Highland Plaza Limited v Ondieki & 6 others (Environment & Land Case 104 of 2016) [2024] KEELC 7209 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7209 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 104 OF 2016

LL NAIKUNI, J

OCTOBER 30, 2024

BETWEEN

HIGHLAND PLAZA LIMITED ..... PLAINTIFF

AND

EVANS ONDIEKI ..... 1ST DEFENDANT

MANYALA AWOUR ..... 2ND DEFENDANT

GEORGE OMONDI ..... 3RD DEFENDANT

MOSES KURGAT ..... 4TH DEFENDANT

SAMUEL KENYATTA ..... 5TH DEFENDANT

CHARLES KOTUT ..... 6TH DEFENDANT

SAFARICOM LIMITED ..... 7TH DEFENDANT

RULING

I. Introduction

1. This Honourable Court is tasked with the determination of the Notice of Motion application dated 27th May, 2024 filed by Highland Plaza Limited, the Plaintiff/ Applicant herein. It was brought pursuant to the provision of Order 50 Rule 1 and Order 42 Civil Procedure Rules, 2010, the inherent Powers of the Court and all other enabling Provisions of the Law.

2. Upon service of the Application upon the Defendants/ Respondents, the 1st Defendant/Respondent responded through a Replying Affidavit sworn on 30th May, 2024.

II. The Plaintiff/ Applicant's case

3. The Plaintiff/Applicant sought for the following orders:

a. Spent.

b. Spent.

c. That this Honourable Court be pleased to grant leave to the Law firm of Messrs. OSORO OMWOYO & CO. ADVOCATES to come on record for the Plaintiff/Applicant

d. That the Honourable Court be pleased to stay the Ruling dated 2nd May, 2023 and all subsequent Orders thereof pending the hearing and determination of this of the intended appeal.

e. That costs of this application be provided for.

4. The application was supported by the grounds, testimonial facts and the averments found under the 13th paragraph supporting affidavit of BEATRICE MBELA, a Director of the Plaintiff/Applicant with four (4) annextures marked as "BM - 1 to 4". She averred that:-

a. This Honourable Court delivered a Ruling dated 2nd May 2023 by Hon. Justice L.L. Naikuni (Judge) at the Environment and Land Court in Mombasa.

b. She was aggrieved by the said ruling dated 2nd May, 2023 and as a consequence, she instructed her advocate by then Messrs. Kittony Maina Karanja & Co. Advocates to file a Notice of Appeal dated 9th May 2023. Attached in the affidavit and marked as Exhibit No. "BM - 1" a copy of the Notice of Appeal.

c. She requested for certified copy of the proceedings vide my letter dated 9th May 2023 and served upon the Respondents herein on 16th May 2023 and 19th May 2023 respectively. Attached in the affidavit and marked as Exhibit No. "BM - 2" a copy of the letter dated 9th May 2023.

d. On 26th April 2024, she received certified copy of the proceedings. Attached in the affidavit and marked as Exhibit No. "BM - 3" was a copy of the certified proceedings.

e. On 21st May 2024, she received certified copy of the Ruling dated 2nd May 2023. Attached in the affidavit and marked as Exhibit No. "BM - 4" was a copy of the certified Ruling dated 2nd May 2023.

f. She was in the process of filing the Memorandum of Appeal together with the Record of Appeal

g. The acts and/or omissions not of her making should not be visited on her.

h. The intended appeal was meritorious, had a high probability of success and unless taxation proceedings herein were put on hold, the said Appeal if successful will be rendered nugatory.

i. Further the Applicant had already set their appeal in motion and intended to duly submit themselves to the jurisdiction of the Court of Appeal and it would be defeatist of the process to the jurisdiction of the Court did not grant Orders for stay.

j. The stay of execution of the ruling datted 2nd May, 2023 was not prejudicial to the Respondents.

k. There had not been any inordinate delay in bringing this application.

III. The responses by the 1st Defendant

5. The 1st Defendant opposed the Notice of Motion application through a 7 paragraphed Replying Afffidavit sworn by EVANS ONDIEKI ANYONA, the 1st Defendant herein on 30th May, 2024 where he deponed that: -

   i. The Judge delivered a ruling on 2nd May 2023 in which he struck out the plaint and dismissed the plaintiff's suit.

   ii. The suit having been dismissed i.e the final order being a negative order that there could be no stay of execution orders granted in such a case.

   iii. The Applicant filed a similar application to the current one being Notice of Motion dated 27th October 2023 and the same was dismissed on 28th February 2024 hence the application herein was res judicata and an abuse of the court process.

   iv. The Plaintiff had not met the requirements for stay pending appeal as they have not shown that they will suffer irreparable or substantial damage and had also not offered any security which is a mandatory requirement in matters involving stay pending appeal.

IV. Submissions

6. On 15th July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 27th May, 2024 be disposed of by way of written submissions. Pursuant to that on 23rd September, 2024 a ruling date was reserved on 30th October, 2024 by Honourable Court accordingly on its own merit.

A. The Written Submissions by the 1st and 2nd Respondent

7. The 1st and 2nd Respondent through the Law firm of Messrs. Jengo & Associates Advocates filed their written submissions dated 29th July, 2024. Mr. Jengo Advocate commenced his submissions by stating that that the Applicant sought to stay the orders of this court issued on 27th May 2023 which dismissed the Plaintiff's suit herein with costs. It was now trite law that a negative/dismissal order could not be stayed. Both the high court and the court of appeal have settled this issue with finality. He cited the case of:- "Marisin – Versus -Naiguta & 4 Others (Civil Appeal (Application) E126 of 2023) (2024) KECA 638(KLR) (7 June 2024) (Ruling)", the Court of appeal held:-

> " 14. Secondly, the orders made on 20th June 2023 were negative: the court rejected the application seeking to reinstate the application dated 19th August 2022. Such a rejection of the orders that had been sought, is not capable of being executed.
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> 15. This Court in the case of *Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme – Versus - Millimo, Muthomi & Co. Advocates & 2others, (Civil Appeal (Application) E383 of 2021*) [2021] KECA 363(KLR) stated as follows;
>
> "We start by acknowledging the fact that the ruling appealed against was a compounded one dealing with 2 applications, which yielded two different results. The first application, which was made by the applicant, was dismissed. As submitted by learned counsel for the 1st respondent, the position taken by this Court in respect of applications for stay of execution in respect of negative orders is clear. Negative orders cannot be stayed. We reiterate the sentiments

of the predecessor of this Court in its decision in Western College of Arts and Applied Sciences vs Oranga & Others (1976 – 80) 1KLR, where the Court stated that in respect of the stay of execution as follows:

"But what is there to be executed under the judgment, the subject of the intended appeal". The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In Wilson v Church, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any parties to do anything, or to refrain from doing anything, or to pay any sum."

16. Similarly, in the case of *Gitundu – Versus - Wathuku, (Civil Application E024 of 2021)* [2022] KECA 959 (KLR) (26 August 2022) (Ruling), this Court stated:

"Additionally, even if we had the requisite jurisdiction, this Court has said time without number that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task. See Western College of Arts and Applied Sciences – Versus - EP Oranga & 3 Others [1976] eKLR. In this case, the learned Judge merely struck out the applicant's application. The Court cannot stay that striking out. Contrary to Mr. Amuga's submission, this Court lacks jurisdiction to stay the decree from the Chief Magistrate's Court whose fate is yet to be determined before the High Court."

8. The Learned Counsel submitted that the upshot of all this was that the suit having been dismissed, the issue of stay pending appeal could not arise. The decision aforesaid was binding on this court and the basis of it, the application for stay pending appeal should be dismissed with costs. In addition to that, the plaintiffs herein on 27th October 2023 filed an application for stay pending appeal which was dismissed. The current application was thus res judicata and the court cannot revisit the same. The plaintiff being unable to surmount the res judicata plea meant that the application herein was an abuse of the court process.

9. The Learned Counsel relied on the case of "Greenfield Investment Limited – Versus - Baber Alibhai Mawji (2000) eKLR" the Court of Appeal while dealing with res judicata held

"Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya is in the following terms:

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."

Dealing with the aspect of res ju dicata wherein it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been raised in earlier proceedings, Wigram, V.-C. in Henderson – Versus - Henderson, (1843) 3 Hare 100, 115 had this to say:

"...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."

The phrase 'every point which properly belonged to the subject of litigation' quoted in the passage set out above was expanded in Greenhalgh – Versus - Mallard, [1947] 2 All E.R. 255, 257, by Somervell, L.J.in these terms:

"... 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."

"and in Yat Tung Investment Co. Limited – Versus - Dao Heng Bank Limited an d Another, [1975] A.C. 581, 590E, it was observed that:

The shutting out of a 'subject of litigation' - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule."

10. In conclusion, the Learned Counsel averred that this was that application that lacked merit and should be dismissed with costs.

V. Analysis And Determination

11. The court has considered the said application and the annexures thereof and the Submissions in support and opposition of the Application. The following issues fall for determination in the application:

    i. Whether the Notice of Motion application dated 27th May, 2024 is res judicata;

    ii. Whether the Plaintiff/ Applicant has made out a case for this Honourable Court be pleased to grant leave to the Law firm of Messrs. OSORO OMWOYO & CO. ADVOCATES to come on record for the Plaintiff/Applicant.

    iii. Who bears the costs of the Notice of Motion application dated 27th May, 2024

ISSUE No. a). Whether the Notice of Motion application dated 27th May, 2024 is res judicata;

12. Under this sub title, the Honourable Court shall examine whether the present application is "Res Judicata" being that the Plaintiffs herein on 27th October 2023 filed an application for stay pending appeal which was dismissed. The provision of Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " 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."

13. It is now old hat that the said doctrine applies to both suits and applications as was held in the case of:- "Abok James Odera – Versus - John Patrick Machira Civil Application No. Nai. 49 of 2001". However, as was held in the said suit, to rely on the defence of res judicata there must be:

    i. a previous suit in which the matter was in issue;

    ii. the parties were the same or litigating under the same title;

    iii. a competent court heard the matter in issue;

    iv. the issue had been raised once again in a fresh suit

14. As regards the rationale of the doctrine of res judicata, reliance was placed on the decision of the Court of Appeal in "Independent Electoral & Boundaries Commission – Versus - 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."

15. What more would a party require to prove that a case is res judicata. In the case of "Henderson – Versus - Henderson (1843) 67 ER 313" res-judicata was described as follows:-

> " .....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 of litigations 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 pleas 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".

16. Additionally, in the case of:- "Apondi – Versus - Canuald Metal Packaging [2005] 1 EA 12" Waki, JA stated as follows:

> " A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

17. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation of the provision of Sections 6 and on 7 of the *Civil Procedure Act*, Cap. 21 where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

18. The 1st and 2nd Defendants argued that the current application was thus res judicata and the court cannot revisit the same. The plaintiff being unable to surmount the res judicata plea meant that the application herein was an abuse of the court process.

19. Courts must always be vigilant to guard against litigants who metamorphosis to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. Accordingly, the plea of the suit having offended the Doctrine of "Res Judicata" must fail and thus it is disallowed.

ISSUE No. b). Whether the Plaintiff/ Applicant has made out a case for this Honourable Court be pleased to grant leave to the firm of OSORO OMWOYO & CO. ADVOCATES to come on record for the Plaintiff/Applicant.

