent's contention that the costs that were awarded and paid were for the injunction application.The costs of the entire suit, including of the injunction application, were paid sometimes in 2006. It is *trite law* that unless the court directs the immediate taxation and payment of costs in an interlocutory application, there should only be one taxation of costs at the tail end of

a suit. See **HOMI DARA ADRINWALLA V JEANNE HOGAN & ANOTHER [1966]** E.A.290

20. What is a bill of costs and when is it filed? According to **Duhaime's Law Dictionary,** *"a bill of costs is a formal itemized memorandum presented by the successful party to concluded litigation, to the other, as a proposal of costs and disbursements that the issuing party claims".*

21. We think the respondent's conduct of applying for striking out of the appellant's statement of defence and counterclaim; praying for costs of the entire suit; filing a party and party bill of costs for the entire suit; negotiating the same with the appellant; and ultimately receiving full payment of the agreed costs reasonably implied that the entire matter had been finalized. Ordinarily, a bill of costs is drawn, filed and taxed upon finalization of a suit.

22. Between 5th July, 2006 when the respondent's bill of costs was taxed by consent and 7th November, 2008 when interlocutory judgment was applied for, no action had been taken by the respondent.

23. The request for interlocutory judgment long after payment of costs of the entire suit amounted to abuse of the court process. Under **Order IXA rule 3** of the **Civil Procedure Rules** that was cited by the respondent in its application for interlocutory judgment, such judgment could only be sought where the plaint makes a liquidated demand or together with some other claim but the defendant fails to appear. That was not the case. The defendant (appellant) had appeared and filed a defence and counter claim. The appellant had been made to believe, and reasonably so, that since the respondent in its application filed on 25th March, 2005 sought for striking out of its statement of defence and counterclaim, eviction from the suit property and costs of the application and the entire suit, the respondent had opted not to pursue the claim for damages for trespass and loss of user.

24. In the circumstances as aforesaid, we agree that the respondent, by its own conduct, is estopped from pursuing its claim for damages. Public policy demands that there has to be an end to litigation in a given matter. Equally, a party cannot be permitted to litigate by instalment. Wigran, VC in **HENDERSON V HENDERSON** [1843] Hare 100 at 115 held:

> **"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 context, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case".**

25. Although Wigram, V.C. was pronouncing himself in the context of a plea of ***res judicata,*** which we have already held inapplicable, in the context of the matter that was before the trial court, the omission by the respondent, whether by choice, inadvertence or otherwise, to pursue the claim for damages immediately after the striking out of the defence and counterclaim, and in any event, before filing its final bill of costs, renders the claim an abuse of the court process.

26. For these reasons, this appeal is hereby allowed. Accordingly, the ruling and order of the High Court given on 30/10/2013 in Machakos HCCC NO. 141 of 2009 is hereby set aside. We order that each party bears its own costs.

DATED and delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.