



Wachira v Mwalimu National Savings & Credit Co-operative Society Limited (Tribunal Case 286/E346 of 2022) [2024] KECPT 1867 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KECPT 1867 (KLR)

**REPUBLIC OF KENYA
IN THE COOPERATIVE TRIBUNAL
TRIBUNAL CASE 286/E346 OF 2022
BM KIMEMIA, CHAIR, J MWATSAMA, VICE CHAIR, B SAWE,
F LOTUIYA, P. GICHUKI, M CHESIKAW & PO AOL, MEMBERS
OCTOBER 31, 2024**

BETWEEN

LUCY WAHITO WACHIRA CLAIMANT

AND

**MWALIMU NATIONAL SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED RESPONDENT**

RULING

1. The Ruling by the Tribunal is on two Applications dated:
 - i. 7th June, 2024, and
 - ii. 8th July, 2024.
2. This Tribunal on 17th July, 2024 gave directions that the two Applications be heard and conversed simultaneously.
3. The first Application was filed by the Claimant on 7th June, 2024 seeking among others;
 - i. That the Honorable Tribunal be pleased to declare the actions of the Respondents through its Chief Executive Officer of continuing to advertise, selling, auctioning, alienating, transferring, disposing of, charging, evicting, managing, dispossessing or in any way interfering with the ownership and legal entitlements of Title Number Nyaribari Cache/B/B/Boburia/11838 are acts calculated to disregard and disobey the orders given on 27th April, 2023 and are in gross disobedience and contempt if the said court orders and should be punished by way of fine and/or imprisonment for 6 months.



- ii. That the Honorable Tribunal be pleased to direct the Officer Commanding Kisii Central Police Station or such other nearby police station to assist in the enforcement of the Court Order issued 27th April, 2023.
 - iii. That the Honourable Tribunal be pleased to find and hold the Chief Executive Officer of the Respondent in contempt of the Tribunal orders issued on 27th April, 2023.
4. On 8th July, 2024, through its Business Leans Assistant Manager, the Respondent filed their Replying Affidavit in opposition to the Notice of Motion and stated among others:
- i. That the Respondent filed a Statement of Claim dated 19th January, 2022 being cause No. E023 of 2022 over the Claimant's default on loan repayment, and as at the time of filing the arrears stood at Kshs. 15,862,520/=.
 - ii. That the loan had been secured by property known as Nyaribari/Chache/b/B/B/ Boburia/11838.
 - iii. That the Claimant was duly served with the Statement of Claim and the trial bundle, all dated 19th January, 2022, together with summons to enter appearance dated 27th January, 2022.
 - iv. That the Claimant was aware of the existence of the suit and its content but failed, neglected and or refused to enter appearance or file a Defence despite having been duly served.
 - v. That on 6th April, 2022, the Honorable Tribunal entered a Summary judgement against the claimant with a decree dated 6th May, 2022 issued pursuant to that judgement.
 - vi. That the Claimant filed this suit on 27th May, 2022 seeking orders to restrain the suit property and seeking orders from the Tribunal for the loan to be restructured.
 - vii. That the suit filed by the Claimant involves the same parties, subject matter and questions in law that were directly and substantially is issue in clause No. E 023 of 2022 making the suit res judicata.
 - viii. That the decree issued by the court on 6th May, 2022 in E023 of 2022 has not been raised nor set aside and as a result, still valid.
 - ix. That execution of a valid court decree cannot be construed as contempt as it is an act in compliance with a court issued directive.
 - x. That the decree of 6th May, 2022 was first in time and therefore duly enforceable against the Claimant, and the Claimant should not be allowed to circumvent the court process in order to evade repaying a loan she owes.
 - xi. That the Claimant herself is in contempt of court under the purported order dated 14th June, 2023 as she has never made any of the payments indicated under paragraph (2) of the alleged order.
 - xii. That this Tribunal should not facilitate the Claimant in deriving benefit from her wrong doing and leave the Respondent without recourse, and as such, the Application should be dismissed for being frivolous, vexatious and an abuse of the Court process.
5. The 2nd Application was filed by the Respondent on 8th July, 2024 and largely is a replica of the facts captured in their Replying Affidavit dated 8th July, 2024 which was a response to the 1st Application dated 7th June, 2024. That 2nd Application is seeking orders for:



- a. That the Statement of Claim filed by the Applicant dated 26th May, 2022 be struck out for being scandalous, frivolous and vexatious.
 - b. That the Statement of Claim filed by the Claimant dated 26th May, 2022 be struck out for being an abuse of the court process.
 - c. That the entire suit should be dismissed for being res judicata.
6. The Respondents filed two Written Submissions dated 2nd and 6th September, 2024 for the two Applications stating among others:
- i. That it is trite law that whoever alleges contempt must also prove contempt and as such, the Claimant must prove to the required standard that:
 - a. The terms of the order were clear and unambiguous and were binding on the Respondent.
 - b. The Respondent had knowledge of or proper notice of the terms of the order
 - c. The Respondent has acted in breach of the terms of the order
 - d. The Respondent's conduct was deliberate.
 - iii. That the entire suit should be struck off for being res judicata and an abuse of the court process as the Claimant being fully aware of E023 of 2022 still went ahead to improperly utilize the Court process to file this preset suit which involves identical parties, similar legal issues and the same subject matter.
 - iv. That the decree in E023 of 2022 was first in time and the same has never been reviewed, set aside nor varied and as such the same remains in force and is fully enforceable against the Claimant. Consequently, execution pursuant to that judgement and decree cannot be termed as contempt of Court.
 - v. That the Claimant has also failed, refused and neglected to repay the loan arrears since the order she claims the Respondent is in contempt of was issued. That to come to equity, a party must come with clean hands.
 - vi. That entertaining the Application filed by the Claimant would result to two conflicting orders emanating from the same court, thus undermining the integrity of the judicial process and causing wanton embarrassment to the Tribunal.
 - vii. That the Respondent Chief Executive Officer acted in compliance with a valid and enforceable Court order and to issue orders finding the Respondent Chief Executive Officer in contempt of Court would prejudice the principles of justice.
 - viii. That this Tribunal has no jurisdiction to entertain this current suit and Application as the matter is res judicata.
 - ix. That the Claimant filed this suit in a bid to evade repayment of the amounts owed to the Respondent and to further deny the Respondent the fruits of the judgement and decree in E023 of 2022.
7. The Claimant filed her Written Submissions dated 31st August, 2024 raising among others issues:



- i. That the Claimant has already filed an Application seeking to set aside the ex-parte judgement and decree in E 023 of 2022 and as such it is not true that the Claimant has never challenged the judgement of 6th April, 2022 or the decree of 6th May, 2022.
 - ii. That the Respondent is mischievous in accusing the Claimant of the very thing they are guilty of in the conduct of the proceedings in both matters.
 - iii. That the Respondent did not disclose the existence of E023 of 2022 up to and until they obtained a judgement and decree and execution of the same began as the Claimant did not receive proceedings in that case and was unaware of its existence.
 - iv. That the Respondent cannot claim that this current suit is res judicata when they obtained ex-parte orders which they set on for two years and only became known to the Claimant at the point of execution.
 - v. That the Respondents are guilty of non-disclosure throughout and they cannot now be heard to find refuge in the doctrine of res judicata.
 - vi. That the ex parte judgement the Respondents have was obtained fraudulently without the knowledge and participation of the Claimant.
 - vii. That to strike off this suit and let the ex-parte orders in E 023 of 2022 to stand will condemn the Claimant unheard as there has never been a hearing on merit.
 - viii. That suits should only be struck off as the last option when such a suit is so hopeless and it cant be cured. That this current suit is not hopeless and has a reasonable cause of action.
 - ix. That the Respondent should have accorded the Claimant a fair chance to defend the Claim but instead they opted for tricks and approached the process with hidden cards.
8. We have considered the two Applications and the Submissions filed in opposition or support, and it is our considered position that two questions need to be answered:
- i. Is the Respondent in contempt?
 - ii. Should the suit be struck off for being res judicata?
- Is the Respondent in contempt?
- The beginning point in these two cases:
- i. E023 of 2022, and
 - ii. E 346 of 2022.
9. Is to state that on a balance of probability, it is difficult to tell to certainty with party should this Tribunal believe and which one should they not believe, because if this Tribunal engaged its official mind to look at the two cases, something seems to be off or not clear or both parties were I some sort of a chess game at the expense of this Tribunal; and as such, it is difficult to tell whether the Respondents in this matter actually served the Claimant in E023 of 2022 or whether the Claimant was unaware of the existence of that same case till execution. There are gaps in both stories that leave a lot of questions that can't be fullt answered based on Written Submissions.
10. Courts generally use the test of balance of probability when the court is faced with two probabilities, and it can only decide the case on a balance of probability to show that one probability was more probable than the other. Did the Respondent serve the Claimant and she chose not to file a Defence



- of the suit in E023 of 2022? Or in the alternative, if it is true that the Respondent served the Claimant and actually had a judgement and decree by 6th May, 2022, why sit on it for two years before executing?
11. Or why did the Respondent not file a Preliminary Objection in 2022 when E346 of 2022 was filed and raise the question of res judicata? Even when this Tribunal gave its ruling and orders in an earlier Application on 27th April, 2023, why did the Respondent fail to inform this Tribunal of the existence of another case in E023 of 2022?
 12. In order to succeed in a case of contempt, a party must prove that the party in in contempt:
 - i. Was aware of the terms of the order,
 - ii. Had knowledge of those terms,
 - iii. Failed to comply with those terms.
 13. In this particular case, it is clear that the Respondent was aware, had knowledge and failed to comply. However, the Respondent has also raised the issue that there was an earlier order of this court emanating from the judgement and decree of this Court in E023 of 2022 which had not been set aside and as such was still valid, and second, that the Claimant cannot Claim that the Respondent was in contempt when that very Claimant was not also making payments consistently as oer the order given by this Tribunal on 27th April, 2023.
 14. The two points raised by the Respondent may need further evidence to confirm their validity, but be it as it may, this Tribunal gives the Respondent some benefit of doubt to allow this suit to be heard and determined on merit, and as such, at this particular point will not fins the Chief Executive Officer of the Respondent in contempt.

Should the suit be truck off for being res judicata?

15. It is settled in law that in civil matters for res judicata to be invokes, the following must be demonstrated:
 - i. There was a former judgement or order which was final,
 - ii. That judgement or order was on merit,
 - iii. That judgement or order was rendered by a Court having jurisdiction over the subject matter and the parties, and
 - iv. There had to be between the first and the second action identical parties, subject matter and cause of action.
16. Numbers (iii) and (iv) are clear and not in contention, but, was E 023 of 2022 heard and determined on merit, and was the judgement and order final if and when one party has raised issues that they did not know about its existence as they were never served with the Statement of Claim and only got to know about it at the time of execution.
17. First, we have looked at the Respondent's Statement of Defence and Amended Statement of Defence dated 3rd August, 2022 and it is not clear to us why they did not raise the issue of res judicata in those statements of Defence. Is it that they didn't know is they had already had a judgement on 6th April, 2022 and a decree on 6th May, 2022 in a case where they are represented by the same advocate as in this case in a matter touching on identical parties, cause of action and subject?



18. Second, res judicata is founded on the understanding that a party should not be harassed twice with the same account of litigation. In this particular case, can it be said realistically that this case has been brought in bad faith and is meant to harass the Respondent twice and prolong litigation. If that is the case, why did the Respondent not raise a preliminary objection to the filing of this case? Or why wait for 2 years to serve the Claimant with proceedings of execution from another case when this case has also had a life more than one year. Who exactly between the Claimant and the Respondent is litigating in bad faith? Or who is prolonging litigation between the two?
19. Third, this Tribunal has considered whether either party will suffer any substantial loss if we allow the Application or not allow the Application. It is clear that only one party will suffer substantial loss in that the Respondent is still receiving payments to service the loan as a result of this Tribunal's ruling of 27th April, 2023. The loan has not stood still during the period of this case in court. That is not the same case with the Claimant if the execution of the property was to take place today. The constitution mandates this Tribunal in the interest of justice to balance the interest of parties to avert substantial losses especially if we are convinced that the first case which is being matured to occasion the second case to be potentially res judicata, was not heard and determined on merit.
20. In light of the above, this Tribunal dismisses the two applications and make the following orders:
- i. The Notice of Motion Application dated 7th June, 2024 is dismissed.
 - ii. The Notice of Motion Application dated 8th July, 2024 is dismissed.
 - iii. The Order of Injunction issued on 27th April, 2023 restraining the Respondent, their servants, Auctioneers, Licensees, Agents or any other persons acting on their behalf from howsoever advertising for sales or further advertising selling, auctioning, alienating, transferring, disposing, charging or further charging, evicting, managing, dispossessing or any way interfering with the right of spousal ownership, proprietorship and legal entitlements of the Claimant to Property No. Nyaribari/Cache/b/B/Boburia/11838 pending the hearing and determination of the suit is contained.
 - iv. The Claimant to continue servicing the loan under the terms agreed by the orders of this Tribunal of 27th April, 2023. Specifically, the Claimant to pay Kshs. 75,000/= per month pending the hearing and determination of the suit.
 - v. Mention for pre-trial directions and to confirm compliance on 6/2/2025 together with E023/22.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024.

HON. B. KIMEMIA - CHAIRPERSON SIGNED 31.10.2024

HON. J. MWATSAMA - DEPUTY CHAIRPERSON SIGNED 31.10.2024

HON. BEATRICE SAWE - MEMBER SIGNED 31.10.2024

HON. FRIDAH LOTUIYA - MEMBER SIGNED 31.10.2024

HON. PHILIP GICHUKI - MEMBER SIGNED 31.10.2024

HON. MICHAEL CHESIKAW - MEMBER SIGNED 31.10.2024

HON. PAUL AOL - MEMBER SIGNED 31.10.2024

Tribunal Clerk Mutai



Nekoye advocate for Respondent

Nkatha advocate holding brief for Kiriimi for Claimant

HON. B. KIMEMIA - CHAIRPERSON SIGNED 31.10.2024

