REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 423 OF 2009

CAPTAIN MOSES KARIUKI WACHIRA …..…….....….. PLAINTIFF

VERSUS

JOSEPH MUREITHI KANYITA ……..…… 1ST DEFENDANT

MONICA JAMES …… 2ND DEFENDANT

JOHN MBURU ……...…… 3RD DEFENDANT

INVESTMENTS & MORTGAGE BANK LTD ….....……. 4TH DEFENDANT

R U L I N G

1. On 7th October 2013, all parties in this suit appeared before Court ready to proceed with a projected 4 day hearing of this already part heard matter. On that day, Mr. Kanjama, learned counsel for the Plaintiff, informed the Court that subsequent to the dates for the resumed hearing being taken, a Judgement had been delivered in the Chief Magistrate's Court here at Milimani in **CMCC No. 1110 of 2010**. In that criminal matter before the Chief Magistrate, the first Defendant herein was the first accused and the subject matter of the criminal proceedings were as regards the suit property herein. The same had alleged fraud and forgery as regards the Transfer of the suit property from the second Defendant herein to the first Defendant. Counsel stated that the said Transfer gave rise to subsequent transactions which the Plaintiff claimed were fraudulent as between the first and third Defendants for which the fourth Defendant gave financial security.

2. As a result of the Judgement of the Chief Magistrate finding the accused guilty on all 4 counts in relation to the criminal proceedings, counsel was of the view that the Plaintiff would seek to rely on the certified typed Judgement of the lower Court and would undertake to provide the certified typed copy of the proceedings before the lower Court. Various submissions were made in response to Mr. Kanjama's statement before Court by the counsel appearing for all 4 Defendants. At the end of that hearing, I recorded the following:

"It is quite clear that the Judgement in the Criminal Case No.1110 of 2010 is going to have far reaching consequences in respect of this suit, particularly as to how it will affect the Defences of all 4 Defendants herein. It also appears likely that the certified typed copy of the proceedings in the lower Court which have yet to be produced before Court or served upon the Defendants herein, may open up further skeletons in the cupboard of this case. Accordingly, I allow the adjournment prayed for and this matter will come out of the hearing list for today and tomorrow. However, I am conscious of the same having been listed for 4 days and consequently would not wish to adjourn the same *sine die*. Mention of this suit will be before Court on Wednesday 9th. October 2013 at 9.00 a.m. so as to ascertain progress on how this suit shall proceed before Court. Costs in the cause."

3. At the resumed hearing on the 9th October 2013, for various reasons more particularly in relation to the certified copy of the typed proceedings in the lower Court not being available, the case was stood over for hearing on 17th December 2013. On that day, Mr. Kanjama produced before Court what was termed the Plaintiff's Further Supplementary List of Documents which contained the certified typed copy of the Judgement (in Volume I) and the certified typed proceedings (in Volume II) in **Criminal Case No. 1110 of 2010 Republic v Joseph Kanyita & Michael Ngugi**. Counsel sought directions from the Court as to the admission of these records of the lower Court under the provisions of **section 36** of the *Evidence Act*. He referred to **sections 1A, 1B and 3A** of the *Civil Procedure Act* as well as to Article 159 of the Constitution. It was the Plaintiff's position that the witnesses in the lower Court need not appear in this matter as they had already given evidence under Oath. Counsel maintained that the need for justice to be expeditious was emphasised by the provisions that he had cited before Court. He advised that should the counsel for any of the Defendants wished to call any particular witness for any reason, they should advise the Court accordingly. The matter in issue in the criminal case was directly and substantially in issue in these civil proceedings. The matters of fraud as alleged by the Plaintiff against the first Defendant is a major issue in this case and as it had been dealt with in the criminal proceedings, such would alleviate the full process before Court. Counsel further referred the Court to the paragraph relating to evidence given in previous judicial proceedings in the volume entitled "The Law and Practice of Evidence in Kenya" edited by Kyalo Mbobu..

4. Mr. Havi, learned counsel appearing for the first and second Defendants, submitted that there was nothing in law to preclude the Plaintiff from relying upon the proceedings in **Criminal Case No. 1110 of 2010**. However, the first and second Defendants objected to the position taken by counsel for the Plaintiff in suggesting that the copies of the typed proceedings and Judgement, if put before this Court, precluded the evidence of the 14 witnesses that had gone before the lower Court from appearing at the trial hereof. The presence of the said 14 witnesses could only be excused under the provisions of **section 34 (1)** of the *Evidence Act*. The Plaintiff had not demonstrated that any of those witnesses were dead, could not be found or had been kept away by the Defendants. Counsel also pointed to the proviso to **section 34 (2) (b)** of the *Evidence Act* noting that matters relating to criminal cases involved an enquiry as between the prosecutor and the accused. The second Defendant herein was not an accused in the criminal proceedings and, as such, it would be a travesty if the 14 witnesses did not come before Court and face cross-examination. Mr. Havi also produced before Court, a copy of an Order in **Misc. Criminal Application No. 318 of 2013** in which this Court had granted a stay of execution of part of the sentence of the Criminal Court in cancelling the Appellant's Certificate of Title to the suit property, Nairobi/Block/94/170/Nyari.

5. Counsel for the third and fourth Defendants adopted the submissions as put before Court by Mr. Havi commenting that as far as their clients were concerned, they had not been involved in the criminal proceedings in the lower Court. Further, there was an interest in the proposed Appeal of the first Defendant as against the Judgement of the lower Court particularly as regards the cancellation of the Certificate of Title as aforesaid. In both counsel's viewpoint, their clients would be highly prejudiced if not given the opportunity of cross-examining witnesses that gave evidence before the lower Court. They noted that the Criminal Appeal had been filed on 23rd September 2013 in the Criminal Division being **Criminal Appeal No. 181 of 2013**.

6. In his rejoinder, Mr. Kanjama submitted that if the Court directed that the witnesses who had given evidence in the lower Court should come for the hearing before this Court, then witness summonses should be issued as necessary. He pointed to **section 34** of the *Evidence Act* which talks about "judicial proceedings" but says nothing about when the proceedings commenced or when the evidence therein was actually taken. In his opinion, such could be admitted subsequently, even bearing in mind that the criminal proceedings in the lower Court had been commenced on a date after the civil proceedings in this Court. It was incorrect, as counsel for the first Defendant had stated, that the Judgement of the lower Court was stayed by this Court. What had been stayed was that part of the sentence of the lower Court in respect of the cancellation of the Title to the suit property had been stayed. In Mr. Kanjama's view, such stay had been granted because of this issue before this Court. As regards the pending Appeal, such sought to challenge the whole Judgement of the lower Court. It did not seek to challenge the proceedings thereof. As a consequence, it did not challenge the evidence led before the lower Court. The Plaintiff was not telling the Court to be bound by the Judgement of the subordinate Court, he was asking that the Court admit the record of the proceedings in the same way as the Civil Procedure Act allows evidence to be taken on commission. The Plaintiff would be asking this Court to consider the evidence as persuasive not binding. Finally with regard to a stay of the proceedings as before this Court, Mr. Kanjama submitted that such would not be applicable as civil and criminal proceedings can run concurrently.

7. The admissibility of evidence taken in criminal proceedings and the judgments arising therefrom, in subsequent civil proceedings, is provided for under various Sections of the *Evidence Act Cap 80 of the Laws of Kenya*. The admission of any such evidence before the Criminal Court may not be conclusive evidence of facts, but may be used by a Plaintiff in civil case by way of establishing a prima facie case as against a Defendant being the accused person(s) in the criminal suit. **Section 34 (1)** of the *Evidence Act* allows for the admission of evidence in judicial proceedings in subsequent proceedings, including those of a civil nature but in the following circumstances:

> **"(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable;"** (Emphasis mine).

Sub-**section (b) and (d)** of **section 34 (1)** as read together with **Section 45** of the Act, enunciate the admissibility of evidence in proceedings between the same parties and the question in issue being substantially similar in the first as in the second proceeding. **Section 45** provides that the judgment obtained in such proceedings may be admissible as evidence if the matter is of public interest. It therefore follows that evidence taken in a prior criminal case, at the discretion of the Court (exercising such discretion as provided under **Section 3A** of the *Civil Procedure Act* and the overriding objective enunciated under **Sections 1A and 1B** of the same Act), may be allowed in subsequent civil proceedings. The Court in exercising such discretion shall take cognizance of the provisions of the **Section 34 (1) (b) and (d)** as aforesaid in that the issues in question in the two proceedings are similar in nature as the parties thereto.

8. Given that the scope of reference in such matters is so diverse, the Court would be at liberty to admit evidence and judgments rendered in criminal matters in subsequent civil matters, but not the alternate. **Sopinka, Lederman & Bryant** in ***The Law of Evidence in Canada*****, 2nd Edition (Butterworths, 1999)** at page 1123, the learned authors state:

> **"A judgment of a civil court, however, need only be based on proof to a balance of probabilities. A civil judgment is, therefore, worthy of less respect in a subsequent proceeding and should not, as a general rule, be admissible as prima facie proof of the commission of the relevant acts or the existence of negligent conduct. ... It is not logically irrelevant; it just has less weight."**

9. Judicial discretion as regards admissibility of evidence taken in criminal proceedings has been

seen to be exercised in a number of jurisdictions. Most notable among them are the English Courts, who have in most instances adopted the *lexus classicus* case of **Hunter v Chief Constable of West Midlands & Another (1981) 3 All ER 727**. In its judgment, the English House of Lords also adopted **Reichel v Magrath 14 App Case 665**, **Mills v Cooper (1967) 2 All ER 100** and **McIlkenny v Chief Constable of West Midlands Police Force (1980) 2 All ER 229**. In all the aforementioned cases, the English Courts adopted and admitted prior convictions in criminal cases, as evidence of establishing a prima facie case in subsequent civil proceedings. Lord Denning in **Hunter v Chief Constable of West Midlands** (supra) reiterated that:

"Thus a decision in a criminal case on a particular question in favour of a defendant, whether by way of acquittal or a ruling on voire dire, is not inconsistent with the fact that the decision would have been against him if all that were required were the civil standard of proof on the balance of probabilities. This is why acquittals were not made admissible in evidence in civil actions by the Civil Evidence Act 1968. In contrast to this a decision on a particular question against a defendant in a criminal case, such as Bridge J's ruling on the voire dire in the murder trial, is reached on the higher criminal standard of proof beyond reasonable doubt and is wholly inconsistent with any possibility that the decision would not have been made against him if the same question had fallen to be decided in civil proceedings instead of criminal. This is why convictions were made admissible in evidence in civil proceedings by the Civil Evidence Act 1968".

Indeed, **Lord Loreburn** in the **McIlkenny** case (supra) put it even more succinctly by saying:

"the issue had already been finally determined against them by a court of competent jurisdiction in the criminal proceedings to which they were parties, and in those proceedings they had a full and fair opportunity of presenting their case, and in all the circumstances it would not be just to allow them to re-open the issue… In any event it would be an abuse of process to all the Plaintiffs to litigate again the identical issue to that which had already been decided against them in the criminal proceedings, and they would not be permitted to call the further evidence on which they sought to rely…".

10. Thus having established that criminal evidence and judgments may be admitted in subsequent civil proceedings, the other issue that arises is how the Defendants may be allowed to test the veracity of the evidence adduced in the lower Court, if at all. In **Haystead v Taxation Commissioner (1925) All ER 56** referred to in **Mills v Cooper** (supra), it had been held that if an issue that had been determined in a previous Court of competent jurisdiction, the parties would not be allowed to re-litigate the same issue in a different Court, hence an application of the principle of issue estoppel. It had been held therein *inter alia*:

"…the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation."

In this case, however, it would seem that the Plaintiff's intention in applying for the criminal case evidence to be allowed into evidence in this Court is to establish a *prima facie* case against the first Defendant. It is not, in my opinion, a claim at re-litigating the issue but to bring evidence on a similar cause of action that may or may not have been determined by the criminal court. For example, issues that the criminal court would not have been able to determine are the quantum of damage, which falls within the purview of the civil court. It was reiterated in **Mills v Cooper** (supra);

…. a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or the legal consequence of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential

element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him."

11. As is provided under **Section 45** of the *Evidence Act*, the Judgment in the criminal case is not conclusive proof of the fact that the Plaintiff wishes to prove, namely the forgery of the said Transfer document as between the first and third Defendant. Depending upon the Plaintiff's evidence, the veracity thereof may be determined by allowing the Defendant not only to file its defence in rebuttal but also bring evidence of his own in that connection. This was reiterated in **Trang v Alberta (Edmonton Remand Centre) 2002 ABQB 658** in which it was held:

> **"The fact of the convictions and the essential findings upon which the convictions were based, determined beyond a reasonable doubt by a court of competent jurisdiction, are to be afforded a high degree of deference. They are not subject to re-litigation. The non-essential findings, not held to the same standard of admissibility, are to be given some deference. Certainly, as a minimum, they provide prima facie proof of the underlying circumstances, and strong evidence would be required to refute those findings".** (emphasis added).

12. The Court therefore, in following the provisions of *Article 165(7)* of the Constitution as read with **Sections 1A, 1B and 3A** of the *Civil Procedure Act* and **Section 34(1) (b) and (d)** of the *Evidence Act*, is empowered to make directions it considers would be appropriate in ensuring fair administration of justice as postulated under *Article 159 (2)*. **Section 45** as read with **Section 44 (1)** of the Evidence Act provides that the judgments obtained in criminal proceedings may not necessarily be conclusive proof of facts (read **Trang v Alberta**). This Court in exercising its inherent powers under **Section 3A** and discretion under **Sections 1A and 1B**, may give directions it considers appropriate to ensure just, expeditious, proportionate and affordable dispensation of matters. From the foregoing, it would be in the interest of the Court and the parties to the suit, to achieve the overriding objective as set out in **Section 1B** of the *Civil Procedure Act* and *Article 159 (2) (d)* to achieve justice in such expeditious, proportionate and affordable resolution of disputes. Read together with **Order 1 Rule 15** of the *Civil Procedure Act*, the Court has the discretion to make such Orders as may be necessary for the enforcement of the overriding objective, pursuant to the provisions of **Section 1B** of the *Civil Procedure Act* and *Article 159 (2) (d)* of the Constitution. However, the power of the Court to grant such orders should not be used whimsically or capriciously or to the detriment of either or all parties to a suit.

13. Reverting for a moment to **section 45** of the *Evidence Act*, the same clearly spells out that the judgement obtained in criminal proceedings must necessarily be in the public interest. As quoted in the Canadian case of **Huang v Sadler et al (2006) BCSC 559,** the finding of **Dorgan J.** in the case of **P. J. v Canada (Attorney General) (2000) 198 D. L. R. (4th) 733** was adopted as follows:

> **"Given the important public interests favouring disclosure to the plaintiffs, and the various conditions that can be attached to the plaintiffs' use of the documents, the public's interest in facilitating frank communication cannot outweigh the need to ensure a fair trial for these litigants……. At the root of the claim for public interest immunity is the issue of fairness. The concept of fairness is of course pivotal in maintaining respect for the administration of justice, which is clearly a public interest issue. To allow a defendant in this litigation to have unfettered access to documents potentially relevant to this litigation, while precluding the plaintiffs from having the same access, would fall far short of accomplishing the goal of ensuring that justice is not only done but is seen to be done. The presumption in civil litigation is that the parties have the same exposure to relevant documents."**

14. If I were to allow the certified copy of the proceedings and the Judgement in the lower Court to be tendered as evidence before this Court, it is obvious from the authorities quoted above that there must be fairness on all sides. Certainly the second, third and fourth Defendants will now have access to the facts and evidence that were laid before the lower court in the criminal case as against the first Defendant. It may be that the proceedings and Judgement in the criminal matter will be sufficient for the Plaintiff to establish his *prima facie* case as against the first Defendant. Such would be along the lines of the finding of **Lord Diplock** in the case of **Thoday v Thoday (1964) 1 All ER 341 at page 352** wherein the learned Judge stated:

> **"…. Of the determination by a court of competent jurisdiction of the existence or non-existence of fact, the existence of which is not itself a condition the fulfilment of which is necessary to the cause of action which is being litigated before the court, but which is only relevant to proving the fulfilment of such a condition, does not at any rate *per rem judicatam* exonerate either party in subsequent litigation from asserting the existence or non-existence of the same fact contrary to the determination of the first court."**

15. As a result, I see considerable benefit in allowing into evidence the certified copy of the proceedings and the Judgement in **Criminal Case No. 1110 of 2010** in terms of the overriding objective of the Civil Procedure Act as regards the expeditious disposal of this suit before Court. Most certainly, it would cut down costs. I see no point in having all 14 witnesses that gave evidence in the Court below to come before this Court and repeat what they have said a second time round. However, I recognise the fact that the second, third and fourth Defendants, having not been involved in the proceedings in the Court below, have not had a chance of cross-examining any of those 14 witnesses. It seems to me only just and fair that they should be allowed to do so. Consequently, in view of Mr. Kanjama's submission that he would treat the evidence of the 14 witnesses in the Court below as the Plaintiff's evidence in chief, I direct that the Defendants, including the first Defendant, may have an opportunity of calling and cross-examining those witnesses during the presentation of the Defence case. It will be incumbent upon each of the Defendants to notify this Court, as well as the other parties hereto, as to which of the witnesses, who gave evidence in the lower Court, that they wish to cross-examine. This Court will issue the appropriate witness summonses accordingly.

16. In conclusion therefore, I allow the Plaintiff's Application to put in evidence the certified typed copies of the proceedings and Judgement in **Criminal Case No. 1110 of 2010**. Parties may now take dates for the resumed hearing of this suit in the new Court term over 4 days. Costs in the cause.

DATED and delivered at Nairobi this 19th day of December, 2013.

J. B. HAVELOCK

JUDGE