IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MAKHANDIA & M'INOTI, JJA)

CIVIL APPEAL NO. 107 OF 2010

BETWEEN

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

BENJOH AMALGAMATED LIMITED.....RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Lady Justice Khaminwa**) delivered on 6th July, 2009*

in

H.C.C.C. No. 90 of 2009)

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CONSOLIDATED WITH

CIVIL APPEAL NO. 137 OF 2010

KENYA COMMERCIAL BANK LIMITED.....APPELLANT

AND

BENJOH AMALGAMATED LIMITED.....1ST RESPONDENT

BIDII KENYA LIMITED.....2ND RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Lady Justice Khaminwa**) delivered on 17th November, 2009*

in

H.C.C.C. No. 494 of 2008)

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CONSOLIDATED WITH

CIVIL APPEAL NO. 174 OF 2010

BIDII KENYA LIMITED.....APPELLANT

AND

BENJOH AMALGAMATED LIMITED.....1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....2ND RESPONDENT

*(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (**Lady Justice Khaminwa**) delivered on 17th November, 2009*

in

H.C.C.C. No. 494 of 2008)

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JUDGMENT OF THE COURT

The record of appeal before us is voluminous. It comprises eleven volumes with each running into hundreds of pages. The record itself is a reflection of the enormous amount of litigation that has been undertaken by the parties herein. The dispute between the parties has had a long history in the court corridors spanning a period in excess of 25 years, from 1992 when the first suit was filed in the High Court. Since then, there has been at least fourteen (14) suits with all manner of applications being made in the said suits. The dispute between the parties has been canvassed in all the courts of record in this land, all the way to the Supreme Court. Suffice it to say, all the suits and applications have been geared towards resolving the dispute resulting or arising from the same transaction and involving the same parties.

This judgment is in respect of 3 consolidated appeals and one cross appeal.

The appeals are **Civil Appeal number 107 of 2010**, **Kenya Commercial Bank vs Benjoh Amalgamated Limited**. This appeal emanates from the ruling and order of the High Court (*Khaminwa, J.*) dated 6th July 2009. The second appeal, **Civil Appeal No. 137 of 2010**, **Kenya Commercial Bank limited vs. Benjoh Amalgamated Limited and Bidii Kenya Limited** arises from a ruling by the same Judge dated 17th November, 2009. The last appeal being **Civil Appeal No. 174 of 2010, Bidii Kenya Limited v. Benjoh Amalgamated Limited and Kenya Commercial Bank Limited,** also challenges the ruling dated 17th November by the same Judge. The cross-appeal is filed in respect of Civil Appeal No. 107 of 2010 by Benjoh Amalgamated Limited.

The background to these appeals and cross-appeal is that sometimes in 1988, the United States of America International Development "USAID" offered funds by way of loans to Kenyans under the Rural Projects Enterprise Programme to be administered by the Kenya Commercial Bank "KCB" amongst other banks. Benjoh Amalgamated Limited "Benjoh", wishing to start a flower export business applied for a loan of Kshs. 18,675,000 through KCB. Following a feasibility study, KCB recommended the project and in 1989, granted Benjoh the loan facility secured by legal charges over two properties known as **LR No. 12411/1** and **LR No. 12411/2** "*the suit properties*". Upon request by KCB for further security, and as a guarantee for the loan facility, a charge was further created on a property known as **LR No. 10075** owned by Muiri Coffee Estate Ltd "*Muiri*".

As is often the case, the loanee defaulted in the repayment of the loan. Following the default on the part of Benjoh, KCB instructed a firm of its advocates to realize the securities charged. The advocates in turn

instructed auctioneers to advertise and sell by public auction the charged properties. A day before the scheduled auction, Benjoh and Muiri filed H**CCC No. 1219 of 1992 Benjoh and Muiri v KCB** seeking to stop the auction and claiming Kshs. 13.125 million which it alleged it had lost in the process. The suit was however compromised by the parties through a consent order recorded before **Githinji, J.** (as he then was) on 4th May, 1992 in which Benjoh admitted its indebtedness to KCB and undertook to repay the loan by 31st July 1992. In default thereof, the consent order further allowed KCB to proceed with the realization of the securities. Benjoh and Muiri failed to liquidate the loan as per the consent order and KCB again sought to realize the security through a public auction scheduled for 23rd January 1993. A day before the said auction, Benjoh filed **HCCC No. 285 of 1993** seeking to stop the looming auction. It managed to get an injunction which was later dismissed after *inter-partes* hearing. Undeterred in the realization of its security, another auction was scheduled for 26th June 1996 by KCB. Two days prior to the scheduled public auction, the guarantor, Muiri filed **HCCC No. 1520 of 1996** seeking general damages and contemporaneously filed an application seeking to stop the auction of its property against KCB and Benjoh. The suit was however dismissed. Almost a year later, Muiri filed **HCCC No. 1611 of 1996** against KCB and Benjoh but the suit was struck out as it was based on a mistaken belief that the LR No. 10075 had been sold. Another auction was slated for 7th February 1997 but **HCCC No. 24 of 1997** was filed in the High Court at Nyeri by Benjoh against KCB a day prior to the said auction. In the suit, Benjoh prayed for a proper and detailed statement of account and general damages. It successfully sought and obtained an injunction stopping the said auction but the suit was ultimately struck out on 9th May 1997 for being *res judicata*.

