



Kipsowe & 2 others v Simba Caetano Formula Ltd & another (Appeal 64 of 2019) [2024] KEELRC 13390 (KLR) (29 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13390 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 64 OF 2019
NJ ABUODHA, J
NOVEMBER 29, 2024**

BETWEEN

**O'BRIAN BOLEI KIPSOWE 1ST APPELLANT
LAWRENCE KARANJA 2ND APPELLANT
SHEIKH YAQUB 3RD APPELLANT**

AND

**SIMBA CAETANO FORMULA LTD 1ST RESPONDENT
CAETANO FORMULA EAST AFRICA SA 2ND RESPONDENT**

(Being an appeal from the ruling delivered on 28th November, 2019 at the Chief Magistrate's Court, CMELRC No. 1436A of 2019 by Hon. Ocharo)

JUDGMENT

1. Through the Memorandum of Appeal dated 19th August, 2019 the Appellant appeals against the ruling of Honourable D.A Ocharo delivered on 28th November, 2019
2. The Appeal was on the grounds inter alia:
 - a. that the Learned Trial Magistrate erred in law and fact by falsifying the facts and proceedings to make a decision on the basis of the said falsified facts as outlined hereunder:
 - i. Striking out the Appellants' suit ostensibly on the ground that the 1st Respondent had filed another suit on the same facts allegedly being HCCC No. E049 of 2019 *Simba Corporation Ltd v Caetano Formula East Africa SA* (hereinafter called the said suit) which is blatantly false in view of the fact that the 1st Respondent never filed the said suit and was never a party thereto.



- ii. Striking out the Appellants' suit ostensibly on the ground that the said suit challenged the validity of a termination notice issued on 19th February 2019 which is factually untrue because the said suit merely sought interim measures of protection pending the reference of the dispute between the 2nd Respondent and a third party to arbitration.
 - iii. Striking out the Appellants' suit ostensibly because the said suit had determined and/or dismissed the contentions raised by the Appellants in their suit before the lower court which is materially false and incorrect in view of the fact that neither the said suit nor the application filed therein has ever been heard nor finally determined as alleged by the learned magistrate.
 - iv. Striking out the appellants' suit ostensibly because it raised the same issues raised in the said suit which is terribly false in view of the fact that the issue raised in the lower court case was whether the termination of the 1st respondent's distributorship agreement with the 2nd respondent would violate the appellants' employment rights which issue was never raised at all and is therefore not a matter for determination in the said suit.
- b. That the Learned Trial Magistrate erred by failing to appreciate that the Appellants cannot enjoin the said suit given that the primary party against whom they are seeking relief from; to wit, the 1st respondent (their employer), is not a party to the said suit.
 - c. That the learned Magistrate erred in law and fact by holding that the Appellants can enjoin the suit in the said suit without appreciating that the High Court has no jurisdiction to grant the orders which the appellants sought.
 - d. That the learned Magistrate erred in law and in fact in failing to appreciate that the appellants' suit before the lower court was not barred by the doctrine of resjudicata for the following reasons:
 - i. The parties to the suit before the lower court were not the same parties in the said suit (neither the Appellants nor the 1st Respondent were parties to the said suit).
 - ii. The issue raised in the lower court matter was never raised in the said suit; to wit, whether the termination of the distributorship agreement between the 1st and 2nd Respondents would illegally and wrongfully precipitate a termination of the Appellants' employment with the 1st Defendant
 - iii. The said suit has never been heard and finally determined
 - iv. The High Court is not a "competent court" within the meaning of Section 7 of the [Civil Procedure Act](#) since it has no jurisdiction to hear and determine a labour dispute.
3. The Appellant prayed that the appeal be allowed and that the ruling of the learned judge (sic) dated 14th June, 2019 alongside all its consequential orders to be set aside and that the Court be pleased in the interest of justice, remit Nairobi CMELRC Case No. 1436A of 2019 back to the Chief Magistrate Employment and Labour Relations Court with directives that it be heard and determined on its merits
4. The Appeal was disposed of by written submissions.

Appellant's Submissions

- 5. The Appellant's advocates Messrs. Julius Juma Advocates reduced the grounds for determination of the appeal to three main grounds. Namely:



- i. Whether *CMCELRC No. 1436A of 2019* was barred for *res judicata*
 - ii. Whether the claimants in CMELRC No. 1436A of 2019 could have their issues determined in [*HCCC No. E049 of 2019*](#).
 - iii. Whether the preliminary objection was merited.
6. Counsel therefore submitted that CMELRC No. 1436A of 2019 was not *res judicata* and that the learned trial magistrates fell into grave error by holding to the contrary. Counsel relied on the provisions of section 7 of the [*Civil Procedure Act*](#) and the case of *Lotta v Tanaki* [2003] 2 EA 556 on what constitutes *res judicata*. In the *Lotta* case, the Court of Appeal stated that the object of *res judicata* was to bar multiplicity of suits and guarantee finality to litigation. It made conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. According to counsel, a party raising the defence of *res judicata* to defeat an action must not only prove the existence of the five conditions set out in the *Lotta*'s case but also that these conditions all exist at the same time. Counsel further place reliance on the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017]eKLR
7. According to Mr. Juma, the former suit exhibited at page 160 of the Record of Appeal and which is alleged to have determined issues in CMELRC No. 1436A of 2019 was filed by a plaint dated 28th March, 2019. The said matter was filed in High Court at Nairobi, Commercial Division. The plaintiff was Simba Corporation Ltd while the defendant was Caetano Formula East Africa SA. In the said suit Simba Corporation Ltd sought conservatory remedies against Caetano Formula East Africa SA in accordance with section 7 of the [*Arbitration Act*](#), pending referral of the dispute to arbitration. However in CMELRC No. 1436A of 2019, the appellants herein who were employees of Simba Caetano Formula Limited sought injunctive remedies stopping their employer as well as Caetano Formula East Africa SA from terminating the distribution agreement as that would expose them to loss of employment.
8. Counsel further submitted that the suit in the High Court was a commercial dispute between the parties to a commercial contract hence was filed in the commercial division of the High Court. The suit by the appellant's sought to protect their employment interests and as such could not be said that that the issues were the same. Further under section 162(5) of the [*Constitution*](#), employment and labour relations disputes could not be determined by the High Court.

Respondent's Submission

9. Ms Weru instructed by the firm of Iseme, Kamau and Maema submitted among others that the issues raised before the Chief Magistrate's Court were substantially the same issues that were heard and conclusively determined by the High Court ruling as well as the Court of Appeal. Consequently, the lower court correctly found the appellant's suit *res judicata*. According to Counsel, Simba Corporation Ltd was a 50% shareholder in the 1st Respondent while the appellants in these proceedings were employees of the 1st Respondent, Simba Caetano Formula SA. While the appellants contend their claim was different from the claim filed by the plaintiff in the High Court proceedings, from the reading of the statement of claim and orders sought specifically the order to stop the termination of the distributorship agreement, it was clear that the appellants were litigating for and behalf of the 1st respondent with a view to seeking the very orders unsuccessfully sought in the High Court. The intended outcome being to extend the life of the expired Distributorship Agreement and not to pursue a genuine employment claim as alleged.



10. According to Ms. Weru, the suit filed before the Magistrate’s Court was a commercial dispute disguised as an employment claim with a view to relitigating issues which the High Court had already determined. According to Counsel, if the Appellants had a genuine employment claim, the same would have been lodged against their employer, the 1st respondent herein and not third parties such as the 2nd respondent and interested party. Further the claim could have entailed a claim of threatened or actual loss of employment evidenced by actual notices or actions taken by the employer and not actions of a third party. The appellants were not parties to the distributorship agreement and therefore by doctrine of privity of contract, they had no locus whatsoever to seek a claim to stop its termination.
11. To support their submission Counsel sought reliance on the case of *Mohammed Dado Hatu v Dhadho Gaddae Godhana & 2 others* [2017] , *Satya Bharma Gandhi v Director of Public Prosecutions & 3 Others* [2018]eKLR and *E.T v The AG & Another* [2012]eKLR. Counsel further submitted that by virtue of the claim framed by the appellants which was on all fours with the claim filed before the High Court, the court correctly found that the appellants fall under the ambit of “parties under whom they or any of them claim”. Counsel further submitted that the ruling by the High Court conclusively determined the issues in dispute in the said suit which was about the renewal of the distributorship agreement.

Determination

12. The court has considered the pleadings and submissions filed by the parties herein and observes that it is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424. Where the Court stated that:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
13. This appeal is around a single issue of whether the trial court erred in law by holding that the matter before it was res judicata having been the same issue between the same parties or those litigating through them in HCCC No. E049 of 2019 in which the High Court declined to grant an injunction against the defendant (2nd Respondent herein) from terminating the Distributorship Agreement executed in June, 2024.
14. The Court has reviewed and considered submission by both Counsel on the issue of res judicata and the authorities cited and is persuaded they capture quite succinctly, what constitutes and does not constitute res judicata. Further the authorities are clear on which situations the defense of res judicata could be raised and when it could not. The Court will therefore not regurgitate what has already been competently dealt with by Counsel.
15. The issue in the Appeal therefore turns around the claim filed before the lower court, subject of this appeal and the ruling of the High Court in HCCC No. E049 of 2019. It has been argued by the respondent that the issue between the parties in the High Court matter and the matter before the lower Court, subject of this appeal, was around the decision by the defendant in the High Court matter



not to renew the distributorship agreement. It was contended by Ms Weru that the appellants were being used by the 1st respondent herein to relitigate and in effect prevent the 2nd respondent from terminating the distributorship agreement between it and the 1st respondent, a matter the Court had pronounced itself on. According to Counsel, the matter in the lower court subject of this appeal was not an employment matter since the appellants never demonstrated in their pleadings or otherwise, any notices of termination of their service.

16. Apart from alleging that if the 2nd respondent terminated the distribution agreement, the claimant would be rendered jobless, the appellant's in the prayers sought in the statement of claim as exhibited at page 126 of the record of appeal are simply seeking a permanent injunction restraining the respondents from implementing the termination notices of 19th February, 4th July and 30th July, 2019. These notices were all about the termination of the Distributorship Agreement and attendant consequences, between the 1st and 2nd Respondent.
17. The Court notes that the appellant's were employees of the 1st Respondent hence had no privity of contract with the 2nd respondent hence the termination of the distributorship agreement if impacted on their employment would be an issue between them and the 1st respondent and had nothing to do with the 2nd respondent.
18. It is trite law that a party is bound by their pleadings hence it is the Court's view that the pleadings as drafted, especially the prayers in the statement of claim in the lower court are on all fours with the prayers sought in the High Court matter over which that Court pronounced itself. The respondent herein was therefore justified in raising the issue of res judicata and further, the learned trial magistrate was right in upholding the preliminary objection.
19. In the upshot the Appeal fails for lack of merit and is hereby dismissed with costs to the Respondent.
20. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

