IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & GATEMBU, JJ.A)

CIVIL APPEAL NO. 257 OF 2013

BETWEEN

RAMABEN RAMNIKLAL PATANI.....1ST APPELLANT

ASHIT RAMNIKLAL PATANI…….....……..2ND APPELLANT

SELINA RAMNIKAL PATANI……..….....……..3RD APPELLANT

AND

GARDEN CHAMBERS LTD……....….....….……..RESPONDENT

*(Being an appeal against the Ruling and Order of the High Court of Kenya at Nairobi - Milimani (**J.B. Havelock, J**.) dated the 3rd day of November, 2011 in H.C.C.C. No. 896 of 2009)*

****

JUDGMENT OF THE COURT

The respondent "**Garden Chambers Ltd**" instituted the suit leading to this appeal in the High Court, Nairobi against the appellants jointly and severally. According to its plaint, it is a management company engaged in the managing of a property known as Garden Chambers situate on LR No. 209/4355 and LR No. 209/2632 on Moktar Daddah Street within Nairobi city, "*the suit property*". The management entailed collection of rent from the tenants on the suit property and paying salaries and all outgoings including taxes and rates to various authorities. The respondent accused the appellants of unlawfully collecting rent from the suit property's tenants estimated at Kshs. 10 million as at the date of filing suit on 26th November 2009. The respondent claimed that the appellants had collected rent from the tenants under the pretext that they were its directors when they were not and or were beneficiaries of the estate of the late **Ramniklal V. Patani** "*Patani*" who had been its director before his demise.

The respondent denied that the appellants were ever its directors and that Patani was not allowed to receive the suit property's rental income since there had been a receiving order issued against him on 25th November, 2003. Though the respondent averred that there had been several other suits between it and the appellants, it claimed that they had been concluded but had not been on the same subject matter as in this suit. The respondent therefore prayed for judgment against the appellants jointly and severally for Kshs. 10 million, an order for account of rent collected by the appellants in respect of the suit property be taken and an order to pay back to the respondent the amount found due after the taking of accounts.

The appellants are wife, son and daughter of Patani respectively. In their joint statement of defence, they denied the respondent's averments in general. They added however that Patani was a joint owner of the suit property and that though the suit property had been disposed off, they had the right and authority as administrators of his estate to administer his estate diligently, by collecting and reserving the deceased's estate. They denied knowledge of a receiving order being made against Patani. Most significantly, the appellants pleaded that there had been several other suits previously between the parties herein and in one such suit, **HCCC No. 2250 of 2007** *"the former suit"* had conclusively determined the same issue as in the instant suit. To that end, they stated that they had been the plaintiffs in the former suit and one **Dhirajlal V. Patani**, who now holds himself as the respondent's managing director, was the defendant. In light of the foregoing, the appellants raised the defence of *res judicata*. According to them, a consent order had been recorded in the former suit and the same had been adopted as a court order on 30th September, 2009 finally settling the suit. The appellants threatened at the opportune time to apply to strike out the suit on that account and on the basis that it was an abuse of the court process as well as failure to disclose any cause of action.

True to their threat, the appellants filed an application dated 22nd January, 2010 praying that the suit be struck out with costs. The application was brought pursuant to order VI rule 13 (1) (a) (b) and (d) of the Civil Procedure Rules and section 7 of the Civil Procedure Act and all other enabling provisions of the law. It was premised on the grounds that the suit was *res judicata*, scandalous, vexatious, frivolous or otherwise an abuse of the court process.

It was deponed in support of the application that the suit property was until March 2009, owned jointly by Patani, Dhirajlal V Patani, S.S Trivedi and Mansukhal V. Patani. The suit property had since been disposed of through a court order. That Patani was a brother to Dhirajlal Patani, who swore the verifying affidavit in support of the plaint on behalf of the respondent. That following Patani's demise, the appellants were issued with a grant of probate of written will to his estate. As the executors of the deceased's estate, they thereafter filed the former suit against Dhirajlal V. Patani, the suit property's co-owner, seeking accounts for the rent collected and the appointment of receivers to manage the suit property in a bid to collect and protect the deceased's estate. That suit culminated in a consent order between the parties dated 30th September, 2009 which was in terms '*inter alia:*

> ***"1. That by consent:***
>
> ***(a) This matter be marked as fully settled on the following terms;***
>
> ***(i) That the balance of the deposit of 20 million held by W. J. Ithondeka & Co. Advocates amounting to Kshs. 3,480,540/- million be shared equally among the 4 owner and/or their representative, that is to say that each ofthe 4 owners and/or their representatives be paid the sum of Kshs. 870,135/.***
>
> ***(ii) That upon payment of the said amounts, the firm of W.J. Ithondeka & Co. Advocates be and is hereby discharged from any further liabilities and/or undertakings to the registered owners and/or their representatives on account of the deposit monies so received.***
>
> ***(iii) That further also that the 4 owners and/or their representatives be discharged from liability as against each other in respect to the suit premises then known as i.e. GARDEN CHAMBERS BUILDING i.e. L. R. No. 2009/4355 and 209/2632.***
>
> ***(iv) That this file be closed."***

This consent was however entered into after the suit property had been sold off and the proceeds distributed to all interested parties, the appellants included. According to the appellants therefore, the respondent's suit was *res judicata* since the maters directly in issue in the former suit were substantially the same as in the present suit, which matters had been conclusively determined. That the present suit was only meant to harass, intimidate and oppress them meriting it being struck out.

The respondent on its part denied that the parties in the present suit were the same as those in the previous suit since the respondent in the present suit is a limited company which is a distinct legal entity with separate status from its directors and with power to sue and be sued in its own name. That in the previous suit, neither the appellants nor Dhirajlal V. Patani were sued as directors of the respondent nor were any reliefs sought or obtained for or against it and so in essence the parties therein were not litigating in the same capacities as now. Further, that during the pendency of the former suit, the suit property was not owned or registered in the respondent's name. The respondent deponed that in the consent order there was no entity called Garden Chambers Limited. It also contended that while the former suit was in respect of the sale proceeds arising out of sale of the suit property, the subject matter in the present suit was in respect of the rent collected by the appellants in their private and personal capacities beginning 2006 when they were neither the directors of the respondent nor executors or administrators of the estate of Patani. According to the respondent therefore, the application was presumptuous and ill advised.

Faced with the above set of facts the High Court dismissed the application in a ruling dated 3rd November, 2011. The court (**Havelock, J**.) found that both the parties in the two suits and the subject matter were different. The learned Judge therefore held that the principle of *res judicata* was inapplicable in the circumstances. Being aggrieved by the said findings, the appellants are now before this Court on an appeal premised on 3 grounds that the learned Judge;

1. erred and misdirected himself in law and in fact by disregarding the clear and statutory provisions relating to res judicata and its applicability;

2. failed to recognize that parties either litigate by themselves or through parties under whom they claim when he wrongly found that the parties in the two suit were different;

3. ignored to look at the actual and real subject matter in the two suits under reference as to form an opinion that the subject matter was the same whatever angle the issue was to be looked at**.**

Through their written submissions dated 18th April, 2017, the appellant's reiterated their contention that the same parties had litigated over the same subject matter in a previous suit that had been settled before a competent court.

According to the appellants, the main dispute in the former suit was with regard to collection and sharing of rents by the owners as well as management of the suit property. It was subsequently resolved to have the suit property sold, the sale proceeds thereof, be distributed to the parties and the concerned parties to release each other from liability. The appellants submitted further that releasing each other from liabilities meant releasing parties from obligations and counter allegations of failure to account for rents collected and so on. They faulted the Judge's finding that since the respondent was a company, the parties could not be held to be the same since the respondent only owned the building and that at all times had the appellants as directors and were therefore privy to all the issues which they would have advanced for determination. They cited the case of **John Florence Maritime Services Ltd & Anor v Cabinet Secretary for Transport & Infrastructure & 3 Ors (2005) eKLR** where the Court of Appeal held that the plea of *res judicata* not only applies to points upon which court was actually required by parties to form an opinion and pronounce a judgment but also to every point which properly belonged to the subject of litigation which the parties might have brought at the time. The case of **Theresa Costabir v Alka Roshankal Harbankal Sharma & Anor (2005) eKLR** was further relied upon by the appellants for that proposition. The appellants urged the Court to find that the defendant in the former suit, who is the respondent's managing director ought to have raised all his claims in the earlier suit for determination to prevent abuse of court process.

In its written submissions in reply, the respondent cited the case of **Uhuru Highway Development Ltd v Central Bank & 2 Ors [1996] eKLR** where the Court of Appeal set out the factors that ought to be present for a party to successfully rely on the plea of *res judicata.* These are that there was a previous suit in which the matter was in issue; that the parties were the same or litigating under the same title; that a competent court heard the matter in issue and that the issue previously determined has been raised once again in a fresh suit. According to the respondent, the issues for determination in the application were

whether the parties in the two suits were the same and whether the issues in the two suits were the same. It denied that the parties in the previous suit and the present suit were the same. It submitted that the parties in the previous suit were Patani (deceased) suing through the representatives of his estate, the appellants, and one Dhirajlal V. Patani whilst in the instant suit the plaintiff is a company, which is a separate legal entity, suing the appellants herein in their personal capacities. As such and according to the respondent, the parties in the two suits were totally different.

The respondent further denied that the subject matter in the two suits was the same. In its view, the issues in the previous suit were not directly and substantially the same as the issues in the instant suit. The respondent submitted that the issue in the former suit was the suit property where an order for permanent injunction restraining the defendant, Dhirajlal V. Patani, from evicting, interfering, selling or disposing off the suit property was being sought while in the present suit, the issue was rent illegally collected by the appellants in their private and personal capacities from 2006 when they were neither its directors nor executors/administrators of the estate of Patani. It in fact denied that the deceased could legally receive rental income from the suit property. The respondent claimed that the instant suit seeks an order of account for rent irregularly collected from the suit property amounting to Kshs. 10,000,000/-. It argued that the issues and prayers in the two suits were different and the consent recorded in the former suit could not be taken as having settled the issues in the present suit since the consent was in regard to sharing sale proceeds from the suit property. It therefore denied the applicability of the doctrine of *res judicata* and termed the applicants assertions as farfetched only intended to misguide the court.

After taking into consideration the parties pleadings, their respective submissions, authorities and the law, the only issue arising for determination is whether the plea of *res judicata* was properly invoked by the appellants to act as a defence or bar to the instant suit. In our jurisdiction, the doctrine of *res judicata* is found in **section 7** of the Civil Procedure Act, 2010 which provides as *inter alia*:-

> ***"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."***

The foregoing provision has been considered and expounded on, in many decided cases. This Court recently in **Independent Electoral & Boundaries Commission v Maina Kiai, Khelef Khalifa, Tirop Kitur, Attorney-General, Katiba Institute & Coalition for Reforms & Democracy [2017] eKLR** revisited the salient features that inform this doctrine**.** The Court observed as follows;

> *"**Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> > ***(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 Court went further to examine the importance or rationale behind the doctrine and stated as follows,

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation***

and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

The rationale was put differently by the Court in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR.** The court observed,

"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. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence."

In essence, litigation must at some point come into an end. Successful parties must be allowed to enjoy the fruits of their litigation and not at a later date be vexed with same issues that have already been decided upon by a competent court of law.

Did the circumstances of this case then allow the appellants to raise the plea of *res judicata*? As already observed, the issue in the instant suit must have been directly and substantially in issue in the former suit for the plea to hold. The appellants have submitted that soon after their appointment as the representatives or executors of the estate of Patani, they instituted HCCC No. 2250 of 2007 in a bid to collect rent and generally protect Patani's estate. A perusal of the plaint in that suit shows that the subject matter of that suit was the suit property and concerned disputes on rent collection and sharing of the same from the suit property. The appellants sought *inter alia* an order that they were entitled to a ¼

share of all the rental proceeds collected from the suit property. That suit was settled through a consent by the parties to the effect that the suit property be sold and the sale proceeds be distributed to the owners or their representatives. That consent also contained a clause to the effect;

"THAT further also that the 4 owners and/or their representatives be discharged from liability as against each other in respect to the suit premises then known as i.e. GARDEN CHAMBERS BUILDING i.e. L.R. NO. 209/4355 and 209/2632."

The appellants in their submissions took the view that the foregoing clause was meant to settle all the issues or parties' obligations regarding the suit property which as is discernable from the pleadings was mostly or solely in regard to the collection and sharing of the rent from the suit property. That allegation has not been controverted by the respondent. A reading of the consent as filed in court indeed gives the impression that parties intended that with the sale of the suit property and sharing the proceeds thereof, all other claims they held against each other in regard to the suit properly and which can be discerned to be on rental income, be extinguished or be taken as having been settled or abandoned.

The present suit on the other hand sought Kshs. 10 million allegedly collected as rental income by the appellants unlawfully in 2006. Further, the respondent demanded an account of rent it alleged was collected on its behalf by the appellants in regard to the suit property. It is prudent to note that the Kshs. 10 million sought to be recovered had allegedly accrued in 2006 even before the former suit was filed in

court.

The Court of Appeal has previously in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** (supra) quoted with approval the case of **Henderson v Henderson [1843] 67 ER 313** as follows:-

> ***"…..where a given matter becomes the subject of litigation in and 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 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 cases, not only to points upon which the court was actually required by 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….."***

In our view therefore, the issues directly or substantially in issue in the former suit are the same as in the present suit. The issues the respondent is raising in the present suit could have well been raised and canvassed in the former suit. We are therefore unable to agree with the learned Judge finding that the subject matter of the two suits were different so as to render *res judicata* inapplicable in that sense.

Was the former suit between the same parties or parties under whom they or any of them claim? The former suit was between the appellants and Dhirajlal V. Patani as the only defendant. It is prudent to note that the defendant in that suit was the respondent's manager and further a co-owner of the suit property. Any rental income he collected cannot be said to have been for his personal appropriation as the same was for and on behalf of the respondent to be shared among the co-owners. It can reasonably be argued that the defendant being sued in the former suit was not in his personal capacity but was sued as a representative of the respondent. In our view therefore, the parties were litigating under the same title or under the parties under whom they claimed.

Even if it can be argued that the parties are not the same or that the parties under whom they claimed are different, the effect and tenor of the consent recorded by the parties in the former suit cannot be wished away by the respondent or any party for that matter. As far as can be gleaned from its contents, the parties intended to put the issues regarding collection and sharing of the rental income to rest with the recording of the consent. After all, it is apparent that the institution of the former suit was also geared towards resolving issues with regard to collection and sharing of the rental income from the suit property that already existed. The consent clearly stated that the owners of the suit property, and their representatives "*be discharged from liability against each other*' in respect to the suit property. Which is this liability that the parties to the former suit, or their representatives, intended to be discharged against each other? The liability can be no other than the collection and sharing of the suit property's rental income which was a live issue then as it is in the present suit. One can therefore not fail to read mischief with the respondent's institution of the instant suit which in essence seeks to reopen issues that parties had put to rest. In their supporting affidavit, the appellants have deponed that the institution of the present suit was only meant to harass, intimidated and to oppress the appellants. The respondent did not deny or controvert that averment.

In the premise, we hold that the plea of *res judicata* is available to the appellants. It would not be in the interest of justice, to allow issues which the parties in the former suit had wished to put to rest by consent to be subject to litigation again. Institution of the present suit smacks of dishonesty and ingenuity on the defendant in the former suit part, who having brought the appellants to the negotiating table successfully, is now attempting to impeach or find another way to go against the consent by now invoking the title and name of the respondent.

Just like in contracts, parties arrive at a consent after negotiations and trading concessions to find a common ground. Having come to a common ground, the parties then record a consent and filed the same

in court with the intention that they be bound by its contents. After the adoption of the consent by court, it further mutates to a court order. Courts of law must endeavour to give effect to parties' intentions in a consent unless such exceptions such as coercion, fraud or undue influence are pleaded and proved.

The upshot is that the appeal succeeds with costs to the appellants.

Dated and delivered at Nairobi this 22nd day of September, 2017.

ASIKE- MAKHANDIA

……..……..……..

JUDGE OF APPEAL

W. OUKO

……..……..……

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

……..……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR