



**Nation Media Group Limited v Nyawiri (Civil Appeal E065 of 2022)
[2024] KEHC 3129 (KLR) (27 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E065 OF 2022
RE ABURILI, J
MARCH 27, 2024**

BETWEEN

NATION MEDIA GROUP LIMITED APPELLANT

AND

CARILUS OSERO NYAWIRI RESPONDENT

(An appeal arising out of the Ruling of the Honourable K. Cheruiyot in the Chief Magistrate's Court at Kisumu delivered on the 10th June 2022 in Kisumu CMCC No. 266 of 2019)

JUDGMENT

Introduction

1. The appellant herein, Nation Media Group Limited was the defendant in the trial court. Vide an application dated 22nd October 2021, it sought to introduce another list of witnesses and their entire statements. The respondent Carilus Osero Nyawiri, who was the plaintiff in the said suit raised an objection on the grounds that the said application was res judicata an earlier application made by the same appellant on the 23.3.2021.
2. The trial court considered the application and in its ruling which is impugned by this appeal, sustained the objection and disallowed the application on the grounds that it was res judicata the earlier application which was made orally and dismissed. Aggrieved by the said ruling, the appellant filed this appeal vide its memorandum of appeal dated 20th June 2022 raising the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and in fact and ended up misdirecting himself as to the proper principles applicable in production of documents and in particular, by sustaining the respondent's objection to production of the appellant's further list of documents.
 - b. That the learned trial magistrate erred by failing to appreciate that the appellant had come across new and crucial information.



- c. That the learned trial magistrate erred and misdirected himself as to the proper principles applicable for production of documents by watering down crucial evidence by the appellant when he ruled out the filing of the further list of documents.
 - d. That the learned trial magistrate misdirected himself by entertaining extraneous consideration and in particular by declining to produce the new crucial evidence.
 - e. That the learned trial magistrate erred and misdirected himself by failing to consider the exceptions to the rule of production of documents under Section 35 of the Evidence Act Cap 80 Laws of Kenya.
 - f. That the learned trial magistrate failed to fairly apply justice and fairness during hearing and production of new crucial evidence.
 - g. That the learned trial magistrate gave undue regard to technicalities thereby dismissing the appellant's application contrary to the dictates of law, in particular Article 159 of the Constitution of Kenya 2010.
3. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

4. The appellant submitted that it is a cardinal principle of natural justice that no one should be condemned unheard as was held in the case of Kiai Mbaki & 2 Others v Gichubi Macharia & Another [2005] eKLR and that while courts are strict on the duty of parties to comply with the provisions of Order 11, they are cognizant of the need for a level playing field where the parties can fully ventilate their cases, and therefore, where it is deemed necessary and in the interest of justice, will permit the filing of documents out of time. The appellant submitted that Order 11 does not therefore lock out evidence arising during the course of the trial.
5. It was submitted that the contemplated new evidence was not substantial and certainly did not involve massive additional evidence that may make it difficult for the respondent to respond effectively. The appellant submitted that the said evidence was a one-page letter that the respondent could respond to without having to adduce additional evidence and was thus not of a nature that would fundamentally alter the character of the case to one that the respondent could not have contemplated when presenting his evidence.
6. The appellant submitted that no prejudice will be occasioned to the respondent if leave to file a further list of documents and witnesses was granted. Further reliance was placed on the case of Leonard Munyua Mbugua & Another v Equity Bank Limited [2020] eKLR, where the plaintiffs had closed their case and argued that allowing the defendant's witness statement would cause great prejudice to the plaintiff's case but the court went on to grant the plaintiffs the opportunity to recall their witness or present further documents should they deem it necessary, upon receiving the defendant's witness statement.
7. The appellant further relied on the case of Hangover Kaakwacha Hotel Limited v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel [2022] eKLR where this court stated inter alia that "...even under Order 18 Rule 10 of the Civil Procedure Rules, the court may allow a party to recall any witness at any stage of the proceedings. In addition, Section 146 of the Evidence Act provides that the court may permit a witness to be recalled either for further evidence - in chief or for further cross examination and if it does so, the parties have the right of further cross examination respectively."



8. It was submitted that section 35 of the *Evidence Act* laid down exceptions to the rules of production of documents which are pertinent to this application which exceptions the trial magistrate failed to consider and that in so doing, misdirected himself.
9. The appellant submitted that there was an exception to the doctrine of res judicata as enunciated by the Supreme Court in the case of *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* (Petition No. 17 of 2015) [2021] eKLR where the court stated inter alia that exceptions to the doctrine of res judicata should be permissible where there was real potential for substantial injustice if a constitutional matter was not heard on its merits, after examining the entirety of the circumstances.
10. The appellant further relied on the case in Petition (Application) No. 7 Of 2017 Between Patrick Thoithi Kanyuira and Kenya Airports Authority where the Supreme Court cited its earlier ruling in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR where it expanded the three-fold test of the English Court of Appeal case of *Ladd v Marshall* [1954] 1 WLR 1489 for granting leave to adduce fresh evidence in appellate courts in matters in which judgment had already been rendered.
11. It was submitted that the application for leave to put in a further list of documents and witnesses was made as soon as the additional/new evidence was received on 15th September 2021, after the close of the plaintiff's case and that the appellant showed that all reasonable efforts were applied in good time to obtain and/or confirm the evidence sought to be produced, and the same was not within the knowledge of the appellant at the time of the suit.
12. The appellant submitted that Article 159 (2) (d) of the *Constitution* of Kenya provides that one of the principles that the courts and tribunals must be guided by in exercising judicial authority, is the principle that justice shall be administered without undue regard to procedural technicalities as was held in the cases of *Kelili Ole Kuna v Jonathan Ole Ngouwa* [2004] eKLR and by the Supreme Court in the case of Patrick Thoithi Kanyuira and Kenya Airports Authority (supra).

The Respondent's Submissions

13. On behalf of the Respondent, it was submitted that the prayers sought by the appellant on the face of the application which led to this appeal were res judicata as the same issues were up for determination in the application earlier on considered by the trial court and determined vide the ruling issued on the 25th March 2021.
14. Reliance was placed on section 7 of the *Civil Procedure Act* that provides for the doctrine of res judicata as well as the Court of Appeal Case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR where the court held inter alia that:

“the doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being hounded by issues and suits that have already been determined by a competent court.”

Analysis and Determination

15. This being a first appeal, this court is under a duty as stipulated in section 78 of the *Civil Procedure Act*, to re-evaluate and re assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of



the witnesses and hearing their evidence first hand. In [Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates](#) [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

16. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in [Mkubee v Nyamuro](#) [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that:

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

17. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, it is apparent that this appeal turns on the issue of whether the trial court erred in dismissing the appellant’s application dated 22nd October 2021 on the grounds that the same violated the doctrine of *res judicata*.

18. Section 7 of the [Civil Procedure Act](#), 2010 provides:

“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.”

19. In the case of [Christopher Kenyariri v Salama Beach](#) (2017) eKLR, the court clearly stated the ingredients to be satisfied when determining *res judicata* thus: -

“...the following elements must be satisfied...in conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit;
- b. Former suit between same parties or parties under whom they or any of them claim
- c. Those parties are litigating under the same title
- d. The issue was heard and finally determined.
- e. The court was competent to try the subsequent suit in which the suit is raised.”

20. Additionally, it is trite that the doctrine of *res judicata* similarly applies to applications. I will now turn to consider the two applications presented by the appellant before the trial court, to establish whether the doctrine of *res judicata* applies and whether that doctrine was violated as contended by the respondent herein.

21. On the 23.3.2021, at the close of the plaintiff’s case, the defendant who is the appellant herein made an oral application for witness summons to the Chairman Judicial Service Commission, the Chief Executive Officer EACC, the Chief Registrar of the Judiciary and the Secretary of Kenya Magistrates



- and Judges Association as witnesses to tender evidence on the strength of various letters authored by them and or that were addressed to them.
22. The respondent's counsel raised an objection to the application saying that at the filing of the defence and other pleadings, pre-trial took place and the pleadings closed and that for the same to be raised at the defense stage would amount to a breach of Order 11 of the Civil Procedure Rules.
 23. The trial court in its ruling delivered on the 25th March 2021 upheld the objection by the respondent stating that the appellant's application was in violation of Order 11 of the Civil Procedure Rules on pretrial procedures.
 24. Subsequently, the appellant herein filed an application dated 22nd October 2021, seeking to introduce another list of witnesses and their entire statements. In fact, the appellant sought to introduce the same witnesses and witness statements that it had sought to introduce and for the witness summons to issue, vide its counsel's oral application made on the 23rd March 2021.
 25. It is clear that the appellant's application dated 22nd October 2021 involved the same issues and parties that were present in its oral application made on the 23rd March 2021 that had been determined by a court of competent jurisdiction. That being the case, the appellant cannot rely on Article 159 of the Constitution on procedural technicalities since it had the opportunity to seek leave and appeal against the earlier ruling which declined its oral application.
 26. The Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR held that:

“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.”
 27. The action of the appellant in filing the application dated 22nd October 2021 was in my view an abuse of the court process. If at all the appellant was dissatisfied by the trial court's ruling rendered on the 25th March 2021, then it had the option of seeking leave to pursue an appeal. Litigation must come to an end. The rule of res judicata is meant to counter the all too human propensity to keep trying until something gives in.
 28. In the circumstances I find and hold that the trial court did not err in declining to grant the orders sought and in finding that the latter application was resjudicata the earlier application. I uphold the trial court's finding that the appellant's motion dated 22nd October 2021 violated the doctrine of *res judicata*.
 29. Accordingly, I find this appeal not merited. It is hereby dismissed with costs of Kshs 30,000 to be paid by the appellant to the respondent within 30 days of today and in default, execution to issue.
 30. Save for costs as assessed, this file is closed and the lower court file together with copy of this judgment to be returned forthwith.
 31. I so order.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