20. Under this sub title the Court shall examine whether the proper procedure has been followed for the firm of Osoro Omwoyo & Co Advocates to come on record for the Applicant. The provision of Order 9 Rule 5 of the Civil Procedure Rules, 2010 provides for change of Advocates as follows:

> " A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with Rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

21. Unless and until a notice of change of Advocate is filed and duly served an Advocate on record for a party remains the Advocate for that party subject to removal from record at the instance of another party under Rule 12 of the same Order or withdrawal of the Advocate under Rule 13 of the same Order.

22. The provision of Order 9, rule 9 of the Civil Procedure Rules provides as follows:-

> " When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."

23. Further, the provision of Order 9, Rule 10 provides;

> " An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first."

24. In this case the matter had been dismissed on 2nd May, 2023 and called for compliance under Order 9 rule 9. Is a dismissal a judgement? The Learned Judges when confronted by the same question in the case of "Njue Ngai – Versus - *Ephantus Njiru & Anor CA 29 of 2015*", stated as follows

> " 18. Another issue may arise as to whether a dismissal of a suit for non attendance of the Plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the Plaintiff to attend Court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. stating:
>
> "Rule 4(1) does not say "judgment shall be entered for the defendant or against the Plaintiff." It uses the word "dismissed." The *Civil Procedure Act* does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:
>
> "Judgment is a judicial determination; the decision of a Court; the decision or sentence of a Court on the main question in a proceeding or/one of the questions, if there are several."
>
> Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."
>
> In my view, a judgment is a judicial determination or decision of a Court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the Plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because, when neither party attends Court on the day fixed for hearing, after the suit has been called on for hearing outside the Court, the Court May dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the Plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a Plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a Plaintiff from applying for the dismissal to be set aside under Rule 8."

25. It is clear that a dismissal of a case is similar to a judgement and therefore this application falls squarely under order 9 rule 9 a). As per order 9 rule 9 the correct procedure to be followed in case of a dismissed suit was to seek leave to come on record, then file and serve the notice of change of Advocates and then file the application to stay execution the orders of the Court pending Appeal. In the present case the Applicant's Counsel filed a notice of change of Advocates without leave to come on record. This clearly offends the express provisions of Order 9 Rule 9. The application for leave to come on record having been filed much later than the one for seeking to set aside the orders cannot be heard together

as per order 9 rule 10. The procedure set out above is mandatory and thus cannot be termed as a mere technicality.

26. The provision of Article 50 (2)(b) of *the Constitution* protects the rights of an accused person to choose and be represented by an Advocate. Order 9 does not impede the right of a party to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of Advocate should comply with the rules. Chaos would reign if parties can change Advocates at will without notifying the Court and the other parties. I have noted that the Applicant did not comply with order 9 rule 5 as well. There is no evidence of service to the former Advocate of the change of Advocates filed on record.

27. Consequently, the Notice of Change of Advocate together with the Notice of Motion application dated 27th May, 2024 are struck out with costs to the 1st and 2nd Respondents. Having struck out the Application I can not proceed to examine the other issues in it.

ISSUE No. c). Who bears the costs of the Notice of Motion application dated 27th May, 2024?

28. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri v Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

29. In the present case, the Honourable Court elects to award the 1st and 2nd Defendants/Respondents the costs.

VI. Conclusion and Disposition

30. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following: -

    a. That the Notice of Motion application dated 27th May, 2024 is hereby struck out for having been filed by an Advocate who is in contravention with Order 9 Rule 9 of the *Civil Procedure Act*.

    b. That the 1st and 2nd Defendant/ Respondents shall have the costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH THE MISCROFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....30TH ..... DAY OF .....OCTOBER..... 2024.

HON. MR. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

a. M/s. Firdaus Mbula – the Court Assistant.

b. Mr. Osoro Advocate for the Plaintiff/Applicant.

c. Mr. Jengo Advocates for the 1st & 2nd Defendants/Respondents.