Case Number:	Civil Appeal 190 of 2015
Date Delivered:	25 Oct 2019
Case Class:	Civil
Court:	Court of Appeal at Nairobi
Case Action:	Judgment
Judge:	Philip Nyamu Waki, Mohammed Abdullahi Warsame, Fatuma sichale
Citation:	Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu [2019] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & SICHALE, JJ.A)

CIVIL APPEAL NO. 190 OF 2015

BETWEEN

KENYA TRYPANOSOMIASIS

RESEARCH INSTITUTE.....APPELLANT

VERSUS

ANTHONY KABIMBA GUSINJILU

(Suing for and on behalf of 112 plaintiffs).....RESPONDENT

(Being an Appeal from the Ruling and order of the High Court of Kenya at Nairobi (Onyancha, J.) dated 22nd September, 2014

in

HCCC No. 781 of 2003)

****

JUDGEMENT OF THE COURT

In the year 2002, the appellant, **Kenya Trypanosomiasis Research Institute**, notified its employees of an early retirement scheme where they would be entitled to terminal benefits. The Appellant calculated the retirement package and benefits but some of the retirees were allegedly underpaid and deprived of some of their entitlements.

Consequently, the deceased respondent **(Anthony Kabimba Gusinjilu)** filed a representative suit in the High Court on his behalf and on behalf of 112 other retirees, as against the Respondent seeking payment of the correct retirement benefits due to each retiree.

On 19th December 2003, the High Court, by consent of the parties, entered judgment on admission against the appellant; "*for the payment of Trypension dues and with the Insurance Company of East Africa Ltd forthwith to the Plaintiffs*". The matter was then fixed for assessment of damages.

On 9th March 2006, the appellant's counsel made an application before the court to cease acting on the grounds that his client had been dissolved and its assets taken over by Kenya Agricultural & Livestock Research (KARI), whom they had served with the requisite notice. The Court allowed the application.

Two years later, the matter proceeded *ex parte* for formal proof and judgment was entered on 10th July, 2009 in favour of the retirees for the sum of Kshs. 41,987,120.80.

On discovery of this judgement, the appellant filed an application dated 16th December 2009, seeking orders to stay further proceedings consequential to the judgment pending the determination of the application and to set aside the ex-parte proceedings and the judgment. The grounds adduced in support of the application were: failure of their previous advocates to serve them with the application to cease acting; failure to be served with a hearing notice when the matter came up for hearing; and that the judgment was obtained without them having an opportunity to defend themselves.

As the said application was pending, the appellant filed another application dated 2nd August 2010, seeking to review and set aside the judgment dated 10th July 2009, and to strike out the entire suit. The latter application was heard first by consent, wherein the same was dismissed by Hon. Justice Waweru as lacking in merit.

Subsequently, the appellant set down for hearing the earlier application dated 16th December 2009. The respondent (represented by the 1st plaintiff, Simon Onkoba) opposed the application and filed a Replying Affidavit and a Notice of Preliminary Objection dated 31st July 2013 on the grounds that the application is *res judicata*; and that the application is bad for want of the deponent's authority to depose an affidavit on behalf of the corporation as required under **Order 9 rule 2 (c)** of the Civil Procedure Rules.

After taking into consideration the submissions made on behalf of each party, the learned Judge (Onyancha, J.) in a ruling dated 22nd September, 2014, upheld the preliminary objections and struck out the appellant's application dated 16th December, 2009. In doing so the Court stated as follows:

"***It is clear from the comparison of the prayers in the application of 2nd August, 2010 determined by Waweru J, and those of the application of 16th December, 2009 now before me, that the prayer for the setting aside and/or reviewing of the judgment of 10th July, 2010, is in both applications. The issue having been considered and fully decided in the application of 2nd August, 2010, it should not be allowed to be again canvassed and determined by this court, as that would be breach of the principle of Res judicata…The Plaintiffs also sought to have the application dismissed on the principle of estoppel which operates in a similar way as that of Res Judicata. This court tends to agree with them and would dismiss the said application on this principle also***"

With regards to the objection grounded on the incompetency of the supporting affidavit, the learned Judge stated:

"I observe that the said affidavit was sworn by an Administrative officer, and not a Director or Managing Director or Secretary as authorised by the Companies Act. I would also agree with the Plaintiffs in view of the fact that no other explanation as to how the deponent got authority was recorded"

Aggrieved by the decision above, the appellant filed the present appeal based on the grounds that the learned Judge had erred in law and fact by:

a) Misdirecting himself on the doctrine of res judicata and estoppel

b) Failing to appreciate that the appellant had been condemned unheard

c) Misdirecting himself by determining that the Administrative Officer had no authority to swear an affidavit on behalf of the appellant

At the hearing of the appeal, **Mr. Burugu** Advocate, appeared for the Appellant while **Mr. Simon Onkoba** appeared in person on his behalf and on behalf of 112 others. Both parties relied on their written submissions.

Mr. Burugu submitted that a similarity of prayer could not be the basis of an objection under the doctrine of *res judicata* and that that the two applications raised two distinct issues. The application dated 16th December 2009 was brought under **Order IXB Rule 8** of the Civil Procedure Rules and **Section 3A** of the Civil Procedure Act. It sought to set aside the *ex-parte* proceedings and the judgment/decree dated 10th July 2009, on the grounds that the Appellant was not served by the previous advocate with the application to cease acting in the matter; that the appellant had not been served with a hearing notice when the matter came up for hearing and consequently, the appellant had been denied an opportunity to be heard and defend the suit.

On the other hand, the second application dated 2nd August 2010, sought to review and set aside the judgment/decree dated 10th July 2009 on the grounds that: having learnt that the 1st plaintiff had passed away on 11th February 2008, the suit had abated at the time of hearing and by the time judgment was entered on 10th July 2009. Mr. Burugu further argued that there was non-compliance with the mandatory provisions of **Order 1 Rule 8(2) and (3)** of the Civil Procedure Rules.

The appellant lastly argued that the question whether or not the administrative office of the Appellant had authority to swear the affidavit, was a question of fact which could not be dealt with by way of a preliminary objection.

Supporting the Learned Judge's decision dated 22nd September 2014, the respondent argued that allowing the appellant to fall back to the application dated 16th December, 2009 would be tantamount to allowing them to have a second bite of the cherry. Furthermore, the respondent argued that the appellant's deliberate refusal to appeal the ruling by Hon. Mr. Justice Osiemo which allowed the appellant's previous advocate to cease acting clearly points to the fact that they were properly served by counsel.

The respondent submitted that litigation must come to an end and emphasized that while the appellant endlessly relitigated the suit, the retirees were dying without benefiting from the award in the judgment. Reliance was placed on the decision in ***Independent Electoral & Boundaries Commission vs. Maina Kiai & 5 Others [2017] eKLR,*** where this court stated:

"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."

We have considered the record, written submissions on record and the law. The doctrine of *res judicata* is defined under **Section 7** of the Civil Procedure Act. This court in ***Civil Appeal No. 107 of 2010, Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited [2017]*** enunciated the principles

that must be present before a suit or an issue is deemed *res judicata* as follows:

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

With the above principles in mind, the first question we must address is whether the appellant's application dated 16th December, 2009 was *res-judicata*. The application in question was anchored on the grounds that they were condemned unheard, that their previous advocate did not serve them with the application to cease acting and that they were not served with a hearing notice when the matter came up for hearing.

Without discussing the merits of the application, the pertinent question is whether these grounds were subject to determination by the court in a previous application"

In our view, the application dated 2nd August, 2010 was a review application seeking to set aside the Court's judgment dated 10th July, 2009 and to strike out the entire suit on the grounds that the suit had abated by operation of the law and that the judgment was in favour of persons who are not parties to the suit.

In contrast, the core issue raised in the application dated 16th December,2009 is whether or not the Appellant was condemned unheard by virtue of the previous advocate not serving them with the notice to cease acting and not being served with a hearing notice when the matter came up for formal proof.

In the instant case, the issue of failure to be heard due to lack of service had not yet been duly adjudicated upon and the issue was therefore never resolved by the court. The application was simply suspended in limbo awaiting determination. The fact that both applications sought the same prayer "…*be pleased to review and set aside its judgment/decree dated 10th July, 2009*" does not mean that the issues raised are the same. We therefore disagree with the findings of the learned Judge that: "*that the prayer for the setting aside and/or reviewing of the judgment of 10th July, 2010, is in both applications. The issue having been considered and fully decided in the application of 2nd August, 2010, it should not be allowed to be again canvassed and determined by this court, as that would be breach of the principle of Res judicata"*

As was stated in ***Henderson vs. Henderson (1843) 67 ER 313***, *res judicata* applies not only to points upon which the court was actually required by 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 issue raised by the appellant was worthy of litigation and determination. Moreover, a perusal of the ruling on the application dated 2nd August, 2010 by

Waweru, J. clearly shows that the learned Judge did not make any definitive determination on the same. Consequently, the inevitable conclusion is that the doctrine of res judicata does not apply and has no relevance to the dispute which is the subject of this appeal.

Another issue that cannot be ignored that is whether the application was rightly before the superior court and whether the deponent in the appellant's supporting affidavit dated 16th December 2009, was authorised to swear the affidavit in question.

Under **Order 9 rule 2 (c)** of the Civil Procedure Rules (2010) the recognized agent of parties by whom such appearances, applications and acts may be made or done are, in respect of a corporation is an officer of the corporation duly authorized under the corporate seal. In the same spirit, **Order 4 Rule 1(4)** provides:

"Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so."

The question we have to determine is; who is a ‘duly authorized’ officer"

This question was answered in ***Makupa Transit Shade Limited & Another vs. Kenya Ports Authority & Another*** ***[2015] eKLR*** as follows:

“In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorized by it. It was therefore sufficient for the deponents to state that “they were duly authorized.” It was then up to the appellants to demonstrate by evidence that they were not so authorized.”

Here is a person, who on oath stated that he is duly authorized and in the absence of evidence to counter or contradict him, it cannot fall for the Judge to rule otherwise. It is obvious that whether or not the deponent was an authorized agent is a matter to be decided on evidence and none has been adduced by the respondent.

In ***Spire Bank Limited vs. Land Registrar & 2 others*** ***[2019] eKLR*** the

court in **discussing Order 4 Rule 1(4) Stated as follows:**

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

Has sufficient evidence been preferred to demonstrate that an unauthorized person took part in the proceedings before the trial court" In our view there was no evidence/material to support such contestations by the respondent.

A preliminary objection by its very nature is founded on law and not fact. The objection must be based on points of law, clearly set out in the pleadings and which by clear implication have the effect of disposing the suit.

A preliminary objection is therefore quite narrow in its scope and cannot raise substantive issues which may have to be determined by the court after perusal and interrogation of evidence. In our view, a preliminary objection cannot be left to the discretion of the court on facts which need to be ascertained.

Having expressed ourselves as herein above, we therefore conclude that the preliminary objection raised in this case lacks merit and is without substance. The right to be heard is a cardinal rule established under the principles of natural justice generally expressed *as audi alteram partem*. This Latin phrase literally translates 'hear the parties in turn' and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means that a party, no matter how seemingly frivolous or inconsequential, must be given a fair hearing. Whether orders sought are similar is certainly not a principle that must be present before a suit or an issue is deemed as *res judicata*. A court must look beyond the face value of the orders sought and keenly ascertain the issues in dispute. This was not done and we think it was a misdirection, in regard to which we must interfere.

The upshot of the above is that we allow the appeal and consequently direct that the application be re-instated for hearing on a

priority basis at the High Court. Each party to bear its own costs.

Dated and delivered at Nairobi this 25th day of October, 2019.

P.N WAKI

……

JUDGE OF APPEAL

M. WARSAME

……...

JUDGE OF APPEAL

F. SICHALE

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR