REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 243 of 2001

BETWEEN

UKAY ESTATE LTD ……....1ST APPELLANT

NAKUMATT HOLDINGS LTD ……..…….2ND APPELLANT

AND

SHAH HIRJI MANEK LTD ……1ST RESPONDENT

RAMESH PREMCHAND SHAH …….……2ND RESPONDENT

SUNNY STYLE MANUFACTURERS LTD ……3RD RESPONDENT

(An appeal from the order and ruling of the High Court of Kenya at Milimani Commercial Courts, (Hon. Mr. Justice Onyango Otieno) dated 29th May, 2001

in H.C.C.C. NO. 312 OF 2001)

****

JUDGMENT OF DEVERELL, J.A.

This is an appeal against the decision of Onyango Otieno J. (as he then was) in HCCC No 312 of 2001 in which the learned Judge declined to strike out the suit against 3rd and 4th defendants who are now the 1st and 2nd appellants herein. The appeal arises from the existence of two separate suits involving the same parties one filed after the other giving rise to claim that the later suit should be struck out on the basis of *res judicata* and breach of ***section 7 of the Civil Procedure Act Cap 21 Laws of Kenya***.

High Court Civil Case ***883*** of 1998 was filed on 28th December 1998, (hereinafter the "***First suit***"). The plaintiff was Shah Hirji Manek Ltd., which is the 1st respondent to this appeal. The claim was for Shs. 11,143,330/- plus interest and costs. In the Amended Plaint the 1st respondent pleaded that it was the holder in due course for value of two promissory notes made by Ukay Estate Ltd., which is the 1st, appellant.

The two Promissory Notes, numbered 406 and 405, were both dated 27th September 1996 and were for Shs. 6,000,000/- and Shs. 5,143,330/- respectively, each having a due date of 29th December 1996. I will

henceforth refer to these two Promissory Notes as "*the **September '96 Notes***".

The ***September '96 Notes*** were alleged in the Amended Plaint in the ***First Suit*** to be made by the 1st appellant in favour of Sunny Style Manufactures Ltd who in turn endorsed them and transferred the same for value to 1st respondent.

The ***September '96 Notes*** were duly presented for payment on the due dates but were dishonoured.

The 1st respondent claimed in the Amended Plaint in the ***First Suit*** Shs. 11,143,330/- being the total principal amount claimed under the ***September '96 Notes*** from the 1st appellant Sunny Style Manufactures Ltd., the 3rd respondent herein.

Shah Hirji Manek Ltd. also claimed in paragraph 5 of the Amended Plaint the same sum from Nakumatt Holdings Ltd., the 2nd appellant herein and Ramesh Premchand Shah, the 2nd respondent herein, (who was a director of the 3rd respondent), on the foot of their guarantees alleged to be endorsed at the back of the ***September 96' Notes***. It was further pleaded in paragraph 7 of the amended Plaint in the ***First Suit*** that "*the said sum of Shs.11,143,330 continues to accrue interest from the date of dishonour of the notes at commercial rates until payment in full."*

The final prayers in the Amended Plaint in the ***First Suit*** were expressed in these terms:-

"***...The plaintiff prays for judgment against the defendants jointly and severally for: -***

(a) Shs. 11,143,330/-

(b) Interest on (a) above until payment in full.

Costs of this suit and interest thereon at Court rates."

I now turn to the second suit. In this case the plaint was, in all material respects, identical to the amended plaint in the ***First Suit*** except for the following: -

(i) *The **First Suit** was filed on 28th December 1998 and the **Second** Suit was filed on 2nd March 2001.*

*(ii) In the **Second Suit** the two relevant promissory notes sued upon were dated 1st May 1996 and 2nd May 1996 and were numbered 183 and 184 respectively. Their respective due dates were 2nd August 1996 and 3rd August 1996. The amounts of the promissory notes were Shs 4.5 million and Shs. 6.5 million totaling 11 million. These promissory notes are hereinafter called "the **May 96 Notes**". There was no claim in the second suit in relation to the **September 96 Notes**.*

*(iii) In the **Second Suit** it is pleaded in paragraph 9 that "The said sum of Shs.11 million continues to accrue interest from the date of dishonour of the notes at the rate of 36% p.a. until payment in full."*

*(iv) In the **Second Suit** it is pleaded that "**There is no other suit pending nor has there been any other previous proceedings in any court between the plaintiff and the defendants over the same subject matter.**"*

The final prayers in the Amended Plaint in the ***Second Suit*** were expressed in these terms:-

"***...The plaintiff prays for judgement against the Defendants jointly and severally for: -***

(a) Shs. 11,000,000/-

(b) Interest on (a) above at the rate of 36% p.a. from 03.08.96 until payment in full.

(c) Costs of this suit."

It is clear from the foregoing that, while the two suits were not identical, there were many similarities between the ***First Suit*** and the ***Second Suit***. It is now time to consider the history of the two suits to date.

In the ***First Suit*** an amended defence was filed on 9th March 1999 on behalf of the 3rd and 4th defendants being the 1st and 2nd appellants herein. Most of the Amended Defence is not relevant to this appeal. However in Paragraphs 4 and 7A of the Amended Defence which may be relevant, the 3rd and 4th defendants pleaded: -

4. The 3rd defendant denies having made promissory notes whether in the manner purportedly particularised in paragraph 3 of the Amended Plaint or at all and puts the plaintiffs to the strictest proof thereof.

7A The 4th defendant deny (sic) having endorsed any guarantee at the back of the said notes and shall put the plaintiff to strict proof.

These two paragraphs summarise the main issues raised by the defendants in the ***First suit.*** The plaintiffs on 20th April 1999 applied for summary judgement, which was granted by ***Mbaluto J.*** in a Ruling dated 30th July 1999. In that ruling the learned judge stated that judgment in default of appearance and defence had been entered against the 1st and 2nd defendants i.e. R. P. Shah and Sunny Style Manufactures Ltd who are the 2nd and 3rd respondents herein.

The learned judge went on to deal in some detail with the issues raised by the 3rd and 4th respondents to the application for summary judgment in these terms: -

"***The third defendant denies having made the promissory note (sic) while the fourth defendant denies having endorsed them. They jointly aver that the claim must fail for total failure of consideration. In the alternative, they aver that if any promissory notes were issued, the same would only be payable on presentation for payment which presentation the two defendants say they are strangers to. Finally, they say that if the promissory notes were presented for payment, no notice of their dishonour was ever served on them.***

Although the third defendant denies either making or knowledge of the promissory notes, that denial is in the face of the signature of the third defendant's director on the promissory note, not only evasive but also of no substance. The third defendant does not say anything about what clearly appears to be a valid signature. As for the fourth defendant, the same argument applies. To say that there was no endorsement of the promissory notes or that the endorsement was not in accordance with the fourth defendant's internal arrangements for execution of documents is to refuse to accept the obvious. The law is that: -

"***A third party dealing with the company is not bound to ensure that all the internal regulations of the company have in fact been complied with as regards the exercise and delegation of authority." (see Gower, 4th Ed. Page 183).***

In the instant case the issue of lack of authority is raised in the replying affidavit but not in the defence. By virtue of section 35 of the Companies Act, authority can either be express or implied. The document in question is signed by a director of the fourth defendant and there is an official stamp on it. Both defendants cannot therefore deny liability. Quite clearly, an outsider dealing with a company is not bound by the internal irregularities happening in the company. Authority is in this case presumed.

Two other issues were raised by learned counsel for the respondents in their opposition to the application. Firstly it was claimed that no notice of dishonour was given and secondly that there was no consideration. With respect to notice, Mr. Kinoti for the respondent submitted that the promissory

notes were not valid in that the rules regarding dishonour were not complied with. This ground of defence is however a sham in view of the provisions of section 52 (3) of the Bills of Exchange Act And the decision in African Overseas Trading Co. V. Bhagwanji Harjiwan (1960) EA 417 where it was held:-

*"**In view of the terms of section 52 (3) and section 90 (2) of the Bills of Exchange Ordinance it was not necessary for notice of dishonour of the promissory note to be given."***

In this regard it should be noted that section 48 of the Bills of Exchange Act which requires notice of dishonour to be given to the drawer of the note (sic: section 48 only refers to a bill which is defined in section 2 of the Act to mean "bill of exchange") applies only to bills of exchange but not to promissory notes. Mr. Kinoti for the respondents made an attempt to show that the two notes were something other than promissory notes but in my view his effort was bound to fail because the two notes clearly come within the meaning of a promissory notes (sic) as defined in section 84 (1) and (3) of the Bills of Exchange Act. The section reads: -

"***A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a certain sum in money, to, or to the order of, a specified person or to bearer." and "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose of thereof."***

As for lack of consideration, it is clear that the issue does not arise between a holder of a note in due course, which is the plaintiffs and the defendants. (sic)

In my judgment therefore the defence by the third and fourth defendants is a clear sham, which has been made for the sole purpose of delaying the early disposal of this suit. It raises no trial (sic) issues and ought to be struck out and a judgment entered in favour of the plaintiff as prayed. Accordingly, the application is allowed, the defences of the third and fourth defendant's struck out and judgment entered against both as prayed in the plaint with costs."

An appeal was filed against the ***Mbaluto J***. Ruling which was allowed and the decretal amount in the ***First Suit*** was paid to the plaintiffs in full. That was the end of the ***First Suit***.

The ***Second Suit*** was filed on 2nd March 2001 nearly two and a half years after the defences of the 3rd and 4th defendants in the ***First Suit*** were struck out and judgment was entered against these defendants. It was similar to the ***First Suit*** in many ways but was founded on the earlier ***May 96 Notes***. It provoked an application by the 3rd and 4th Defendants (the appellants herein) by Chamber Summons dated 17th April 2001 seeking an order striking out the ***Second Suit*** on the grounds that: -

a) The plaintiffs had previously in Suit No. H.C.C.C. No 883 of 1998 sued the exact same parties and in the same capacities and that the suit was finally decided by way of summary judgment, in favour of the plaintiff and judgment in respect there of has been recovered in full.

b) That alleged cause of action is pleaded as 2nd and 3rd August 1996 which was well before the institution of H.C.C.C. No. 883 of 1998 in which the plaintiff's claim could have been included.

c) *That the plaintiffs having failed to include their claim at the time of instituting HCCC No.883 of 1998 cannot be seen to make a claim now as equity aids the vigilant and not the indolent*.

d) That the plaintiff is therefore estopped by the doctrine of res judicata from instituting this suit.

e) That the suit is an abuse of the court process and offends the principle of law that litigation must come to an end.

This application came before ***Onyango Otieno J.*** (as he then was) who declined to strike out the suit

(i.e. the ***Second Suit***) and dismissed the application with costs to the plaintiff.

The learned judge said this in his Ruling: -

"***The defendants have filed this application ..... seeking orders to strike out the suit against 3rd and 4th defendant's with costs on the ground that this suit is res judicata as the previous suit was against the exact parties and in the same capacities and that suit was finally decided. The applicants/defendants though they have not mentioned in their ground anything about the issues, state that the matters now pleaded in the present suit could have been included in HCCC No.883 of 1998. They rely on explanation (4) of section 7 of the Civil Procedure Act and contend that the claim in respect of the present two promissory notes are matters which might and ought to have been made a ground of attack in HCCC No.883 of 1998 and thus they are deemed to have been matters directly and substantially in issue in the HCCC No. 883 of 1998.....***

The respondent/plaintiffs opposed the application through a Replying Affidavit sworn by Shashi Shah. In that affidavit, the respondent states that the present suit is not res judicata because the cause of action in the instant case is not the same as the cause of action in H.CCC. No.883 of 1998 and that the cause of action in HCCC No. 883 of 1998 arose at different times from the time the cause of action in the present case arose. In HCCC No.883 of 1998, the cause of action arose on 29 February 1996 when the promissory notes Nos. 405 (sic) were dishonoured whereas the cause of action in the instant case arose on 2nd August, 1996 and thus the two could not be merged into a single cause of action when they arose from separate transactions…….

The superior court then referred to the cases of ***T. Horne vs. J. Usher Jones*** (1914) AC 157, ***Henderson v. Henderson*** (1843) All E R 378 and ***Talbot v. Berkshire***... (1993)4 All ER 9. The learned judge cited the following passage from the last cited case.

"***In trying this question I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject matter 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.....***"

The learned Judge continued: -

"*Throughout the judge is talking about a subject and not subjects. I understand the words subject in that quotation to mean a transaction or a cause of action. I do not understand it to mean that whenever two people have problems between them and arising from different transactions, they must bring all of them in one suit. It maybe time saving and convenient to do so but a court of law cannot force them to do so as clearly the evidence required to prove each transaction may very well be different. I have perused the case of Pop-in (Kenya) Ltd. and others vs. Habib Bank Court of Appeal Civil Appeal No. 80 of 1988. The facts in that case are different from the facts in this case but even in that case the judges have not stated that two different causes of action would have to be brought together.*

I do feel that the approach spelled out in the case of Hawkesworth vs Attorney General (1974) EA 406 is the correct approach. There the Court of Appeal held:

"***The two Management orders related to two different periods and formed distinct transactions and therefore it was not necessary that they should be dealt with in the same suit".***

I believe the situation before me is the same as in the Hawkesworth case. Here we have two sets of the promissory notes each set issued on a different date, and dishonoured on a different date giving rise to two different distinct transactions. In my humble opinion, if for example a person is involved in two road accidents on different dates in which the owner of the vehicles is the same, the victim can decide to sue the owner in one suit in respect of the two accidents together or he can decide to sue the owner

in respect of each accident. All he must do is that for each suit he must plead all that he claims in respect of that accident e.g. he cannot claim for medical expenses leaving out his transport to the hospital and hope to claim that later in a separate suit. He is however not estopped from filing a suit in respect of the each accident as they were two separate and different transactions giving rise to two different and distinct causes of action."

I will now examine the precise wording of ***section 7 of the Civil Procedure Act Cap 21*** with particular reference to ***Explanation. (4).*** In doing so I will bear in mind that these provisions do not have any equivalent in the United Kingdom statutory law. Our provisions are taken verbatim from the ***Indian Code of Civil Procedure***. The United Kingdom approach to this issue is through the route of considering whether the subsequent proceedings are an abuse of the process of the court and should therefore be struck out under the United Kingdom equivalent of our ***Order VI rule 13(1)(d).*** See ***Supreme Court Practice Under Order 18 rule 19.***

Section 7 of the Civil Procedure Act Cap 21 provides:-

"7. 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 any 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.

Explanation. (4)— Any matter which might and ought to have been made ground of defence or attack in such a former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The key phrase in both the main section and the Explanation is "*the matter directly and substantially in issue*". It has to be borne in mind that neither the ***Section*** nor the ***Explanation*** mentions the "*cause of action."*

I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit. In cases where the cause of action is the same the task will be easier than in cases where the cause of action is different but the matter directly and substantially in issue is the same. In the case before us it is clear that the causes of action in the two suits are not the same—they relate to enforcement of liabilities under quite different promissory notes.

I have found the following passages in the illustrations in *Mulla on the Code of Civil Procedure 13th edition Vol. 1* to be of considerable relevance.

Mulla On the code of Civil Procedure Vol 1 1965 p.58

Illustration (1).

"*A sues B for rent due for the year 1903. The defence is that the land is rent–free. An issue is raised, " whether the land is rent free." The Court finds that the land is rent-free and A's suit is dismissed. Subsequently A sues B, claiming rent for the year 1904. B again sets up the same defence, namely, that the land is rent-free. Here the question of A's right to recover the rent having been "**directly and substantially"** in issue in the previous suit, the suit for the rent for 1904 is barred as **res judicata."***

Illustration (2).

"*A sues B for rent in kind for betel trees for the year 1897 – 98 alleging that B was liable to pay. B applied for time to file a written statement, which was refused. The only issue raised was as to the amount of produce and the suit was decreed. Next year A again sues B for rent in kind for 1898-99 and B pleaded that he was not liable to pay any rent. Here the question of B's liability for all years was not alleged in*

the previous suit and was not therefore directly and substantially in issue and that suit is not barred res judicata.

It may here be observed that each year's rent is in itself a separate and entire ***cause of action****, and where a suit is brought for the rent due for a particular year, a judgment obtained in that suit, whatever the defence may be, would seem only to extend to the subject matter of the suit, and hence the landlord is only entitled to bring another suit for the next year's rent and the tenant is at liberty to set up to that suit any defence he thinks proper. The above proposition, however, is subject to this, and here comes in the doctrine of res judicata, that neither party is at liberty to reopen in the suit for rent for the next year any question that was substantially and necessarily tried and determined between them in the suit for the rent for the previous year. For, the essence of the doctrine of res judicata is that where a material issue has been tried and determined between the same parties in a proper suit and in a competent court as to the status of one of them, in relation to the other or as to a right or title claimed by either of them against the other, it cannot again be tried in another suit between them.*

Illustration (13) on Page 61

Subject matter of suits may be different:-

As the test of res judicata is the matter directly and substantially in issue, it follows that the subject matter of the second suit may be entirely different. Thus, if A claims certain property as the adopted son of X, and the defendant denies the adoption, a finding in A's favour on the issue as to adoption will be binding on the defendant as res judicata in a subsequent suit by A against the same defendant to recover ***another property*** *claimed under the* ***same title****. It is not open to the defendant to contend that the properties claimed in the two suits being different, the decision on the question of the A's adoption in the first suit cannot operate as res judicata in the second. On the same principle where in a suit brought by A against B for possession of one of two properties comprised in a sale-deed passed by B to A, B contends that the deed is fictitious, and the court finds that the deed is fictitious, the finding that the sale deed is invalid will operate as res judicata in a subsequent suit by A against B to recover the other property under the* ***same sale deed****. Similarly, ...it is no answer to the plea of res judicata that the subject matters of the two suits are different. The reason is that the matter directly and substantially in issue in both the suits is the same, namely, whether the particular land of which the rent is claimed is rent free, and the decision therefore on that issue in the first suit operates as res judicata in the subsequent suit.*

.....But the decision cannot apply to other lands unless they form part of ***the same tenure****. A decision on a question of title in a proceeding under the Land Acquisition Act 1894 will operate as res judicata in a subsequent suit between the parties relating to other properties covered by the* ***same title****, as the test of res judicata is identity of title and not of property. Likewise a decision that certain properties were ancestral would operate as res judicata in a subsequent suit between the partes relating to other properties held under the* ***same title****.*

From the same fundamental principle that the matter directly and substantially in issue, and not the subject matter, constitute the test of res judicata, it also follows that where a matter directly and substantially in issue in a suit is not the same as that in a previously decided suit, the trial of that matter will not be barred as res judicata though the subject matter of the two suits may be the same. An application by a landlord to eject a tenant under the provisions of the West Bengal Rent Control Act, 1950, on the ground that he required the premises for his own use is not barred as res judicata by an order dismissing a previous application because though the subject matter is the same, the matter for decision whether the landlord required the house for his own use at the time of the action is different."

The first question I need to consider in the current appeal is what was ***the matter directly and substantially in issue*** in Case 883 of 1998, which was the ***First Suit***. It related to the ***September 96 Notes***. The answer to this would appear to be that it was the issue as to whether those Promissory Notes were executed by the 3rd defendant so as to be binding on the defendant in that suit. It is clear from the pleadings in the ***First Suit*** and from the ruling of ***Mbaluto J***. on the application for summary judgment that there were five reasons advanced by the defendants in the superior court in opposition to that

application. These reasons were: -

1. The denial by the 3rd defendant of the making of the promissory note by it.

2. The denial by the 4th defendant that it endorsed the promissory notes.

3. There was total failure of consideration for the issue of the promissory notes.

4. In the alternative if any promissory notes were issued, they would only be payable upon presentation of the notes for payment which never happened.

5. In the further alternative that, if there was such presentation, no notice of dishonour was ever served on the defendants.

As stated above ***Mbaluto J***. rejected all of these reasons and allowed the summary judgment application and was upheld by the Court of Appeal.

The matter directly and substantially in issue in the ***Second Suit*** (apart from the *res judicata* issue itself) would appear to relate to the enforceability of the ***May 96 Notes*** in view of the manner in which they were executed or endorsed by the defendants.

If the reason for the alleged invalidity of the execution was the same in both cases then it would follow that the "*matter directly and substantially in issue"* in the two cases was the same. If this is so then it would be immaterial to the *res judicata* issue whether the cause of action and/or the subject matter was different.

The plaint in the ***Second Suit*** included the following paragraphs: -

6. The plaintiff also claims the aforesaid sum of Shs. 11,000,000 from the 1st and 4th defendants on the foot of their guarantees endorsed at the back of the said notes....

7. The said promissory notes were duly presented for payment on the due date but were dishonoured.

8. Notice of dishonour for this (sic) promissory notes was issued but the said amount remains unpaid to date.

The defence filed in the ***Second Suit*** by the 3rd and 4th defendants dated 4th April 2001 contained 12 paragraphs.

Paragraphs 3 to 8, 11 and 12 of the defence all relate to the *res judicata* issue itself and not to the nature of the matter directly and substantially in dispute in the ***Second Suit***.

Paragraph 1 of that defence was a general denial of all the allegations in the plaint. Paragraph 10 of the defence denied receipt of demand or notice of intention to sue or notice of the alleged dishonour or at all and put the plaintiff to strict proof thereof. These two paragraphs therefore put in issue paragraphs 6, 7 and 8 of the plaint in the ***Second Suit*** set out above**.**

It is clear from this exchange of pleadings in the ***Second Suit*** that the matters directly and substantially in issue in the ***Second Suit*** were indeed the same as the matters directly and substantially in issue in the ***First Suit*** and which were all determined against the defendants. It would follow from this that the second suit should be a good candidate for application of the doctrine of *res judicata* but for one further aspect, which I will now consider.

This arises from the phrase reading, "***litigating under the same title***" in ***section 7***. See Illustration 13 on page 61 of *Mulla* set out above. In the case before us the matters directly and substantially in issue

between the same parties are not being litigated under the same titles in the two suits: in one suit the titles sued under are the ***September 96 Notes*** and in the other suit the titles are the ***May 96 Notes*.** Could it be argued that which the holder of a Promissory Note claims payment under does not fall within the description "*title*"? I do not think so. ***Chambers English Dictionary 1990 Edition*** lists many meanings of that word among which are: *"a right to possession; a ground of claim; evidence of right."* The last two of these precisely cover the purpose a Promissory Note serves in relation to the money due under it.

Jowitts Dictionary of English Law 2nd Edition in defining "*title"* includes among many meanings the following: "a *cause or basis of acquiring a right"* and "*in the primary sense of the word a title is a right"*.

I do not consider that a person can be said to be litigating under the same title or litigating under the same basis of acquiring a right as another person where the two persons are claiming under different causes of acquiring a right namely different promissory notes.

For the above reasons I find that ***section 7*** of the Civil Procedure Act does not bar the Second Suit, which therefore cannot be struck out as being *res judicata.*

In a situation such as this where there is specific Kenyan legislation applicable to the issues raised, it would in my view be inappropriate to rely on cases from other jurisdictions which lack similar legislative provisions such as the case of ***Henderson v. Henderson (1884) All ER 378*** and other following cases based on the general principles of avoiding abuse of process of the Court.

It will be clear from the above that I consider that the decision of the superior court was correct though for reasons different from those of that court.

I would therefore dismiss the appeal with costs.

Dated and delivered at Nairobi this 17th day of February, 2006.

W. S. DEVERELL

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JUDGE OF APPEAL

JUDGMENT OF OMOLO, J.A

I had the advantage of reading in draft form the Judgment of Deverell, J.A. I agree with his conclusion that this appeal must be dismissed with costs and as Waki J.A also agrees, the orders of the Court shall be that the appeal is dismissed with costs as proposed by Deverell, J.A.

Dated and delivered at Nairobi this 17th day of February, 2006.

R.S.C. OMOLO

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JUDGE OF APPEAL

JUDGMENT OF WAKI, J.A

I had the advantage of reading in draft the judgment of my brother Deverell J.A. I agree with the result he has reached that this appeal is for dismissal. I might however confess that I was at first persuaded that the appellant had in his arguments made a powerful case for expansion of the boundaries of the doctrine of *Res Judicata*. For the doctrine is not merely a technical one applicable only on records.

It has a solid base from considerations of high public policy in order to achieve the twin goals of finality to litigation and to prevent harassment of individuals twice over with the same account of litigation. Put another way, there must be an end to litigation and no man shall be vexed twice over the same cause. The arguments of learned counsel for the appellant were however predicated on jurisprudence developed from English decisions including the 150 year – old leading decision of **Henderson v Henderson (1843-60) All ER 378**. I have perused those decisions and they are clearly not the source of development of our jurisprudence on the doctrine of *res judicata* despite the public policy common denominator. Other than broad considerations of abuse of court process in the English decisions, there is a generic concept for consideration; the concept of "*estoppel per rem judicatam*" which **Lord Diplock** split into two species*: "cause of action estoppel"* and "*issue estoppel"* – See **Thoday v Thoday [1964] 1 ALL ER 341, Talbot v Berkshare County Council [1993] 4 ALL ER 9**. There are also safeguards in place to prevent injustice, in that the court will not apply the rule in its full rigour if there were special circumstances why it should not do so.

As correctly surmised by Deverell J.A, our jurisprudence on the subject is rooted in statutory provisions which are identical to Indian legislation and I agree, therefore, that the more persuasive authorities emanate from that jurisdiction.

I would also dismiss the appeal with costs.

Dated and delivered at Nairobi this 17th day of February, 2006.

P.N. WAKI

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR