



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 188 OF 2004

BETWEEN

NAIROBI CITY COUNCILAPPELLANT

AND

THABITI ENTERPRISES LTD.RESPONDENT

*(An appeal from the ruling and orders of the High Court of Kenya at Nairobi (G.B.M. Kariuki, J.)
dated 30th April, 2004*

in

H.C.C.C. NO. 4624 OF 1992)

JUDGMENT OF THE COURT

Introduction.

1. Although the appeal before us arises from a short ruling of the High Court G.B.M. Kariuki, J. (as he then was) made 11 years ago on 30th April 2004, the matter has had a convoluted history spanning 23 years since the plaint was filed in the High Court on 25th April 1992. A short historical background is therefore necessary for the understanding of the issues raised in the appeal.
2. The appellant is the *Nairobi City Council (NCC)* (now taken over by the Nairobi City County) which was represented before us, as it was in the High Court, by learned counsel Mr. Ngatia. The respondent is **M/S Thabiti Enterprises Ltd (Thabiti)** which has had a turnover of advocates but was finally represented in the High Court by M/s. Meenye & Kirima, Advocates who later, on 18th February 2013, wrote to this Court to say that Thabiti had withdrawn instructions from them and taken their file without leaving their contact address. However, this Court was of the view that the advocates had not followed the procedure for withdrawing from the record and they were deemed to be the advocates on record until the determination of the appeal. An order was made on 19th September 2013 for service of the hearing notice on those advocates and also on Thabiti by registered mail under **rule 17(5)** of the Rules of this Court. That was done, but there was no representation for Thabiti when the appeal was heard on 1st October 2014.

Background

3. Thabiti filed suit against NCC on 25 April 1992 claiming that it had trespassed into a parcel of land owned by Thabiti known as LR No. 209/10466, in Nairobi's Eastlands. The form of trespass was the erection of a fence and some sign posts indicating that the land was part of Martin Luther Primary School which was run by NCC. Thabiti claimed that as a result of the trespass, it had been '*greatly prejudiced and had suffered great financial loss, damage and embarrassment*'. It prayed for the following orders:-

*“(a) A permanent injunction restraining the defendant its servants and/or agents from putting up any and/or further structures on L.R. No. 209/10466.
(b) The defendant be ordered to remove all erections put up on L.R. No. 209/10466.
(c) General damages for trespass.
(d) costs of this suit.
(e) Interest on (c) and (d) hereinabove.
(f) Any other or further relief this Honourable Court deems fit and just to grant.”*

4. NCC filed a defence to that claim but on application by Thabiti, it was struck out by Bosire, J. (as he then was) on 16th June 1993, as being frivolous and an abuse of court process (**the Bosire Ruling**). He entered judgment for Thabiti in the following terms:-

“The result is that there shall be judgment for the plaintiff as prayed in paragraphs (a), (b) and (d). As for general damages, the plaintiff shall be at liberty to pursue that part of the claim by setting down the suit for assessment of the damages.”

NCC was thus restrained by permanent injunction from putting up structures on the piece of land, ordered to remove from it all that it had erected on the land and to pay general damages which would be assessed.

5. The suit was set down for assessment of damages for trespass before Hayanga, J. (as he then was) on 31st July 1995, but instead of limiting the hearing to the prayer pleaded in the plaint, the learned Judge allowed evidence from both parties relating to compensation for the value of the entire piece of land, as if compulsory acquisition had taken place. He assessed the compensation at Kshs.80 million and awarded costs thereon on 27th September, 1995 (**the Hayanga judgment**).
6. As Thabiti made attempts to execute the ensuing decree, and even received some Kshs.1 million in part payment, NCC filed an application before the same court six months later, on 18th May 1996, seeking review of the judgment and the setting aside or quashing of the orders issued. The review application was made on the basis that the court proceeded on the wrong basis in that the prayer in the plaint was for assessment of damages for trespass but the matter was prosecuted as if there was compulsory acquisition of the land, when there was none. There was thus an error apparent on the face of the record, it was submitted, since the judgment did not accord with the pleadings. It was also contended that the court had no jurisdiction to make the orders it did.
7. Hayanga, J. heard the application for review but rejected it on the basis that there was no error apparent on the face of the record since NCC had acquiesced or agreed on the issue that the judgment be compensatory because they were taking the land to make it part of the primary school (**the Hayanga ruling**). In rejecting the review application, Hayanga, J. stated:

“There is no power to dismiss a case on review, so that in this instance if I had allowed review, I would have sought argument on general damages.”

8. NCC was dissatisfied with that ruling and appealed to this Court (differently constituted) on the main ground that Hayanga, J. '*erred in holding that his determination of the compensation payable to Thabiti for alleged expropriation of the suit land by NCC when this had not been pleaded, though acquiesced to by the parties, amounted to an error apparent on the face of the record and that under the circumstances the judge lacked jurisdiction to determine the compensation payable*'. The court by majority (Akiwumi & Tunoi JJA), (Lakha, JA dissenting),

agreed with NCC and allowed the appeal on the ground that there was an error apparent on the face of the record and that Hayanga, J. proceeded to adjudicate an issue which he had no jurisdiction to decide on (**the Court of Appeal judgment**).

9. As regards the error apparent on the face of the record, the court Akiwumi JA, with whom Tunoi JA agreed stated:-

“...no matter whether the parties had agreed to the learned judge determining the purchase price of, or compensation payable for, the suit land which had not been sold, and no matter whether the City Council had made part payment of the assessed compensation, the particular circumstances surrounding that determination and the obvious incongruous indeed, contradictory, nature of the judgment of the learned judge, having regard to the previous ruling of Bosire, J. in the same suit, was such that the learned judge should have granted the review sought. For this reason alone, I would allow the appeal.”

10. On the issue of jurisdiction or lack of it, the court followed the earlier dicta of the court in the case of **Charles C. Sande v. Kenya Cooperative Creameries Ltd**, CA NO. 154 of 1992 (ur) which considered the dicta in the earlier decided case of **Odd Jobs v. Mubia** [1970]EA 476 and stated, thus:-

“In the MUBIA case, the unpleaded issue upon which the judge had based his decision was whether one of the parties to the agreement had failed to comply with a condition in the contract between them. The unpleaded issue was not a claim for special damages which, as we have repeatedly stated, the law requires to be specifically pleaded before it can be proved... We would endorse the well established view that a Judge has no power to decide an issue not raised before him but having said so, we must revert to the question of how or the manner in which issues are to be raised before a Judge. In our view, the only way to raise issues before a Judge is through the pleadings and as far as we are aware, that has always been the legal position. All the rules of pleading and procedure are designed to crystallize the issues which a Judge is to be called upon to determine and the parties are themselves made aware well in advance as to what the issues between them are ... Nor can we find any relaxation of the attitude of this court to the rule that special damages must be specifically pleaded and proved We do not think that the courts in Kenya have adopted any lenient approach as alleged; nor do we think it would be right of them to do so.”

The Court finally, on 7th March, 1997 allowed the appeal and set aside the Hayanga judgment and the Hayanga ruling. It also allowed NCC's application for review.

11. The decision triggered off three reactions, all of which came more than five years after the decision of the Court of Appeal. The first one was from Thabiti which in January 2002 sought to recover the decretal amount of Kshs.156,266,000/= ensuing from the Hayanga judgment and obtained an order for mandamus against the Town Clerk to enforce payment. The execution process was quickly abandoned when Thabiti realized that the Hayanga judgment had been set aside by the Court of Appeal.
12. The second reaction was also from Thabiti which in April 2002 filed an application to amend the original plaint filed on 28th August 1992, to include a pleading on “*alienation/wrongful acquisition*” of its land and a prayer for “*payment of the full value of the property under the Land Acquisition Act and damages for loss of user from 1990 until either vacant possession is delivered or compensation paid.*” The application for amendment was granted by the Deputy Registrar of the High Court on 28th June 2002 and the amended plaint was filed on 23rd July 2002, summons to enter appearance was served, and a default judgment obtained in December 2002 in default of filing defence by NCC. All this process was taking place without the knowledge or involvement of the advocates on record for NCC.
13. The reaction by NCC came on 11th June 2003 when it took out a motion seeking the following

orders:-

- a) The order made on 28th June 2002 (amending the plaint) be set aside.
- b) This suit be marked as settled pursuant to the judgment and order issued in Civil Appeal No. 264/1996.
- c) That the plaintiff be ordered to refund to the defendant the sum of Shillings One Million paid to the plaintiff on 28th November 1995 together with interest thereon.
- d) Costs of this application be provided.”

That is the application which was heard and determined by G.B.M. Kariuki, J. (as he then was) (**the Kariuki ruling**) which decision is the subject-matter of the appeal before us.

Decision of the High Court

14. The main contention made by Mr. Ngatia before the High Court was that after the Court of Appeal set aside the Hayanga judgment, that was the end of the original suit since there was no order for retrial of any issue. The matter became settled and any subsequent proceedings on the basis of the same subject matter would be *res judicata* or an abuse of court process. Counsel for Thabiti, on the other hand contended that the order made by the Court of Appeal set aside the assessment of damages by Hayanga, J. and not the other orders issued earlier by Bosire, J. Thabiti was therefore at liberty to go back to the original suit, amend the plaint and proceed with the hearing of the suit afresh.
15. After considering all submissions, the High Court rejected the submission that the original suit had been finally settled by the Court of Appeal, and reasoned as follows:-

“...After careful consideration of the matter it is my view that the order sought in prayer (b) of the applicant’s application cannot be granted for the simple reason that the suit is not *res judicata*. It is my finding that the orders made on 14.6.93 by Justice Bosire, as he then was, (following the respondent/defendant’s chamber summon application dated 22.1.93) striking out the defence dated 14.10.92 as an abuse of the process of the court and entering judgment as prayed in prayers (a) (b) and (d) of the said application (and ordering that the claim for damages under prayer (c) of the said application be assessed on *ex parte* hearing of the suit) was not subject of the Appeal No. 264 of 1996 to the Court of Appeal. The applicant’s said appeal was against the ruling of Justice Hayanga dated 26.11.96 refusing to review the judgment dated 27.9.95 which was on assessment of damages. The Court of Appeal set aside the said ruling and judgment. It did not set aside or otherwise interfere with the orders made on 14.6.93 by Justice Bosire, as he then was. In the circumstances, I decline to grant the order to have the suit marked settled as prayed in prayer (b) of the Applicant’s application. The Respondent is entitled to proceed with *ex parte* hearing for assessment of damages on the basis of the original plaint.”

16. The court further considered submissions on setting aside the order for amendment of the plaint made by the Deputy Registrar of the High Court and granted it on the basis that it was made post-judgment, reasoning thus:-

“When the Court of Appeal set aside the ruling by the Hon. Mr. Justice Hayanga, it also set aside the judgment delivered by the latter dated 27.9.95. It did not however interfere with the orders made by the Hon. Mr. Justice Bosire made on 14.1.93 and consequently the entry of judgment following the striking out of the defence remained *in situ*. While such judgment remained in place, it was not proper for the Plaintiff to seek to amend the Plaint as it did in its chamber summons application dated 11.3.2002, in which it sought to introduce new allegations including a new alternative relief and a prayer seeking interest on general damages. Judgment had been entered by Justice Bosire, as he then was, on the basis of the un-amended plaint.”

17. Finally the court granted the order for refund of the payment of Kshs.1 million made by NCC on the basis that the decree upon which the part-payment was made had ceased to exist. It stated:-

“As I have said above, the decision of the Court of Appeal in C.A. Civil Appeal No. 264 of 1996 did not determine the issue of payment. Its effect was to return the suit to its original state by setting aside the judgment on assessment of damages and the ruling declining to allow review. As the sum of Shs.1 million was paid pursuant to the judgment for assessment of damages which was set aside by the Court of Appeal, the basis on which it was received ceased to exist. Accordingly, until the damages have been determined, it is not legitimate for the Respondent to continue to hold the said sum. I order that the Respondent do refund to the Applicant the said sum of Shs.1 million. The issue as to whether the Applicant is entitled to interest on the money and if so at what rate was not argued and I will therefore not make a determination as to whether such interest is payable.”

The appeal and submissions of counsel

18. NCC was not aggrieved by the whole decision but only that part of it refusing to mark the original suit as settled and allowing Thabiti to proceed with assessment of damages on the basis of the original plaint. That was clarified in the notice of appeal filed on 7th May 2004 which forms the basis of the appeal before us. The ground of appeal listed in the memorandum of appeal, relating to refusal to award or determine the interest payable on the sum of Kshs.1 million has therefore no basis. There was no cross appeal by Thabiti on the rejection of the amended plaint or the refund of Kshs.1 million to NCC.

19. The memorandum of appeal is based on 7 grounds, but as already stated, one of them has no basis and we reject it summarily. The remaining six grounds, according to Mr. Ngatia, raise three issues which the appeal is predicated upon, thus:

- i). *Whether the judgment of the Court of Appeal concluded the dispute between the parties;*
- ii). *Whether re-assessment of damages can be undertaken in this dispute;*
- iii). *Whether the issue of re-assessment is res judicata.*

20. The three issues were argued globally as Mr. Ngatia sought to underscore the public policy and the principle of finality of judgments which are important and inviolable constituents of the rule of law. He particularly took up the issue of *res judicata* and cited several authorities which lay down the principle of *res judicata simpliciter* and constructive *res judicata*. In the case of **M. Nagabhushana v. State of Karnataka & Others**, CA No. 1215 of 2011 (ur), the Indian Supreme Court stated as follows:-

“The principles of Res Judicata are of universal application as it is based on two age old principles, namely, ‘interest reipublicae ut sit finis litium’ which means that it is in the interest of the State that there should be an end to litigation and the other principle is ‘nemo debet bis vexari, si constet curiae quod sit pro un aet eadem cause’ meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. The doctrine of Res Judicata is common to all civilized systems of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the question litigated and should forever set the controversy at rest.

The principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no need of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a

technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties.”

21.As for constructive *res judicata*, the Privy Council decision in **Yat Tung Investment Co Ltd Vs. Dao Heng Bank Ltd & Another [1975] A.C 581** stated thus:-

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect or *res judicata* is the judgment of Wigram V.-C. in Henderson v. Henderson (1843) 3 Hare 100, 115, where the judge says:

“..... 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 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 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.”

And further:

“The Vice-Chancellor’s phrase ‘every point which properly belonged to the subject of litigation’ was expanded in Greenhalgh v. Mallard [1947] 2 All E.R. 255, 257, by Somervell L.J.:

“... *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but... 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.”

22.Mr. Ngatia cited several other High Court cases on the same issue and also on the issue of review and interest. He submitted in the end that the matter was Fully litigated upon in the High Court and the Court of Appeal and therefore, Thabiti could not go back to the High Court to seek amendment of the plaint. The High Court was thus in error when it did not grant all the prayers as sought by NCC in its motion. He further submitted that there was no order made by the Court of Appeal for re- assessment of damages or retrial on any issue. Consequently, the High Court erred in making an order for the suit to be listed for assessment of damages *ex parte*.

Analysis and determination.

23.We have considered the appeal and the submissions of Mr. Ngatia for which we are grateful. The motion filed before the High Court prayed for orders which the High Court had the discretion to grant, subject, of course, to a judicious approach to that exercise. The usual reasons for interference with the exercise of judicial discretion were stated by this Court in the case of **Mbogo & Another v. Shah [1968] EA 93** at page 96, thus:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not

have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been misjustice.”

24. What the High Court was grappling with and what, in our view, is the kernel of the appeal before us, is the true meaning and effect of the Court of Appeal judgment in **Civil Appeal No. 264 of 1996**. That is to say, whether the Court of Appeal finally decided the dispute between the parties or, without expressly so stating, it took the parties back to the Bosire ruling.
25. We have set out the chronology of events culminating in the final order of the majority in the Court of Appeal which is worth reproducing in full:-

“... the appeal is allowed, the ruling of Hayanga, J. which is appealed against is hereby set aside, the City Council’s application for review is hereby allowed and the judgment of Hayanga, J. of 27th September, 1995, is set aside together with such consequential acts derived therefrom. Each party will bear its own costs of this appeal.”

26. The appeal that was allowed related to dismissal of the application by NCC to overturn the Hayanga judgment which gave Thabiti damages in excess of Kshs.80 million on the basis of a non-existent pleading. In our view, the natural consequence of the Court of Appeal setting aside the Hayanga ruling which dismissed NCC’s application for review, and going further to grant that application and therefore setting aside the Hayanga judgment of 27th September 1995, was that the parties went back to the Bosire ruling of 16th June 1993. We have reproduced the order made by the judge on that day. It was unnecessary for the Court of Appeal to go further and issue an order for retrial, since the Bosire ruling was self explanatory and was not affected by the judicial whirlwinds that engulfed it over the next 22 years. We find nothing in the reasoning of the Kariuki ruling that amounts to a failure to consider relevant facts or the law and it is our finding, and we so hold, that the learned judge arrived at the right conclusion.
27. We have considered the incisive submission by Mr. Ngatia relating to *res judicata* and we endorse the exposition of the doctrine as stated in the authorities cited by him. Indeed, the doctrine of constructive *res judicata* is expressly legislated under **Section 7** of our **Civil Procedure Act** in **Explanation 4**. With respect, however, we think the otherwise potent missiles fired by Mr. Ngatia were misdirected. In his submission, he attacked the intention of Thabiti to amend its pleading to include a claim for the value of the entire piece of land. As stated above, those amendments were allowed by a deputy registrar but they were set aside in the Kariuki ruling and Thabiti did not appeal against that order. It is a dead horse which need not be flogged in these proceedings. If any assessment of damages will proceed, then it will be on the basis of the pleading on trespass in the original plaint, as the High Court rightly held.

Disposition

28. We have come to the conclusion that this appeal is lacking in merit and we order that it be and is hereby dismissed. As there was no appearance for the respondent despite service of hearing notices, we make no order as to costs.

Dated and delivered at Nairobi this 6th day of March, 2015.

P.N. WAKI

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR