IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 14 OF 2015

BETWEEN

KUNDAN SINGH

CONSTRUCTION LIMITED.....1ST APPELLANT

KENYA COMMERCIAL BANK LTD.....2ND APPELLANT

AND

TANZANIA NATIONAL

ROADS AGENCY.....RESPONDENT

(Appeal from the ruling and order of the of the High Court of Kenya

at Mombasa (Kasango, J.) delivered on 5th March 2015

in

HCC Case No. 8 of 2010

****

JUDGMENT OF THE COURT

The twists and turns, intrigues and maneuvers that have comprised the proceedings culminating in this appeal, have led the parties herein on an unrelenting journey from the High Court, Milimani, to the High Court in Mombasa, to the Kenya Court of Appeal and abroad to arbitration in Sweden, back to the High Court, Milimani, once again to the High Court in Mombasa, and now back to this Court on Appeal from a ruling against the decision of the High Court Mombasa (Kasango, J.) which determined that the *Mombasa Civil Suit No. 8 of 2010 (the Mombasa suit)* was not *res judicata*.

The dispute between the parties herein revolves around two suits. The first is *Civil Suit 164 of 2009* filed in Nairobi on 12th March 2010 *(the Milimani suit)* which was instituted by the 1st appellant, ***Kundan Singh Construction Limited*** against ***the respondent, Tanzania National Roads Agency*** *(Tanroads)* and ***the 2nd appellant, Kenya Commercial Bank Ltd*** *(the Mombasa suit).*

The other is the suit giving rise to this appeal, namely, *Mombasa Civil Suit No. 8 of 2010* filed in Mombasa by Tanroads against the appellants.

The background to the dispute, as briefly as we can summarise it, is that on 1st October 2007, the 1st appellant entered into a contract for the construction of the Mbeya-Chunya-Makongolosi Road in Tanzania. The construction was slated to cost a sum of Tshs. 27,463,875,000. The 1st appellant received an advance payment of Tshs. 5,492,775,000 from Tanroads, and to secure this payment and ensure that the 1st appellant performed its part of the contract, Tanroads requested the 1st appellant to provide performance guarantees. The appellant obliged and obtained three performance guarantees that were issued by the 2nd respondent in favour of Tanroads. The performance guarantees issued were namely:

1. Performance Guarantee Number GOKE86046077250C dated 1st August 2007 for Tshs. 2,746,387,500 *(the first performance guarantee)*;

2. Advance Payment Guarantee dated 6th September 2007 Number GOKE86046077397C for USD 3,478,145=93 *(the second performance guarantee)*;

3. Advance Payment Guarantee No GOKE860460773398C dated 6th September 2007 for Tshs. 1,098,555,000 *(the third performance guarantee)*.

As fate would have it, construction of the road did not proceed in the manner set out in the contract, and on 29th April 2009, the 1st appellant terminated it, removed all its machinery from the construction site, and dismantled the site project offices. The road construction was eventually contracted out to another contractor to execute to completion.

Upon terminating the contract, the 1st appellant instituted proceedings in the Milimani suit, where it sought interim protective measures from the court while it filed for arbitration in Sweden. As against Tanroads (the 1st Defendant) the prayers were for orders;

"1.THAT leave be granted to serve the Summons and/or the Notice of Summons on the 1st Defendant outside the jurisdiction through the Honourable the Chief Justice and/or the Ministry of Foreign Affairs or any Orders the Court may grant.

2.THAT the Court do grant the 1st Defendant 21 days to Enter Appearance in the suit or such other time as the Court may deem reasonable.

3.THAT an order of permanent injunction restraining the 1st Defendant by its Directors, Officers, or servants or agents or any of them or otherwise howsoever from making any demand for payment to the 2nd Defendant on the BANK PERFORMANCE GUARANTEE NO. GOKE86046077250C for TSHS. 2,746,387,500.00 and or from calling in for the ADVANCE PAYMENT GUARANTEE NO. GOKE86046077397C for USD. 3,478,145.00 and ADVANCE PAYMENT GUARANTEE NO. GOKE86046077398C for TSHS. 1,098,555,000.00 pending the hearing and determination of this suit or further Orders of the Court.

4.THAT the 1st Defendant be permanently restrained from removing, dismantling or in any other way selling, transferring assigning, interfering, repossessing, alienating, removing and/or disposing all that equipment and machinery of the Plaintiff all valued at approximately Kshs. 1,200,000,000.00 (Kenya Shillings One Billion Two Hundred Million only) as enumerated in Schedule A herein pending the hearing and determination of this suit or further orders of the Court.

5.Further and in the alternative, and without prejudice to the above, any damages that may be found to be due to the Plaintiff.

6.A Declaration that the 1st Defendant by its Directors, Officers or servants or agents or any of them cannot in any circumstances of this particular case make unjustified and unreasonable demand on the Bank Performance Guarantee and the Advance payment Bond in breach of the Terms and Conditions of the Contract Agreement.

7.That an order be issued referring the dispute between the parties to Arbitration as provided under the provisions of Sub-Clause 67.1 of the Conditions of Particular Application.

8.Interest at Court rates on the sums and on the special damages sums found to be due to the Plaintiff from the date when such sums ought to be paid until payment in full.

9.Costs of this suit on the Higher Scale."

And as against the 2nd appellant (the 2nd defendant), the prayers were for orders; that

"1.A permanent injunction restraining the 2nd Defendant by its Directors, Officers or servants or agents or any of them or otherwise howsoever from paying to the Defendant on any demand for payment to the BANK PERFORMANCE GUARANTEE No. GOKE86046077250C for TSHS. 2,746,387,500.00 or any other sum and/or from calling in for the ADVANCE PAYMENT GUARANTEE NO. GOKE86046077397C for USD. 3,478,145.00 and ADVANCE PAYMENT GUARANTEE NO. GOKE86046077398C for TSHS. 1,098,555,000.00 or any other sum pending the hearing and determination of this suit or further orders of the Court."

On 1st October 2010 the 1st appellant obtained the interim injunctive relief orders set out in the plaint in the Milimani suit, and it thereafter proceeded to institute arbitration proceedings in Sweden.

On its part, as a consequence of the premature termination of the construction contract, Tanroads turned to the 2nd appellant seeking a refund of the advance sums paid to the 1st appellant, and accordingly called upon it to honour the guarantees. The 2nd appellant declined to pay the guaranteed sums, claiming that two performance guarantees had since lapsed on account of the stay orders issued in the Milimani case, which orders it claimed were applicable to the guarantees and estopped Tanroads from pursuing the payments. Only the third guarantee was left to subsist.

Aggrieved by the 2nd appellant's failure to honour the guarantees, Tanroads instituted the proceedings in the Mombasa suit where it sought the following orders;

> ***"i) A declaration that the 2nd appellant is still bound upon demand by the 1st respondent to honour the terms of the advance payment guarantees and the performance guarantees;***
>
> ***ii) A mandatory order compelling the 2nd appellant to honour the demand by the respondent in respect of the Advance payment guarantee and the performance guarantee;***
>
> ***ii) A declaration that time does not run leading to expiry of a guarantee where there is a court order prohibiting a party from complying or implementing the terms of the guarantee;***
>
> ***iv) An order of rectification of the expiry date of the Advance payment guarantee and the performance guarantee;***
>
> ***v) A mandatory order compelling the 2nd appellant to honour the three demands dated 8th February 2010 in favour of the respondent."***

Subsequently thereto, on 25th July 2012 the arbitration tribunal in Sweden rendered its decision where the 1st appellant was adjudged liable for wrongful termination of the contract. It was condemned to pay various contractual sums, damages for breach of contract, interest and costs. Pursuant to the award, Tanroads filed *Mombasa Miscellaneous Civil Application No. 171 of 2012, Tanzania National Roads Agency vs Kundan Singh Construction Limited* seeking recognition and enforcement of the arbitration award in Kenya. But in an unexpected turn of events, its application was dismissed on 15th August 2014 for reasons that the arbitral award was against public policy with the result that Tanroads was denied the opportunity to enjoy the fruits of its award.

Dissatisfied with the High Court's decision, Tanroads filed *Civil Appeal No. 38 of 2013, Tanzania National Roads Agency vs Kundan Singh Construction Limited* in this Court. On 14th October 2014 the appeal was dismissed for want of jurisdiction. Tanroads has since sought certification to appeal that decision to the Supreme Court, in *Mombasa Court of Appeal Application SUP. 52 of 2015, Tanzania National Roads Agency vs Kundan Singh Construction Limited,* which application is yet to be determined.

With the arbitration award having been rendered, the 1st appellant filed an application dated 28th April 2014 in the Milimani suit, to have the suit considered as finalized. By a court order issued on 4th June 2014, the 1st appellant's *"…Plaint dated 12th March 2009 …"* was *"… marked as spent as the Arbitral Award was published on 25th July 2012."* A further order was issued to the effect that, *" the Court would peruse the pending applications with a view to giving further orders and/or directions on 24th January 2014"*. The further orders of the court were issued on 6th June 2014, which were that, *"…the matter be and is hereby marked as closed."*

The Milimani suit having been concluded to its satisfaction, the 1st appellant turned its attention to the Mombasa suit, where it had filed a Notice of Motion dated 22nd June 2012, seeking to strike out the suit on the grounds which when summarized were that the arbitral award dealt with most of the issues in the suit except the third guarantee; that the issues concerning the first and second performance guarantees were determined, so that what remained to be concluded was the dispute surrounding the third performance guarantee. Further, that the contract was completed by another contractor; that the arbitral award awarded the respondent damages for breach of contract, for the unlawful termination of the contract by the appellant and for its having abandoning the site; that there was no monetary claim to warrant any payment of interest; that in respect of the third guarantee, though the 1st appellant sought for a permanent injunction to restrain Tanroads from making any demand in respect of that guarantee, demand had in any event already been made, and therefore that issue was overtaken by events. It was finally asserted that the dispute surrounding the third guarantee ought to have been resolved in arbitration in Sweden and not by way of a separate suit in the Kenyan courts.

Upon considering the pleadings as well as the parties' submissions, the learned judge *(Kasango, J.*) concluded that the Mombasa case was not *res judicata* because, the Milimani case which has since been finalised was not heard on its merits and on that basis declined to strike out the Mombasa suit. The judge also observed that, once finalized, the stay of execution that had persisted during the life of the Milimani suit had also lapsed. It is this decision that has prompted this appeal.

The appellants were aggrieved by the trial court's decision and filed this appeal, premised on the grounds that the issues raised in the Milimani suit were substantially the same as those of the Mombasa suit; that the learned judge misdirected herself when she failed to adhere to the ruling of Azangalala, J. delivered on 29th July 2010 which found that the issues raised in the two suits were substantially the same; in holding that the Milimani suit was closed by consent of the parties when the suit was marked as spent and was therefore settled in terms of *Arbitration Cause No. V.09/2009* between the 1st appellant and Tanroads; that the learned judge ignored Tanroad's application for recognition and enforcement of an international award in Arbitration Cause No. V.09/2009 in *Mombasa HCCC Misc Application No. 171 of 2012, Tanzania National Roads Agency vs Kundan Singh Limited* and the appeal arising therefore *Mombasa Civil Appeal No. 38 of 2013 Tanzania National Roads Agency vs Kundan Singh Construction Limited* which dealt with the subject arbitral award and therefore had a bearing on the Milimani suit; that the learned judge failed to take into account Tanroads' application dated 22nd June 2012 in the Milimani suit where it admitted that all issues in the dispute were determined by the arbitral award; and by holding that the Mombasa suit was not *res judicata* when all the issues in the two suits were substantially the same; that the learned judge erred in holding that the Milimani suit was not heard on its merits whereas the same were determined in the arbitral award.

All the parties filed written submissions which they chose to highlight. Submitting on behalf of the 1st appellant was learned counsel ***Mr. Nyachoti,*** who begun by informing us that he would collapse the six grounds of appeal into one as follows;

> ***"The learned judge erred in law and in fact by holding that Mombasa HCCC No. 8 of 2010 Tanzania National Roads and Agency vs Kundan Singh Construction Limited and Kenya Commercial Bank was not res judicata when indeed all the issues in dispute in the suit were directly and substantially in issue in Milimani HCCC 164 of 2009 Kundan Singh Construction Limited which had been referred to arbitration and finally determined by an award delivered in Arbitration Cause No. V.9/2009"***

Counsel argued that the learned judge wrongly declined to strike out the Mombasa suit for reasons that the Milimani suit was not heard on its merits and was closed by the consent of the parties; that the learned judge failed to appreciate that the closure of the suit was by an order of the court of 4th June 2014, and not by a consent recorded by the parties; that the learned judge did not appreciate that the respondent had acknowledged that all issues save for the dispute over third performance bond had been determined, and that it had already been recalled, so that the claims arising therefrom were overtaken by events. In support of the submissions that the suit was *res judicata*, counsel cited the case of ***Henderson vs Henderson (1843) 67 ER pg 313-319***; ***Pop-In (Kenya) Limited & 3 others vs Habib Bank AG Zurich Civil Appeal No. 8 of 1988***; and ***Uhuru Highway Development Ltd vs Central Bank of Kenya*** & ***Others, Civil Appeal No 36 of 1996.***

Counsel further asserted that as far as *res judicata* was concerned, Azangalala, J's ruling of 29th July 2010 was correct, and that Kasango, J. misdirected herself in the ruling of 5th March 2015, when she found that the Mombasa suit was not *res judicata* since the issues in both suits were substantially the same and finally, that the Milimani suit was determined by the arbitral award which also settled the Mombasa suit, leaving nothing more to be determined. We were urged to set aside the ruling of Kasango, J. and allow the 1st appellant's application to strike out the Mombasa suit for the reason that it is *res judicata*.

Mr. Kongere, learned counsel for the 2nd appellant, supported the appeal and contended that the learned judge was wrong to overrule Azangalala, J's decision of 29th July 2010 which found that the two suits were substantially the same; that in finding that the issues were dissimilar, Kasanjo, J. effectively overturned that decision, yet it was upheld by this Court in its judgment of 14th October 2014. Counsel further argued that Kasango, J was also wrong to find that the Milimani suit was not heard on its merits, yet all issues were determined in the arbitration. Counsel also took the view that the Milimani suit having been determined, meant that the Mombasa suit was *res judicata*, and it ought to have been dismissed.

Mr. Munyithya, learned counsel for the respondent, opposed the appeal. Counsel submitted that the appellants' appeal was based on misconceptions on the correct position concerning the two suits; that firstly, the appellants misconstrued Azangalala, J's ruling to be a judgment, yet the ruling was in respect of two applications. The first one by the 1st and 2nd appellants, was seeking to strike out the Mombasa suit, with an alternative prayer seeking to stay the proceedings of the Mombasa suit until the Milimani suit was heard and determined, and the other by the respondent against the 1st and 2nd appellants was seeking similar orders; that the Milimani suit was not heard on its merits, as it did not proceed beyond the interlocutory stage. Counsel pointed out that Azangalala, J. declined to strike out the Mombasa suit, and instead ordered that the proceedings be stayed and that further, the judgment of this Court did not determine the question of *res judicata*, having observed that it was a matter that should be left for the trial court's determination.

It was further asserted that two factors in the arbitral proceedings militated against the Mombasa suit being *res judicata*; first, that the Milimani suit which concerned an application for injunctive relief pending determination of the arbitration in Sweden was between the 1st appellant and the respondent, and the 2nd appellant was not a party to the arbitral proceedings, and that second, the issues framed by the arbitral tribunal were concerned with the breach of the construction contract between the 1st appellant and the respondent, and also comprised of claims for damages for breach; that it was not concerned with the respondent's claim against the 2nd appellant under the guarantees, which issues were contested in the Mombasa suit.

It was further submitted that the objective of the Milimani suit, was to obtain interlocutory relief or interim measures of protection under ***sections 6*** and ***7*** of the ***Arbitration Act,*** which orders were granted by the court, it had no jurisdiction to determine issues reserved for arbitration. In support of this proposition, counsel cited the case of ***Safaricom Limited vs Oceanview Beach Hotel [2010] eKLR*** where it was held that in a suit seeking interim measures of protection pending arbitration, the court's jurisdiction was limited to granting or not granting such relief, after which *"…there was no pending suit because the substance of the suit under Section 7 is a grant or refusal of interim measure itself"*.

Counsel further argued that central to the Mombasa suit were the claims for payment under the performance guarantees, which claims were separate from the claims under the main construction contract; Counsel cited the case of ***Edward Owen Engineering Limited vs Barclays Bank International Limited (1078) QB 159*** for the proposition that the claims under the construction contact differed from those under the performance guarantee.

It was finally submitted that by allowing this appeal, this Court would essentially be denying the Government of Tanzania the ability to recover the amounts due to it from the 1st appellant, and which would result in unjustly enriching the 1st appellant at the expense of the Tanzanian public.

We have considered the voluminous record, grounds of appeal and the submissions of the parties. What can be distilled from the arguments is the question of whether or not the trial court rightly declined to exercise its discretion to strike out the Mombasa suit for reasons that it was not *res judicata*. In determining an issue such as this, we are guided by the oft-cited case of ***Mbogo & Another vs Shah, [1968] EA, p.15*** where it was stated that*;*

> ***"An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice."***

Based on the above directives the issues for our consideration are whether or not in relation to the Milimani suit the Mombasa suit was *resjudicata,* and whether the learned judge rightly declined to exercise her discretion to strike out the Mombasa suit.

In this regard the learned judge had this to say;

> ***"I have considered the application, the affidavit evidence and their annextures and more importantly the pleading and I have formed the opinion that although the issues in both cases relate to the same contract, they are not entirely the same. But perhaps much more, the issue that will determine the Notice of Motion is that Civil Case No. 164 of 2007 (sic) was not heard on its merit. It was closed by consent of the parties."***

In other words, after the learned judge compared the pleadings in the two suits, she found that, the issues in contention were not the same, and therefore the Mombasa suit was not *res judicata, and* that furthermore, the Milimani suit was not heard on its merits.

Section 7 of the ***Civil Procedure Act, 2010*** is clear on the factors that would lead to a finding of *res judicata*. It 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 the 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."***

And this Court's decision in the case of ***Uhuru Highway Development Ltd vs Central Bank of Kenya [1999] eKLR*** identified the key elements that would give rise to *res judicata*. They are that;

> ***"(a) the former judgment or order must be final; (b) the judgment or order must be on merits;***
>
> ***(c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and***
>
> ***(d) there must be between the first and the second action identity of parties, of subject matter and cause of action."***

Essentially therefore, to reach a finding of *res judicata*, the court must ascertain; whether the identities of the parties to the suit and subject matter in dispute were similar; whether the judgment or order was final; whether or not the suit was heard on its merits, and whether the decision was rendered by a competent court with jurisdiction. In the case of ***Kenya Commercial Bank Limited vs Benjoh Amalgamated Limited [2017] eKLR*** this Court expressed that those elements of res judicata are conjunctive rather than disjunctive and must all be present before a suit or an issue is deemed res judicata on account of a former suit. See also Madan J in ***Mburu Kinyua vs Gachini Tutu (1978) KLR 69.***

Beginning with the parties, initially in the Mombasa suit, the parties were the 1st appellant and Tanroads. Later, the plaint was amended to include the 2nd appellant. In the Mombasa suit, the parties were the Chief Executive of Tanroads, the 1st and 2nd appellants. Though in their submissions in the applications to strike out that was before Azangalala, J. the respondent sought to draw a distinction between the Chief Executive and Tanroads, the ruling of Azangalala, J. reached the conclusion that the entities were substantially the same. Upon considering the record, we too are satisfied that the parties were substantially the same. Consequently, we need not dwell on this factor.

However, as to whether the same would be applicable to the subject matter of the two suits, this is not definitive. This is because the disputes in the two suits were with reference to different issues. The Milimani suit was premised on a construction dispute destined for arbitration in Sweden, and the Mombasa suit was a dispute concerning the performance guarantees issued by the 2nd appellant. Though the two suits incorporated both disputes, the question for consideration was whether one was capable of being resolved within the other. In other words, it was not certain whether the dispute over the performance guarantees was capable of being determined in the Milimani suit.

The reasons are first, because the dispute arose from a road construction contract between the 1st appellant and Tanroads, it was a term of that contract that any dispute between them would be referred to arbitration in Sweden. As the 2nd appellant who had issued the guarantees in favour of Tanroads was not a party to that agreement, it could not be a party to the arbitral proceedings. It would follow that the arbitral proceedings was not the forum within which the dispute over the performance guarantees was capable of being settled.

The second reason is that, it cannot be overlooked that the purport of the Milimani suit was to forestall any further action or proceedings by Tanroads pursuant to the construction contract and the performance guarantees. The record shows that the 1st appellant instituted the Milimani suit seeking injunctive relief under ***sections 6*** and ***7*** of the ***Arbitration Act***, whilst it proceeded to have the construction dispute with Tanroads determined in arbitration in Sweden.

It is trite that once a dispute was referred to arbitration, and the injunctive relief was granted, there was nothing further left for the court to do. It is the arbitrator or arbitrators, and not the court that then have jurisdiction to determine the dispute.

In the case of ***Safaricom Limited vs Oceanview Beach Hotel & 2 others (supra)*** it was stated that;

> ***"Although the applicant has invoked Rule 1 (3) of this Court's rules, it is clear to us on the basis of the law as set out above this Court has no jurisdiction. Under Section of the Arbitration Act, the matter had been brought before the commencement of the intended arbitration and it only sought an interim measure of protection during the intervening period. Strictly, on the basis of statute law as analysed above, there is no suit pending in the High Court. For this reason,***

the High Court ruling went beyond the confines of section 7 and therefore the subject matter of the appeal is a nullity for want of jurisdiction by the High Court."

Essentially, if the purport of the Milimani suit was to seek injunctive relief under ***sections 6*** and ***7*** of the ***Arbitration Act***, upon injunctive relief having been obtained, there was no certainty that upon conclusion of the arbitral proceedings, the other issues, including the dispute over the performance guarantee would be resolved in that suit. The purport of the Milimani suit, and its ability to address the dispute over the performance guarantees was to later become apparent, as will be seen below.

The appellants' argument is that Azangalala, J.'s ruling on the applications to strike out the Mombasa case correctly found that there was no difference between the parties in the two cases, and that the foundation of the cases was the performance guarantees.

We pause here for a moment to consider the ruling on the two applications. In its application dated 30th March 2010, the 1st appellant's sought orders, that the plaint in the Mombasa suit be struck out and dismissed with costs and in the alternative that, the Mombasa suit and Tanroads' application dated 22nd March 2010 be stayed pending the hearing and determination of the Milimani suit.

The 2nd appellant also filed an application dated 31st March 2010 seeking similar orders as well as an alternative order on grounds that the issues in the two suits were substantially the same, and that the Mombasa suit was res judicata.

In the ruling of 29th July 2010, Azangalala, J. declined to strike out the Mombasa suit, but instead stayed the proceedings. In so doing the learned judge stated;

"The foundation of the plaintiff's action is enforcement of Bank guarantees. These guarantees are expressly raised as issues in the Milimani case. A specific order is indeed sought in respect of the same guarantees in prayer 2 in the Milimani case. The rest of the reliefs sought herein flow from those guarantees. Being of that view, to my mind the issues being litigated in this suit are being litigated in the Milimani case or should have been raised in the Milimani case…"

In short, the judge was of the view that the matter could be determined in the Milimani suit. But it becomes apparent that this was not to be.

The arbitral award was rendered on 25th July 2012. What then happened was that on 4th June 2014 an order was issued, to the effect that the 1st appellant's *"…Plaint dated 12th March 2009 …"* was *"…marked as spent as the Arbitral Award was published on 25th July 2012."* A further court order was issued on 6th June 2014, that specified that, *"…the matter be and is hereby marked as closed."*

In effect, after conclusion of the arbitral process, the Milimani suit in which the 1st appellant had sought interlocutory relief was concluded, with the result that no other issue, including the dispute under the performance guarantees was determined, which would confirm that the purpose of the Milimani suit was to seek injunctive orders whilst the construction dispute was resolved in arbitration, with the result that once concluded, the case was closed leaving other issues unresolved.

Having discerned that the purport of the Milimani suit was to seek injunctive orders so that the construction dispute could be heard and determined in arbitration in Sweden, whereas the Mombasa suit which concerned the dispute over the performance guarantees was awaiting determination by the court, the only conclusion that can be reached is that the subject matter of the two suits differed, and the question *of res judicata* could not be said to arise.

The final factor for consideration is whether *res judicata* would be applicable to a dispute not heard on its merits. In this regard, Kasango, J. concluded that, *res judicata* did not arise since the Milimani suit was not heard on its merits. The appellants have argued that this was a misdirection, and that with Azangalala, J. having concluded that the suits were substantially the same, since the Milimani case was determined in arbitration, that the award substantially settled the performance dispute as well.

We disagree. It will be appreciated that at the time Azangalala, J. determined the two applications, the Milimani suit was pending determination in view of the ongoing arbitration in Sweden. But by the time the application to strike out the Mombasa suit was placed before Kasango, J. the arbitration award had been rendered, and the Milimani suit marked as closed, without reference to the performance guarantees. Clearly, the circumstances of the Milimani suit had dramatically changed.

In considering whether a suit that has not been heard on its merits can render it *res judicata*, Kuloba, J. in ***Judicial Hints on Civil procedure***, stated thus;

"... a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgement. In that expression is found the rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided."

We respectfully agree. When the construction dispute was determined in arbitration, and the purport of the Milimani suit achieved, the suit was marked as closed. With the conclusion of the suit, there is nothing to show that the dispute concerning the 2nd appellant, and the personal guarantees was heard and determined on its merits.

Despite the lengthy and winding explanations the appellants have sought to provide to explain the circumstances surrounding the status of

the performance guarantees, and their assertion that it was determined in arbitration, our analysis of the record does not show that the dispute was ventilated in a court of competent jurisdiction, or at all. Nothing shows that the appellants' or Tanroads' evidence was tested under cross examination and a final determination reached. It becomes patently clear that the dispute concerning the performance guarantees was not determined on its merits, and we so find.

For the reasons stated above, the Mombasa suit is not *res judicata*, and as such, the interests of justice dictate that the parties herein should proceed to have their day in court to have it fully heard and determined on its merits once and for all.

In sum, we are satisfied that the learned judge rightly exercised her discretion to decline to strike out the Mombasa suit on the basis that it was not *res judicata,* and we have no reason to interfere with that decision.

The appeal is not merited and is dismissed with costs to Tanroads, the respondent.

It is so ordered.

Dated and delivered at Mombasa this 19th day of December, 2019.

D.K MUSINGA

…….……..

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

A.K MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR