



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 182 OF 2011

BETWEEN

THOMAS OWEN ONDIEK.....1ST APPELLANT

EDDAH AMAKOBE INGUTIA.....2ND APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED.....1ST RESPONDENT

CENTRAL BANK OF KENYA2ND RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Eldoret,

(Mwilu, J.) dated 2nd June, 2011

in

H.C.C.C. NO. 175 OF 1999)

JUDGMENT OF THE COURT

1. This is an appeal against the judgment of Mwilu, J. (as she then was) delivered on 2nd June 2011 dismissing the appellants' claims in Eldoret HCCC No. 175 of 1999.

The appellants' Case

2. The background facts of the case were that for a period of about 16 years, from 1982 to 9th April 1999, the 1st appellant was an employee of the 1st respondent. In their amended plaint dated 9th October 2008 and filed in court on 17th October 2008, the appellants alleged that during his employment with the 1st respondent, between 1997 and May 1999, the 1st appellant was in charge of the 1st respondent's computer programme known as "OBLIST". This was an infamous and illegal computer programme operated with the sanction of the 2nd respondent and meant to forestall the imminent insolvency of the 1st respondent. Because the 1st appellant opposed it, and fearing that he was going to leak information on it to the 1st respondent's customers and the general public at large, the 1st respondent resolved to forestall that by

terminating the services of the 1st appellant and punishing him for his unpopular stance on that computer programme.

3. The 1st respondent hatched a scheme to bolster its action of dismissing the 1st appellant on unfounded claim that the 1st appellant was carrying on an illegal money lending business. To that end, on 7th April, 1999, Mr. Zaki Ogana, an employee of the 1st respondent, accompanied by servants and agents of the 2nd respondent, carried out an illegal search at the appellant's residence at Kapsoya Estate in Eldoret Town and took away a sum of Kes.864,490/= in cash; third party cheques and debit notes to the tune of Kes.4,300,000/=; the 2nd appellant's accounting and business documents as well as some stock in trade; and personal items all, including the said cash, all valued at Kes.6,911,940/=. During that illegal search, the appellants claimed that the said Ogana brandished a firearm and threatened to shoot anyone who obstructed that search.

4. After that illegal search, on 9th April 1999, the 1st respondent terminated the 1st appellant's employment. That termination was intended to and did indeed render the 1st appellant impecunious with the consequence that the 1st appellant was unable to service two loans, at that time standing at Kes.1,285,650.50, which he had taken from the 1st respondent.

5. The termination in those circumstances also not only defamed the 1st respondent but also rendered him unemployable. As the appellant was, at that time, only 39 years old, he claimed that he would have worked up to the age of 60 years. He therefore claimed a sum of Kes.14,573,160/= being the loss of earnings at a monthly salary of Kes.57,830/= for the remaining period of 21 years. The 1st appellant also claimed aggravated damages for defamation.

6. In addition to the cash of Kes.824,800/= that the respondents' servants and/or agents allegedly took from the appellant's house, the 2nd appellant also claimed loss of business at the rate of Kes.5/= for every Kes.1/= invested. Besides these claims, the two appellants further claimed general damages for the illegal search.

7. In their respective statements of amended defence, the respondents denied the appellants' claims. After hearing, as we have stated, Justice Mwilu dismissed the case with costs thus provoking this appeal.

8. The appellants listed six grounds in their joint memorandum of appeal which mainly faulted the learned trial Judge for failing to properly evaluate the evidence on record thus leading to her wrong decision. They also faulted the learned Judge for finding that the 1st appellant's claim was *res judicata*.

9. Presenting the appeal before us, Mr. Miyianda, learned counsel for the appellants, submitted that Eldoret HCCC NO. 115 of 1999, upon which the learned Judge based her holding of the 1st appellant's claim being *res judicata*, was only between the 1st appellant and the 1st respondent and the claims therein related to the termination by the 1st respondent of the 1st appellant's employment. In the circumstances, counsel urged us to find that the matter was not *res judicata*.

10. On the second point, Mr. Miyianda faulted the learned Judge for dismissing the illegal search as fantasy despite the appellants' report to police recorded in Occurrence Book Nos. 19 of 24th April 1999 and 33 of 26th April 1999 as well as DW1 and DW2's concessions in their testimony that the respondents' servants and/or agents indeed carried out the search and made an inventory of the items they carried away. Counsel also faulted the learned Judge for ignoring the appellants' claim that the envelope taken from their house contained the 2nd appellant's working capital of Kes.824,800/=; for dismissing the 1st appellant's claim of the "OBLIST" Computer Programme; the 1st respondent's letter dated 9th April, 1999 in which the 1st respondent accused the 1st appellant of all manner of criminal offences; the defence witnesses' said concessions; and the appellant's notices to produce which the respondents had on their part ignored. On those submissions, counsel urged us to find that the learned Judge erred, overturn her decision and enter judgment for the appellants as claimed in the further amended plaint.

The Respondents' Case

11. Opposing the appeal, Mr. Mbaluto, learned counsel for the respondents, lauded the learned Judge for finding that all claims relating to the termination of the 1st appellant's employment were *res judicata* as they were or were supposed to have been canvassed in Eldoret HCCC No. 115 of 1999. He cited this Court's decision in the case of **Kibogy Vs Chemweno [1981] KLR 35** as authority for that submission.

12. On the second point, counsel conceded that the respondents indeed carried out a search at the appellants' premises but asserted that it was with the appellants' consent. Counsel also dismissed the appellants' special damage claims as an afterthought on account of having been made for the first time in the amended plaint filed more than seven years after the search. With no trade license and/or income tax returns to verify the 2nd appellant's claim, counsel urged us to uphold the learned Judge's finding that the 2nd appellant failed to prove that she carried on any business. In the circumstances, counsel concluded that the documents found in the appellants' house related to the 1st appellant's illegal business of money lending. With that, counsel urged us to dismiss this appeal with costs.

Determination

13. Having read the record of appeal and considered these rival submissions, we find that three main issues fall for our determination in this appeal. They are whether or not the 1st appellant's claims were *res judicata*; whether or not the respondents carried out an illegal search at the appellants' residence; and whether or not the respondents' servants and/or agents carried away the 2nd appellant's cash, accounting documents and goods in trade and if so whether or not that caused loss to the appellants.

14. It is trite law that an issue or claim that should have been raised in an earlier case cannot be raised in a subsequent suit between the same parties. Explanation 4 to **Section 7** of the Civil Procedure Act makes this quite clear. It provides:

“Any matter which might or ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

15. Expounding on this Explanation in *Henderson v. Henderson* (1843) 67 ER 313, 319, a dictum which the Privy Council described in *Yat Tung Investment Co. Ltd v. Dao Dao Heng Bank Ltd* (1975) AC 581, 590 as the *locus classicus* of this aspect of *res judicata*, *Wigram V-C*, stated:-

“...where a given matter becomes the subject of litigation in an adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea *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.”

16. In this case as stated, prior to the filing of Eldoret HCCC No. 175 of 1999 which gave rise to this appeal, the 1st appellant had filed Eldoret HCCC No. 115 of 1999 in which he claimed damages for termination of employment. That case was heard and determined in the 1st appellant's favour prior to the hearing of Eldoret HCCC No. 175 of 1999.

17. The termination of the 1st appellant's employment was grounded on the allegation that he was carrying on money lending business contrary to his terms of service. It follows from the authoritative statement in the above case of **Henderson v. Henderson** that all the 1st respondent's claims hinged on

that alleged illegal money lending business were supposed to be canvassed in Eldoret HCCC No. 115 of 1999. In the circumstances, we concur with the learned Judge and Counsel for the respondents that all of the 1st appellant's claims in HCCC No. 175 of 1999 including the ones for loss of earnings of Kes.14,573,160/=, the prayer to repay the outstanding loans of Kes.1,285,650.50 without further interest and general damages for the illegal search itself as well as for the alleged defamation arising from that search, were, as counsel for the respondents argued, *res judicata*.

18. In both their further amended pleadings and evidence in court, the appellants claimed that an inventory was made of the items taken by the respondents' servants and/or agents after the alleged illegal search. No such inventory was produced in court. True, the appellants served the respondents with notices to produce but the appellants never invoked the provisions of **Section 22(a)** of the Civil Procedure Act to compel the respondents to produce that inventory. In the circumstances, we have no basis to fault the learned Judge's unfettered discretion not to make an adverse inference from the respondent's failure to comply with the notices to produce. See **Mbogo v. Shah, [1968] EA 93**.

19. We also reject the respondents' contention that the 2nd appellant's claims for loss of Kes.824,800/= in cash and loss of business at the rate of Kes.5/= for every Kes.1/= invested were statute barred under the Limitation of Actions Act. This is because having been embodied in the further amended pleading, which was apparently filed with leave of the court and/or with consent of the respondents, under the doctrine of *relation back*, those claims are deemed to have been lodged at the time of filing the original pleading. See **Eres N.V. & Another-Vs- Peschaud & Cie International S.A. & Others. Msa HCCC No. 187 of 1994**, in which, citing with approval Lord Denning's decision in **Mitchell v. Harris Engineering Co. Ltd [1967] 2 ALL ER 683** and Biron, J. in **Motokov v. Auto Garage [No.2] [1971] EA 33** the court stated the doctrine of relation back to be that "...once amended, a pleading speaks from the date it was originally filed and not from the date of amendment...."

20. Notwithstanding this finding that the appellants' claims for loss of Kes.824,800/= in cash and loss of business at the rate of Kes.5/= for every Kes.1/= invested were not statute barred under the Limitation of Actions Act, we once again concur with the learned Judge and counsel for the respondents that the lodgment of those claims more than seven years after the filing of the original pleading was clearly an afterthought.

21. Kes. 824,800/= is a lot of money by any standards. One would have therefore expected the 2nd respondent's claim in that regard to have been foremost not only in her report to the police but also in the pleading she subsequently filed in court with the 1st appellant. That, however, was not the case. As is clear from the official receipt the appellants were issued with the police abstract report the 2nd appellant is shown to have complained about the "*loss of Identity Card 1000 – 3907*" only while the 1st appellant reported the "*loss of cheque leave No. 246, third party cheques and other personal effects.*" There was no mention of loss of any cash or documents relating to the 2nd appellants business.

22. The 2nd appellant also claimed loss of business at a rate of Kes.5/= for every Kes.1/= invested. With respect if there was a bare claim thrown to the court, this was it. This was obviously a special damage claim which the 2nd appellant was required not only to specifically plead but to also strictly prove-- **Karauri v. Ncheche [1989-1998] 1 EA 177** – but she did not. She did not state how much she invested in her business or quantify her loss in this regard. On what basis then was the learned Judge supposed to make any award under this head?

23. Counsel for the respondents, quite correctly in our view, conceded that the learned Judge did not quite appreciate the appellants' report to police. However, upon an exhaustive re-evaluation of the evidence on record as we are obliged to-- **Selle & Another - Vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126**-- like the learned Judge, we have come to the conclusion that the appellants' claims were for dismissal. As we have stated, the 1st appellant's claims were *res judicata* as they were supposed to have been canvassed in HCCC No. 115 of 1999 and the 2nd appellant failed to prove her claims to the required standard of a balance of probabilities. Consequently, we find no merit in this appeal and we accordingly dismiss it with costs.

DATED and delivered at Eldoret this 29th day of October, 2015.

D.K. MARAGA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

I certify that this is the true copy of original.

DEPUTY REGISTRAR