**Ngirabatware v Constantin (Civil Case 714 of 2010)**
**[2024] KEHC 3865 (KLR) (Commercial and Tax) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3865 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL CASE 714 OF 2010**

**JWW MONG'ARE, J**

**APRIL 22, 2024**

**BETWEEN**

**FRANCOIS NGIRABATWARE ..... PLAINTIFF**

**AND**

**NDIKUMANA CONSTANTIN ..... DEFENDANT**

## JUDGMENT

1. The Plaintiff instituted this suit through a plaint dated 27th October 2010, seeking judgment against the Defendant for:-

    a. Kshs. 9,800,000/- being the balance due on the agreed purchase price and interest thereon.

    b. Kshs. 7,092,800/- special damage being expenses incurred by reason of the breach of contract.

    c. In addition, and/ or in the alternative to reliefs (a) and (b) specific performance of the contract by way of delivery and surrender of all the trucks and trailers the subject matter of the contract and/or payment of the current market value of the said vehicles.

    d. General damages for loss of use and loss of business for the said vehicles for a period or such other reasonable period that the court may determine.

    e. General damages for breach of contract.

    f. Costs of this suit.

2. The Plaintiff's case is that on 1st July 2000, the Plaintiff entered into an agreement with the Defendant for the sale and purchase of 10 trucks and trailers registration numbers KAH 912Q-ZB6308, KAH 917Q-ZB6309, KAH 921Q-ZB6310, KAK615V-ZB7472, KAK308Z-

ZB7467, KV9072B-KN1067M, KV546C-KV5599C, KV1621D-KV9072B, KV8112C-KV8266C, KV7291C-KV7292CUS at the price of $560,000.

3. The salient terms of the agreement were that the sale transaction would be on credit basis spread over a period of 24 months; that the monthly instalments would be $23,333 payable quarterly per annum at a rate of $70,000; that every six months, the seller would monitor any breach of contract and would repossess all trucks and trailers without notice if the Defendant failed in his obligations and that in case of repossession of the 10 trucks and trailers, the amounts paid in instalments would be forfeited and treated as depreciation fee arising from their use and that the transfers would be effected upon completion of payment in full.

4. In breach of the agreed terms and mode of payment, the Defendant only paid a portion of the purchase price in irregular and inconsistent instalments, over a period of about 7 years, leaving a balance of $120,803.

5. Subsequently, the Defendant fraudulently disposed of all the trucks and trailers and transferred them to other persons and as a result, the Plaintiff has been unable to exercise his right to repossess and sell the securities to recover the said unpaid balances and has therefore suffered losses and damages. The Plaintiff further stated that he had in the process of following up this claim incurred enormous expenses in traveling at least four times a year from Belgium, where he is resident, to Nairobi since 2003 to press for payment and/or repossession of the trucks.

**Defence**

6. The Defendant filed a defence dated 19th October 2016, pursuant to the ruling and orders of 13th October 2016, through which he denied the Plaintiff's claim. The Defendant's case is that together with his wife Bizabigomba Mopeste and their company Ndimo Limited purchased 10 trucks and trailers from the Plaintiff in 2000 at $560,000. By 2005, they were unable to secure delivery of all the trucks and noticed that some of them were not registered in the Plaintiff's name and that some had been vandalized in the yard where they were kept. That they therefore renegotiated the total price of $460,000 which they fully settled by 2008 and signed a transfer agreement.

7. The Defendant argued that on 10th December 2008, the Plaintiff instructed Keysian Auctioneers who attached one trailer, KV 8266C and the same was later taken to Embakasi Police Station. This led to the filing of HCCC 604 of 2008 - Ndimo Limited And Bizabigomba Mopeste v Francis Ngirabatware and Muganda Wasulwa T/a Keysian Auctioneers on 19th December 2009, by his wife and co-director Bizabigomba Modeste against the Plaintiff. On 10th August 2009, the parties entered into a consent which was filed in Court on 13th August 2009, thereafter the Plaintiff acknowledged full payment and the case was marked as settled. Hence, the Defendant argued that, the plaint raises matters and issues that having been fully determined and settled by the court and they are therefore res judicata.

8. The matter having been fully determined, the Plaintiff thereafter executed Motor Vehicle Transfer Forms in favour of Ndimo Ltd for the 9 out of 10 vehicles and that they were transferred on 7th, 12th and 21st October 2009. Motor Vehicle KV 8266C disappeared from the Police Station and has not been traced to date.

**Evidence**

9. The matter was heard by Hon. Tuiyott J. (as he then was) on 4th November 2019. The Plaintiff and Defendant both testified on their own behalf. The Plaintiff adopted his witness statement dated 24th November 2018, as his evidence in chief and produced his bundle of documents of the same date as his evidence and the documents were thereafter marked as Plaintiff Exhibit 1.

10. The Plaintiff stated that he and the Defendant had entered into a supplementary agreement of 28th February 2005 wherein they agreed on a payment plan for the outstanding balance at the time. He stated that the suit in HCCC no. 604 of 2008;- Ndimo Limited And Bizabigomba Mopeste v Francis Ngirabatware And Muganda Wasulwa T/a Keysian Auctioneers was instituted in 2008 after he moved to repossess the 10 vehicles due to the non-payment of the balance of the purchase price.

11. Upon cross-examination, the Plaintiff conceded that HCCC No. 604 of 2008 involved the 10 vehicles that he had sold to the Defendant and that the suit was settled by the consent of 10th August 2009. However, the Plaintiff denied transferring any of the vehicles. He clarified that he had only given the log books to the Defendant when he sold them to enable him to use the vehicles within and outside Kenya. The Plaintiff also mentioned that one of the vehicles had already been transferred before the consent was recorded.

12. The Plaintiff further disclosed that they entered into the consent so that he would not pass a criminal complaint for fraud against them for the transfer of that vehicle and that the vehicle was released. He then intimated that he filed this suit because the obligation to pay him the balance as agreed through the consent was not honoured. He also asserted that he did not transfer the other 9 vehicles after the consent was recorded.

13. In re-examination, the Plaintiff revealed that he did not have a contractual relationship with Ndimo Limited And Bizabigomba Mopeste and that he did not know the directors and shareholders of Ndimo Limited. He reiterated that he did not know that the vehicles had been transferred and clarified that the settlement in the consent was in respect to the vehicles which had been released by virtue of a court order.

14. The Defendant adopted his witness statement dated 19th October 2016 as his evidence in chief and produced his bundle of documents and supplementary bundle of documents dated 19th October 2016 and 26th November 2019 as exhibits.

15. The Defendant stated that the Plaintiff executed the transfer forms for the vehicles after the consent was recorded. He also stated that the 9 vehicles were transferred to his company Ndimo Limited but the vehicle that disappeared at the police station was not transferred.

16. On cross-examination, though he could not recall when the vehicles were transferred and whether any of the vehicles were transferred to his wife as he had over 30 vehicles, he stated that the Plaintiff gave his wife the transfer forms after the consent was recorded. He denied that the vehicles had already been transferred to Ndimo Ltd and his wife at the time HCCC No. 604 of 2008 was filed. However, he stated that did not follow up on the transfer himself as at the time, he was involved in politics in Burundi and that his wife was managing the vehicles and she was the one who decided to go to court.

17. The Plaintiff and the Defendant filed their written submissions dated 17th October 2023 and 1st November 2023, respectively.

**Analysis and Determination**

18. I have carefully considered the pleadings filed in the matter herein by the parties and analysed the evidence tendered in court by the parties and their witnesses and the rival submissions filed together with the list and bundle of authorities that were relied on by the respective parties and I note that the issues for determination are:-

    1. Whether the suit is statute-barred under Section 4 (1) of the *Limitation of Actions Act*.

2. Whether the suit is res judicata

3. Whether the Plaintiff has proven that the Defendant breached the agreement to purchase the 10 trucks and trailers and fraudulently transferred them and whether he is entitled to the prayers sought.

19. The issue of statute bar under the limitation of Action Act and re judicata are issues that touch on the jurisdiction of this court to here and determine the matter before it. It is instructive to note if the court finds that either of the two issues has been successfully established, then this court must down its tools first for want of jurisdiction. As has been established by the court in very many decisions previously, jurisdiction, being the power conferred on the court either by statute or the *constitution* to make a determination on matters before it, must be determined at the earliest opportunity, lest the court proceeds in vain. It is therefore important to analyse the two issues first before proceeding to consider the substantive issues for which the parties have come to court to settle. The court will therefore consider these two issues first and make a determination on the same.

20. As to "whether the suit is time barred under the *Limitation of Actions Act*," I note that in its submissions the Defendant advanced the argument that the Plaintiff's contractual claim is time barred under Section 4 (1) of the *Limitation of Actions Act*, which provides that: -

> 4. Actions of contract and tort and certain other actions
>
> (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
>
> (a) actions founded on contract;
>
> (b) actions to enforce a recognizance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
>
> (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

21. The question under section 4(1) of the *Limitation of Actions Act* is when does the cause of action accrue? The Defendant argued that the Plaintiff filed this suit 8 years and 3 months after the breach arose on 30th June 2002, which was the completion date as per Clause 2 of the Agreement. While the Plaintiff claimed that the agreement subsisted until he received $30,000 on 27th October 2008 from the Defendant.

22. In *B Mathayo Obonyo v South Nyanza Sugar Company Ltd* [2019] eKLR, the Court observed that: -

> " According to *Black's Law Dictionary* (10th Edition) the word "accrue" means "to come into existence as an enforceable claim or right. The right to sue for breach of contract arises when one of the parties fails to meet its obligations under the contract. This is when the cause of action accrues and when, in terms of section 4(1) (a) of the *Limitation of Actions Act*, time begins to run."

23. Guided by the above, I am inclined to find that the cause of action accrued on 27th October 2008 or thereabout, since the actions of both parties kept the matter alive way past the contractual completion period under the agreement. By the actions of the parties, the contract was extended impliedly past the completion date. Therefore, it is my considered view that the suit was filed within the six-year statutory window and is therefore not statute barred.

24. Moving on to the second issue of "whether the present suit is res judicata" I note that the Defendant had earlier filed a motion dated 3rd February 2017 seeking the striking out or dismissal of the suit on, among others, the ground of res judicata. However, the Court deferred the issue for determination after trial due to the lack of clarity as to whether the breach of contract pleaded in this suit was a matter that ought to have been raised in HCCC No. 604 of 2008 Ndimo Limited And Bizabigomba Mopeste v Francis Ngirabatware, Muganda Wasulwa T/a Keysian Auctioneers. The Court made the following pertinent observations: -

> " 22. The gist of the present suit in which the disputants are Ngirabatware and Ndikumana is that Ndikumana breached the contract entered on 1st July 2000 and in it Ngirabatware seeks inter alia, payment of the balance of the purchase price and damages for breach of the contract. It has to be remembered that Ndikumana who was privy to the Agreement of 1st July 2000 was not a Party in HCCC No. 604 of 2008. And it has not been said that Ndikumana was litigating through the Plaintiff's therein.
>
> 23. In addition, while HCCC No. 604 of 2008 apparently settled the issue of ownership of the vehicles/trailers, it is not clear to this Court that the settlement resolved all issues that Ngirabatware feels were outstanding between him and Ndikumana. It is not insignificant for the issue before the Court, that Ndikumana, and not the Plaintiffs in HCCC No. 604 of 2008 was privy to the contract upon which Ngirabatware launched his claim herein and that Ndikumana was not a Party therein.
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> 24. This Court is minded that if it were to uphold the plea of Res judicata, then it may very well be the end of the road for the Plaintiffs' claim. Caution is urged in the circumstances. There is in my view, a haze, as to whether the breach of contract pleaded herein was a matter that ought to have been raised in HCCC No. 604 of 2008. In the unclear circumstances, this Court prefers to postpone the resolution of the matter to a deliberative session, the trial of this case."

25. The statutory underpinning of the doctrine of res judicata is found in Section 7 of the *Civil Procedure Act*, which provides as follows: -

> "
>
> " 7. *Res judicata*
> 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."

26. Pertinent to this suit, Explanation (4) under the said Section 7 provides that:-

> " Any matter which might and ought to have been made 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."

27. In its ruling of 1st December 2017, the Court observed that the trucks and trailers that formed the subject matter of HCCC No. 604 of 2008, are the subject matter of this suit; that the 2nd Plaintiff and the Defendant herein are the owners of the 1st Plaintiff; both the Plaintiffs in that suit and the Plaintiff herein were in consensus that the agreement dated 1st July 2000 was the basis upon which the Plaintiff sold the trucks/ trailers to the Defendant; that however, the Plaintiffs' claim in HCCC No. 604 of 2008 was that the Plaintiff herein was wrongfully claiming the trucks and trailers yet the Plaintiffs had sold them to the Defendant herein; that HCCC No. 604 of 2008 was marked as settled vide a consent order of 10th August 2009, the context and specific terms of which were unclear; that the evidence was that thereafter the ownership of the vehicles was transferred to the 1st Plaintiff and that it could be inferred that the controversy surrounding the ownership of the trucks/ trailers had been settled.

28. Accordingly, the issue that flows for determination is whether the breach of contract pleaded in this suit was a matter that ought to have been raised in HCCC No. 604 of 2008.

29. The Plaintiff argued that the cause of action and issues canvassed in HCCC No. 604 of 2008 do not relate to the issue in this suit; that all the elements of res judicata have not been established; that there has never before, in these proceedings been any application predicated upon the issue of breach of contract and that the Plaintiffs in HCCC No. 604 of 2008 were not parties to the sale agreement dated 1st July 2000.

30. On the other hand, the Defendant argued that the Plaintiff acknowledged in paragraphs 4-6 of his submissions that the issue of non-payment was the subject of HCCC No. 604 of 2008 and that he had the option of filing a counterclaim for any unpaid balances of the purchase price in that suit and not file a fresh suit. The Defendant further argued that in the absence of any evidence that the transfers were done irregularly, the duly transferred log books of the trucks and trailers produced were evidence that they were transferred upon completion of payment of the purchase price in conformity with Clause 7 of the Agreement dated 1st July 2000 and Section 8 of the *Traffic Act*-Cap 403 of the Laws of Kenya.

31. It is common ground that in HCCC No. 604 of 2008 was filed after the Plaintiff attempted to repossess the vehicles that are the subject of this suit. It is also not disputed that the agreement dated 1st July 2000 was the basis upon which the Plaintiff sold the subject vehicles to the Defendant 10th August 2009. The Plaintiffs' claim in HCCC No. 604 of 2008 was that the Plaintiff herein was wrongfully claiming the trucks and trailers yet the Plaintiffs had sold them to the Defendant herein. At trial, the Plaintiff confirmed that he filed this suit because the obligation to pay him the balance as agreed through the consent was not honoured.

32. Although the Plaintiff contended that the Plaintiffs in HCCC No. 604 of 2008 were not parties to the sale agreement dated 1st July 2000, he admitted that he entered into the consent of 10th August 2009 with them. From the record, the consent was signed by him personally after his erstwhile advocates withdrew. As regards the transfer of the vehicles, when the Plaintiff was recalled before this Court on 27th September 2023, he admitted that only two of the vehicles were initially registered in his name while the other 8 vehicles were registered in the names of his wife, Claudine Twagirirwa and their company, Zadok Company Limited. He also admitted that his wife consented to the transfer of the vehicles to the Defendant.

33. To my mind, it is clear that the Plaintiff already raised the issue of payment of the balance of the outstanding sum by the Defendant in HCCC No. 604 of 2008. From the trial, that is what formed the basis of the consent of 10th August 2009. Had he not been paid as agreed in that consent, the Plaintiff ought to have applied to set aside the consent and not institute a fresh suit over the same subject matter.

34. The Court of Appeal in *Flora M. Wasike V Destimo Wamboko* [1988] eKLR stated that:-

> " It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons"

35. What's more, in *Edwin Thuo v Attorney General & Another, Nairobi Petition No. 212 of 2012*, the Court observed as follows:-

> " Courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action to seek the same remedy the case of before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and Others [2001] EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..."

36. In the end, therefore, the Court finds that this suit is res judicata and therefore by operation of the law as espoused under section 7 of the *Civil Procedure Act*, this court lacks the jurisdiction to entertain the matter any further and will therefore not consider the substantive issues identified by the court for determination. The suit is hereby dismissed with costs to the Defendant.

It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 22nd DAY of APRIL, 2024**

.....

**J.W.W. MONG'ARE**

**JUDGE**

**In the Presence of:-**

Mr. Ondari holding for Bosire Nyamori for the Plaintiff.

Mr. Ongocho holding brief for K'opere for the Defendant.

Amos - Court Assistant