Undeterred, Benjoh went back to the original suit **HCCC No. 1219 of 1992,** and filed an application seeking to set aside the consent order. The application was allowed by the High Court but the same was overturned on appeal in **Civil Appeal No. 276 of 1997.** The Court of Appeal upheld and reinstated the consent order. Benjoh then sought consolidation of **HCCC No. 1219 of 1992** with **HCCC No. 285 of 1993** but the application was dismissed since the former suit had been finalized. A subsequent application by Benjoh to review the consent order in HCCC No. 1219 of 1992 was also rejected by court. Still undeterred, Benjoh and Muiri instituted HCCC No. 1576 of 1999 seeking statement of account from KCB but the suit was dismissed by **Lenaola J**. (as he then was) on 23rd July, 2004 with costs to the appellant for among other reasons being *res judicata*. Aggrieved, Benjoh and Muiri filed **Civil Appeal No. 239 of 2005** which appeal was also dismissed on 31st March, 2006 on account of *res judicata*. Four days later, Benjoh, together with Muiri instituted **HCCC No. 337 of 2006** against KCB which later became **HCCC No. 243 of 2006** upon transfer to the Commercial Division of the High Court. In the suit, Benjoh and Muiri sought for release of title deeds to the suit properties and declarations that records from KCB had failed to establish their indebtedness to it. The court however struck out the suit on KCB's application for being an abuse of the process of court. Applying the doctrine of res judicata, the Judge held that the court was not entitled to try issues which had already been determined previously by other courts.

Subsequently, constitutional petition numbers **122** and **352 of 2007** respectively were instituted by Benjoh and Muiri against KCB but were both dismissed for being, *inter alia*, *res judicata* on KCB's application. The first petition sought declaration that Benjoh's loan account had been fraudulently operated and further sought to compel the director of criminal investigations to institute investigations into the said account. The second petition sought declarations that KCB's attempt to sell the charged properties in Nyandarua and Kiambu was in contravention of the petitioner's right to property under section 75 of the former Constitution. The petitioners also prayed that KCB's attempt to sell the charged properties be declared illegal and unconstitutional and the said properties be discharged and released to them.

Eventually on 19th September 2007, L.R No. 10075 was sold through a public auction to the highest bidder, **Bidii** who soon thereafter became the registered owner of the same**.** That notwithstanding, Benjoh and Muiri went ahead and filed **HCCC 494 of 2008** against KCB and Bidii in a bid to nullify the sale. In a ruling dated 3rd November 2008, Lady Justice **J. Khaminwa** found that issues in the suit had been previously canvassed before other courts and hence *res judicata*.

However, since the property had now been disposed off, the Judge ordered KCB to render the final statement of accounts to Benjoh so as to bring litigation between the parties to an end. That was not to be.

Benjoh yet again instituted **HCCC No. 205 of 2009** against KCB, amongst others, still questioning the advanced loan and statement of account which had been raised in the previous suits.

Three applications filed in the High Court are the sources of these appeals. The first appeal is in respect of an application dated 2nd April 2009. The application was filed by KCB against Benjoh. It was based on a suit instituted by Benjoh and Muiri against KCB being HCCC No. 90 of 2009. In the suit, Benjoh and Muiri, as already indicated sought a declaration that the final statement of account rendered by the appellant pursuant to the order of **Khaminwa J.** was fraudulent and a sham. They also sought a declaration that KCB breached the contract between it and Benjoh and further prayed for special damages in the sum of Kshs.2,243,067,494/- and general damages. When KCB became aware of the suit, it filed a defence and simultaneously filed an application to strike out the suit.

The application was premised on the grounds that Benjoh had filed previous suits against it and the issues in those suits were directly or substantially in issue in the instant suit; that the suit was time barred by the Limitations of Actions Act and that the suit had been filed without the authority of Muiri who had previously withdrawn a suit against it. In response to KCB's application, Benjoh raised a preliminary objection on the ground that KCB filed its defence outside the prescribed period of 7 days under the Civil Procedure Rules and therefore sought to have the defence struck out. The Judge however refused to strike out the defence on the basis that Benjoh had failed to demonstrate that summons to enter appearance had been served upon KCB. Similarly, the Judge refused the application by KCB holding that since **HCCC 90 of 2009** was pending and raised similar issues as the instant suit, the instant suit would be stayed pending the finalization of that previous suit. Aggrieved by the said ruling, KCB filed the instant appeal, whereas Benjoh filed the cross-appeal.

In the appeal, KCB contends that the Judge misdirected herself by failing to appreciate the effect of the consent entered into by the parties which had finally resolved the dispute between them. Further, that the Judge erred by failing to appreciate that the suit was *res judicata* and was further statutorily barred by the Limitation of Actions Act.

Benjoh in its cross-appeal faulted the Judge for failing to strike out the KCB's defence on account of it being filed out of time. Further, that the Judge erred by failing to enter judgment as sought by it since KCB had failed to enter appearance and file its defence as provided for under the said rules.

Civil Appeal No. 137 of 2010, as earlier alluded to, arises from **HCCC No. 494 of 2008**. It was instituted by Benjoh and Muiri against KCB and Bidii. It sought to declare the sale of LR No. 10075 to Bidii illegal and void; a declaration that Benjoh's loan account with KCB had been fraudulently operated and an order directing the police commissioner to investigate the account. Again when served with court papers, KCB and Bidii reacted by filing similar applications to strike out the suit on grounds that it was res judicata, scandalous, frivolous, vexatious and otherwise an abuse of the process of the court. The two applications were consolidated and heard together. Both applications were resisted by Benjoh. In her ruling, Khaminwa, J. refused to strike out the suit on the ground that the statement of accounts produced by KCB raised issues or questions that had previously not been canvassed in court. She held that the issue of accounts raised in the suit warranted a trial and therefore dismissed the two applications.

Aggrieved by the said ruling, KCB instituted **Civil Appeal No. 137 of 2010**. In its appeal, KCB faults the Judge for failing to appreciate that the claims or issues contained in HCCC No. 494 of 2008 were *res judicata*. Further, for failing to appreciate the consent order recorded in 1992 where Benjoh admitted owing KCB the loan amount. KCB also impugned the judgment for making conclusive findings without the benefit of a trial. Moreover, it contended that the issues canvassed by the Judge had been conclusively canvassed in Nairobi HCCC 1576 of 1999 and the decision therein upheld by the Court of Appeal in Nairobi Civil Appeal No. 239 of 2004.

Bidii in turn instituted **Civil Appeal No. 174 of 2010** against the same ruling. It complained that the Judge in her determination failed to appreciate that Muiri, as the original owner of LR No. 10075, having discontinued suit against it and KCB on 29th September 2008, then Benjoh lacked requisite *locus standi* to institute the suit. It further faulted the Judge for failing to appreciate that the issues raised in the suit

had previously been canvassed even before her and she had held the same to be *res judicata*. There is also the ground of appeal that the Judge had failed to appreciate the consent previously recorded and upheld by the various courts.

The appeals, with the consent of the parties, were canvassed by way of written submissions with limited oral highlights. In its written submissions in support of the first two appeals and in opposition to the cross appeal, KCB submitted that the prayers sought in **Nairobi HCCC No. 90 of 2009** were similar to the prayers that Benjoh had sought in **Nairobi HCCC No. 122 of 2007** and the matters were therefore *res judicata.* Further, that the Judge in her ruling rendered in HCCC 494 of 2008 had found all the issues between the parties *res judicata* upon being moved by KCB. KCB also pointed out that prior to the filing of Nairobi HCCC No. 90 of 2009, Muiri had filed HCCC No. 505 of 2008 against it and Khaminwa J. who also dealt with the application then granted an injunction against it. However, KCB appealed against that decision in **Nairobi Civil Appeal No 100 of 2010** as consolidated with **Nairobi Civil Appeal No 106 of 2010; KCB Ltd v Muiri Coffee Estate Ltd & Others** on the basis that the Judge had erred in not finding that the matters raised before her were *res judicata*. This Court allowed the appeal. The matter might have ended there but the promulgation of the Constitution, 2010 introduced the Supreme Court as the apex court. Article **163(4)(b)** of the Constitution conferred jurisdiction on the Supreme Court to hear appeals in which it or this Court certified that a matter of general public importance was involved subject to the power vested in the Supreme Court to review a certificate by this Court and to either affirm, vary or overturn it.

Buoyed by the said constitutional provision, Benjoh and Muiri approached the Court of Appeal and applied for a certificate for leave to appeal to the Supreme Court against its decision. The issue as framed before the Court of Appeal which required interrogation and input by the Supreme Court was *"whether the High Court and the Court of Appeal, which are Courts of record, have jurisdiction to entertain proceedings and make Rulings and Judgments on the basis of Orders supposedly made before a Court of record, where that record is in fact missing"*.

It should be noted that the existence of the consent order entered into between the parties had been challenged by Benjoh all through, even in the instant appeal. Benjoh and Muiri managed to persuade the Court of Appeal that indeed such an issue was a matter of general public importance and therefore obtained leave to proceed to the Supreme Court. KCB challenged the grant of the leave in the Supreme Court on the basis that the issues in the suit did not transcend the interest of the parties so as to bear an interest on the society. The Supreme Court ultimately ruled in favour of KCB and the leave to appeal was rescinded and the consent previously recorded between the parties held to be valid and binding.

Further in its submissions, KCB contended that HCCC No. 90 of 2009 was time barred in view of the fact that the contract between the parties was breached in 1990 and the suit was filed on 11th February 2009. According to the appellant, the suit was time barred by dint of section **4 (1) (a)** of the Limitations of Actions Act which required any such suit to be filed within 6 years.

On Benjoh's cross appeal, KCB maintained that Benjoh did not serve upon it the plaint and summons to enter appearance as required by the Civil Procedure Rules. It termed a forgery an affidavit of service stating that the said documents had been served upon it. That however, upon learning of the suit, it duly filed its memorandum of appearance and defence but was unable to serve the same upon Benjoh since the latter did not exist at the address given in the plaint and was untraceable.

Benjoh, in its written submissions in opposition to the appeals and in support of the cross-appeal stated that at the core of the appeals was the question whether a customer in a bank-customer relationship was entitled to a rendition of true and proper accounts. That upon receipt and scrutiny of the same, whether a customer is entitled to hold the bank to account. According to Benjoh, the Judge having perused the accounts produced by the appellant raised various queries in the said accounts which had not been previously canvassed and the judge rightly therefore refused to strike out HCCC No. 494 of 2008 "*since it contains substantial claim on accounts*." The respondent cited the case of **Margaret Njeri Muiruri v**

Bank of Baroda (2014) eKLR where it was held that a bank had an obligation to keep and provide

proper accounts. Benjoh disputed the existence of the consent order relied on by KCB and Bidii as having settled the dispute. According to the respondent, it was being condemned on a non-existent and unascertainable court record.

Benjoh further disputed the exercise of KCB's statutory power of sale over LR No. 10075. It submitted that according to the consent, KCB was only at liberty to proceed with the realization of the two charged properties and not the property owned by Muiri. It rejected the argument by KCB that it was at liberty to realize any of the three securities that secured the loan facility. It also rejected the notion that in the matters before her, the Judge was enjoined to defer to the consent and disregard the duty to render true and proper accounts. Benjoh was also of the view that KCB was obligated to demonstrate how it complied with the consent order by proving the outstanding sums and the co-relation with the two charged properties.

On *res judicata,* Benjoh submitted that the Judge in her ruling of 3rd November 2008 discarded the issues she deemed *res judicata* and upheld those that were not. As such, the Judge held that, the only question not canvassed was the question of how the loan account was operated. That save for the statement of accounts provided by KCB pursuant to the order of the Judge, nowhere in the chequered history of the dispute had KCB been called upon to account. Benjoh reiterated that it was entitled to be provided with the accounts and the same required to be scrutinized to the satisfaction of the Court informed by the duty of the bank to a customer which duty was not in question. It remained adamant that the duty to account had not been extinguished and could not be muted by the principle of res judicata. This is especially since it argued that the subject loan account continued to be operated even after the consent and continues to attract interest at undisclosed rates. That to hold res judicata applied to rendering of accounts was to allow a fiduciary to hide behind the strictures of technicalities.

Benjoh denied that the suit was time barred on the basis that the subject loan account had not been closed. According to it, the duty to render accounts can only be extinguished by rendering true and proper accounts. To the extent that KCB had impugned the High court's duty to make final conclusions prior to a full trial, Benjoh submitted that the Judge was entitled to make an informed and reasoned ruling on the evidence before her. Further, that the findings of the learned Judge at the interlocutory stage were informed by KCB and Bidii seeking to terminate the suit before court without trial and the findings did not bar the conduct of a trial. In reply that it did not have *locus standi* to institute the suit, it contended that a borrower had a right to impeach the realization of a security presented to a lender as a guarantee to its financial facility.

In prosecuting its appeal, Bidii in its written submissions reiterated and associated itself with the arguments advanced by KCB in its written submissions. For instance, it submitted that Benjoh lacked *locus standi* to institute the suit in respect of LR No. 10075. As already observed, the property was owned by Muiri who had earlier on discontinued suit against it and KCB. Further that the issues raised in the suit were res judicata and the suit amounted to an abuse of the court process.

During the oral highlights, learned counsel **Mr. Nyachoti** and **Issa Mansour** appeared for KCB and Bidii respectively and relied on their filed written submissions. Appearing for Benjoh, learned counsel **Mr. Kyalo Mbobu** orally highlighted that in her ruling of 17thNovember 2009 the Judge found as a fact that the question of accounts had never been canvassed. That the Judge found that the question arose in regard to the statements of accounts which had not been dealt with in the prior cases and so on that basis, the Judge refused to strike out the suit. In the circumstances he denied that the Judge fell afoul of the doctrine of res judicata. According to counsel, the issue of duty of a bank to account to a customer had never been canvassed and that was the gist of the suits before the High Court. Further, counsel revisited the issue of the consent and submitted that the same was nonexistent in the court records. Even so, he submitted that according to the consent order, KCB was to realize its security from the two principal properties charged and not Muiri's property as it did. That by doing so, KCB offended the terms of the consent order.

Mr. Nyachoti in reply submitted that the consent order settled the dispute. That even if the consent order itself could not be traced in the court records, that was immaterial since it had never been challenged as a forgery. He submitted that the issue of the property and the accounts that the Director of Criminal

Investigations had been requested to investigate had been settled with finality by the Supreme Court.

Mr. Issa on his part associated himself fully with the submissions of Mr. Nyachoti and further submitted in reply that Benjoh's submissions did not resonate with the plaints before the High Court. He pointed out that the consent order was not challenged or mentioned in the plaints. Further, that Benjoh did not say which property was to be sold, the charged properties or LR No. 10075. In conclusion, counsel submitted that the attempt to reopen the issue of consent flies in the face of the Supreme Court decision which had reaffirmed with finality that issue.

Having considered the records of the appeals, the rulings of Khaminwa, J., the written and oral submissions as well as the law, it is our view that the appeals and cross-appeal can be determined on the following grounds; *res judicata*, the consent order and finally, the statutory power of sale exercised by KCB.

As previously observed, the amount of litigation undertaken by the parties herein has been enormous and unrelenting. A plethora of suits numbering at least 14 have been canvassed in all the courts of record all geared towards resolving the same dispute arising from a single transaction and involving the same parties. In such a scenario, small wonder that issues previously canvassed and determined by other courts have repeatedly found their way before other courts for determination. Courts called upon to determine such issues have all invoked the doctrine of *res judicata*. The doctrine is provided for in our jurisprudence by dint of section **7** of the Civil Procedure Act which provides;

> ***"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 elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit;

> (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.

See **Mulla, Procedure Code Act of 1908 16th Edition**.

Expounding on the rationale of the doctrine, the Court of Appeal remarked as follows in the recent appeal; **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR,**

> ***"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."

See also **William Koros (Legal Personal Representative of Elijah, C.A. Koross v. Hezekiah Kiptoo Komen & 4 others (2015) eKLR**.

Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in **Henderson v Henderson (1843) 67 ER 313**, *res judicata* applies 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 the case of **Mburu Kinyua v Gachini Tutu (1978) KLR 69 Madan, J.** Quoting with approval **Wilgram V.C.** in **Henderson v Henderson** (supra) stated:

"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 in special circumstances) permit the same parties to open the same subject of ligation 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 cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time" (emphasis added).

We have no doubt at all that the suits filed by Benjoh and Muiri raised issues that were previously raised or could with reasonable diligence have been raised in the previous suits. This is the basis upon which we will eventually determine whether the judge erred in not upholding KCB and Bidii contention that issues raised in the suit had already been raised and finally determined in the previous suits; that the former suits involved the same parties, and that the courts which handled those previous suits were competent.

The first case in respect of the dispute was Nairobi HCCC No. 1219 of 1992, instituted by Benjoh and Muiri against KCB which culminated in the consent order which the respondent still impugns before this Court. Faced with imminent sale of the charged property by KCB in exercise of its statutory power of sale, Benjoh and Muiri rushed to court for an injunction. In the suit both prayed that the performance of the contract between Benjoh and KCB, without the fault on the part of Benjoh became impossible and the said contract was frustrated, and Benjoh ought to be discharged from the said contract and it would therefore be unjust and unconscionable for KCB to sell the suit properties belonging to Benjoh and Muiri. Alternatively, a declaration that by withholding the balance of the monies applied for by Benjoh, KCB was thereby in breach of a condition to be implied from the nature thereof, that it would not so withhold the monies rest (*sic*) Benjoh's consideration in the transaction fails. They also prayed for damages of Kshs. 13,125,000/- and general damages.

Subsequently, the suit was compromised in terms that the duo would pay the outstanding balance on the loan but were unable to live up to their promise. Can it be said that the issue of the duty of a bank to render true and proper accounts to a customer now being raised by Benjoh could not have been raised at that stage and in that suit? Indeed, from the prayers above, KCB's obligation to account to Benjoh is indirectly raised. Benjoh and Muiri later instituted HCCC No 1576 of 1999 seeking to invalidate the consent and further sought a statement of accounts. Called upon to decide the suit, *Lenaola, J.* (as he was then), dismissed the suit and further stated as follows;

"43. Do all these issues show that the matters are res judicata? Without hesitation, I shall say, yes. HCCC 1219/92 has been settled in terms of the consent order and the issues pleaded there cannot now be the basis for a fresh plea seeking similar remedies. Litigation must come to an end, however painfully!"

Again the issue of accounts and the duty of the bank to render accounts to the customer was in focus and or could have been raised in this suit. Indeed, it was partially raised. Aggrieved by that decision, the parties moved to this Court in **Civil appeal No. 239 of 2004** and the Court upheld the findings of the learned Judge and stated;

> *"**Having held that all the issues raised in H.C.C.C. No. 1576 of 1999 were res judicata we do not think it is necessary for us to consider whether that suit was an abuse of the process of the court and whether it was filed outside the period of limitation. In any case a party who brings for the decision of the court matters which have already been determined can truly be said to be abusing the process of that court. And whether the suit was brought within or outside the limitation cannot really matter; the issues raised in it having been previously determined, no court was entitled to try those issues again.***
>
> ***We have said enough, we think, to show that this appeal cannot succeed. We think the Appellants will not like it but we also must point out to them that irrespective of how many cases they may wish to bring on the same issues, the answer will and can only be one and they already know what the answer shall be. This appeal fails and we order that it be and is hereby dismissed with costs thereof to the Respondent."***

HCCC 122 of 2007 was a constitutional petition instituted by Benjoh and Muiri against KCB. It was also dismissed on account of being *res judicata*. In the said petition, Benjoh had sought a declaration that the loan account had been fraudulently operated and that the Director of Criminal Investigations be called upon to investigate the account. Once again the issue of accounts and the bank/customer relationship was a live issue and even if it was not, with exercise of diligence, Benjoh could have raised it. Prior to this, there was also HCCC No. 24 of 1997 in which Benjoh sought from KCB the rendering of proper accounts. There was also HCCC No. 243 of 2006 in which Benjoh claimed that records from KCB had failed to establish their indebtedness. Are all these not matters of accounts?

Following the sale of LR No. 10075 to Bidii on 19th September 2007 via a public auction, Benjoh and Muiru sought to restrain the new owners from taking possession. The same Judge (Khaminwa, J) however November held all the issues raised to be *res judicata.* rendered herself; in a ruling dated 3rd This is how the judge

> ***"I have perused all the authorities on this submission and I have come to the conclusion that the matters already determined in this dispute havebecome res judicata in view of the previous suits and the ruling of justice Warsame in Suit No. 11 of 2007 aforesaid decided. All matters relating to the exercise of the power of sale by first defendant are now res judicata***
>
> ***...regarding the issue of accounts this issue has herein been raised before. However the applicant is entitled to final account. In view of the final sale and transfer of the mortgaged property, this should bring this litigation to a close."***

By then, Muiri who was the 2nd plaintiff in the suit and the initial owner of LR No. 10075 and guarantor to the Benjoh had discontinued the suit on 29th September 2008 against both KCB and Bidii which has led to the argument that Benjoh therefore lacks *locus standi*. Upon Benjoh being furnished with the accounts as ordered, it again instituted HCCC No. 90 of 2009 seeking declarations that the statement of accounts rendered by KCB was fraudulent and a sham, that KCB breached the contract between it and Benjoh to advance Kshs. 23,175,00/- for a floriculture project, special damages of Kshs. 2,243,067,494/- as well as general damages. KCB in turn sought to strike out the suit on account of being *res judicata*. The application culminated in the ruling dated 6th July 2009 which stayed HCCC NO. 90 of 2009 till HCCC No. 494 of 2008 was heard and finalized. Again, the question of accounts and KCB's duty to Benjoh is readily discernable. That ruling triggered **Civil Appeal No. 107 of 2010**, wherein the ruling is impugned on grounds that the Judge erred in not appreciating that the issues in the dispute were *res judicata* on account of former suits and the consent decree. Benjoh on its part filed a cross-appeal alleging that the Judge erred in failing to strike out the respondent's defence to the suit as the same was not filed in

compliance with the Civil Procedure Rules. Raising similar issue, the appeals were consolidated for determination.

In its submissions, Benjoh has contended that the matter of accounts raised in the two suits was not *res judicata* and as such required to proceed to trial. KCB on the other hand insists that the matter is *res judicata.* KCB for instance points out that in HCCC No. 122 of 2007, Benjoh sought a declaration that the loan account had been fraudulently operated. In HCCC No. 90 of 2009, Benjoh again sought to declare the statements of accounts furnished as a sham and fraudulent. The earlier suit was dismissed by Warsame, J. (as he then was) on account of being *res judicata.* The learned Judge remarked as follows;

> ***"No matter the number of suits, no matter the distance travelled, no matter who files the case, no matter the sophistication and ingenuity of the advocate acting for the Plaintiff, no matter which Judge attempts to determine the plaintiff's dispute with the bank, the inevitable and only answer to the plaintiff's repeated question to our judicial system is and can only be one. They know it. And there is no need for me to repeat.***
>
> ***I therefore think there is no reason to cling to a property given as a security to the bank for funds received from the bank. The rights of the Plaintiffs in that security are not absolute and it is unwise and unnecessary to come and knocking a door whose keys is in your possession. The point I am making, is that even if Lord Denning was to be recalled from his grave and given the task to decide the Plaintiff's case with the same facts presented before the various courts, he would, I think reach and/or arrive at the same decision as that of the High Court and the Court of Appeal judges who attended to the Plaintiffs' various matters."***

In its quest to escape liability or mitigate loss, Benjoh has pursued almost all possible legal avenues and has employed tremendous legal ingenuity and sophistry. Benjoh however seems to have ignored or failed to grasp the full tenor, extend and spirit of the doctrine of *res judicata*. The doctrine is grounded on public interest and thus transcends the parties' interests in a suit. Public interest requires or demands that litigation must at some point come to an end. In the **Maina Kiai** case (supra), the Court quoted with approval the Indian Supreme Court in the case of **Lal Chand v Radha Kishan, AIR 1977 SC 789** where it was stated;

> ***"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.***
>
> ***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 injunct, from entertaining such suit."***

Again, in **Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited [2014] eKLR**, this Court in determining yet another application by Benjoh stated thus,

> ***"In Management Corporation Stratta Title Plan No.301 v. Lee Tat Development Pte Ltd[2009] S GHC 234, the Court of Appeal (of Singapore) examined the doctrine of res judicata in relation to decided cases and observed that the policy reasons underlying the doctrine of res judicata as a substantive principle of law are first "the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions" and second, "the rights of the individual to be protected from vexatious multiplication of suits and prosecutions."***

The Court went on to state that:

> ***"the courts have never accepted res judicata as an absolute principle of law which applies rigidly***

in all circumstances irrespective of the injustice of the case. There is one established exception to this doctrine, and that is where the Court itself has made such an egregious mistake that grave injustice to one or more of the parties concerned would result if the Court's erroneous decision were to form the basis of an estoppel against the aggrieved party.... In such a case, the tension between justice principle and the finality principle is resolved in favour of the former."

"... the general rule is that where a litigant seeks to reopen in a fresh action an issue which was previously raised and decided on the merits in an earlier action between the same parties, the public interest in the finality of litigation ("the finality principle") outweighs the public interest in achieving justice between the parties ("the justice principle") and therefore the doctrine of res judicata applies. In such cases, it is usually immaterial that the decision which gives rise to the estoppel is wrong because "a competent tribunal has jurisdiction to decide wrongly, as well as correctly, and if it makes a mistake its decision is binding unless corrected on appeal."

Therefore, there are instances where the public interest is given prominence over parties' interests in a suit. Such an instance, in our view, would be like in the instant suit where great burden of litigation has been placed upon a party necessitating such a party to seek protection from court. The Supreme Court of India in the case of **State of UP v Nawab Hussain, AIR 1977 SC 1680**, considered the doctrine of constructive *res judicata* and delivered itself thus,

*"**This doctrine is based on two theories: (i) the finality and conclusiveness of judicial decisions for the final termination of disputes in the general interest of the community as a matter of public policy, and (ii) the interest of the individual that he should be protected from multiplication of litigation. It therefore serves not only a public but also a private purpose by obstructing the reopening of matters which have once been adjudicated upon."***

Further that,

But it may be that the same set of facts may give rise to two or more causes of action. If in such a case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a course of action as an abuse of its process and it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could; have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. This is therefore another and an equally necessary and efficacious aspect of the same principle, for it helps in raising the bar of res judicata, by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which, in reality, is an aspect or amplification of the general principle."

To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive *res judicata* than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of *res judicata* and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer's accounts, has been or could have been raised before the High Court in the previous suits.

The history of this matter shows a vexatious litigant who in spite of having lost all the fourteen cases and despite the costs involved is still willing to further subject KCB and Bidii to ceaseless litigation. Justice demands that a successful party in litigation be allowed to enjoy the fruits of its litigation. It is time the respondent accepted the inevitable despite the consequences such a possibility portends to it and stops further litigation on this long running dispute which has all been about KCB's exercise of its statutory

power of sale and accounts. To open up any further litigation would complicate matters as they stand and goes against the pursuit of finality in this dispute.

Probably recognizing the tenacity of the human spirit in pursuit of a goal, the Supreme Court of India in the **Nawab Hussein case** (supra) stated that the spirit of contentiousness may give rise to conflicting judgments of equal authority, lead to multiplicity of actions and bring the administration of justice into disrepute. To guard against such and in ensuring certainty of the law, this Court ought to and does affirm what the various courts have stated, that the issues in this dispute are for as long as they revolve around KCB's exercise of statutory power of sale and accounts are *res judicata* and Benjoh ought to accept that fact. Accordingly, the learned Judge erred in not allowing the applications by KCB and Bidii to strike out the suit on that account.

Benjoh too has contested the consent order entered into between the parties on the ground that the consent order was nonexistent and was not available in the court records. That contention by the respondent before this Court shows Benjoh's propensity in disregarding the doctrine of res judicata. In no other issue in this matter, in our view, does the doctrine of res judicata apply more than the issue of the consent order recorded before Githinji J. The consent has been affirmed by all the courts of record. In HCCC 1576 of 1999, the High Court in its judgment held that,

> *"**For the avoidance of doubt, the consent order of 4.5.1992 in HCCC 1219/92 remains the decision of the court in the dispute between parties and I so affirm**."*

The Court of Appeal in **Civil Appeal No. 239 of 2004; <u>Benjoh Amalgamated & Another v KCB</u>** dealt with the issue of consent order as follows,

> ***"All those suits ended or were terminated in favour of the Respondent but on 4th April, 1997, some five years after the original suit was filed and the consent judgment entered the two Appellants went back to Civil Case No. 1219 of 1992 and under Order 44 Rule 1 asked Githinji, J (as he then was) who had recorded the consent judgment to review or set aside the consent judgment. The reasons for that application are not really relevant. What is relevant is that Githinji, J heard the application, and by his order dated 31st October, 1997 allowed the same and set aside the consent judgment. The present Respondent was aggrieved by the order of Githinji, J and appealed to this Court vide Civil Appeal No. 276 of 1997. By its judgment dated and delivered on 10thMarch, 1998 the Court allowed the appeal, set aside the orders which Githinji, J had made and restored the consent judgment which had been entered on 4th May, 1992. One would have thought that would be the end of the matter but not so the Appellants."***

Indeed, Benjoh went ahead and managed to convince the Court of Appeal that the issue of missing court record was a matter of general public importance that necessitated the input of the Supreme Court. As stated elsewhere in this judgment, the Court of Appeal did grant leave to Benjoh to appeal to the Supreme Court which basically was a challenge to the consent order entered into between the parties. KCB successfully challenged the grant of the leave in the Supreme Court. In its ruling rescinding the leave, the apex court pronounced itself in **<u>Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another</u> [2016] eKLR** as follows,

> ***"A Court's Judgment and/or Ruling, in the perception of the Constitution and the law, is an edict that resolves a live issue of controversy, and is by no means an abstract pronouncement. In asking this Court to pronounce itself on the propriety of a missing record of the High Court, the Court is being called upon, in the very first place, to determine the question of the legality of the consent made by the parties herein in that missing record. That question was settled as far back in time as 1998. It is not conceivable that this Court should reopen that consent. Since that question was first determined with finality on 10th March, 1998, rights, obligations and interests have crystallized, and they carry all validity, and embody proper and legitimate expectations. The system of justice that is upheld by the Court of law, will not tamper with such rights and obligations, even where some parties may feel aggrieved."***

This Court is bound by those findings. This Court too cannot depart from the findings of fact previously reached by the trial courts as they were based on evidence. We think we have said enough to demonstrate that the question or the fate of the consent order has been settled by the highest court in the land and is therefore not amenable to challenge by Benjoh.

In its submissions, Benjoh has also raised an issue which in the strict interpretation of the law and in an adversarial system should not fall for consideration in this appeal. As already stated, the said issue is outside the purview of the suits from which the current appeals emanate, being HCCC No. 494 of 2008 and HCCC No. 90 of 2009. The issue we are talking about is KCB's exercise of statutory power of sale. The substantive prayer in HCCC No. 494 of 2008 was a declaration that the account had been fraudulently operated. In the latter suit, the respondent sought a declaration that the statements of account were fraudulent and a sham. In his oral submissions learned counsel Mr. Issa Mansour pointed out that the submissions of Benjoh failed to resonate with the suits as filed in the High Court. In its submissions, Benjoh still challenges the appellant's statutory power of sale over LR No. 10075 and faults KCB for having exercised its power of sale over the property owned by Muiri instead of the two principally charged properties. Benjoh submits that in doing so, KCB ran afoul of the consent order. These are issues that were not raised in the suits from which these appeals emanate.

During the oral hearing, Mr. Issa submitted that Benjoh had not contended which property KCB ought to have sold, other than LR No. 10075. On the other hand, it was KCB's contention that it was at liberty to realize its security from any of the properties it held as security. It should also be remembered that the charge over the sold property was created after KCB requested or demanded further security for the loan facility. LR No. 10075 was thereafter charged upon that demand and therefore was given as a security for the loan. Benjoh cannot therefore argue that KCB exercised its right of sale over the wrong property. The said property had been charged to secure the loan and was sold upon default. In our view it was within KCB's right to choose upon which property to exercise its rights over.

Benjoh's cross appeal is anchored on the application that sought to strike out KCB's defence on the ground that the same was filed outside the timelines stipulated under Order VIII rule 1 (2) and Order VI rule 13 (1) (d) of the Civil Procedure Rules. KCB denied service of the suit papers or the summons upon it. Upon interrogation of that allegation by the Judge, she rightly found that Benjoh failed to demonstrate that it had served the summons and the suit papers upon KCB, and therefore, it could not successfully invoke the above provision of the Civil Procedure Rules. This is a finding of fact and no basis has been laid to warrant our intervention. The upshot is that the cross appeal is a non-starter and ought to be dismissed.

On the whole, **Civil Appeals Nos. 107, 137** and **174** all of **2010** are allowed with costs. The cross-appeal is however dismissed with costs as well.

Dated and delivered at Nairobi this 15th day of December, 2017.

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

…….....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR