**Hawkesworth v Attorney-General**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 7 October 1974

**Case Number:** 30/1974 (114/74)

**Before:** Spry Ag P, Mustafa and Musoke JJA

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**Appeal from:** High Court of Kenya – Nyarangi, J

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*[1] Civil Practice and Procedure – Res judicata – Claim in respect of different management orders –*

*Not res judicata.*

*[2] Tort – Compensation – Claim against government for compensation in respect of management order*

*is a tort – Agriculture Act* (*Cap.* 318)*, s.* 187 (*K.*)*.*

**Judgment**

The following considered judgments were read.

**Mustafa JA:** The appellant’s late husband was the owner of two farms, comprised in L.R. 3805 and L.R. 7059/2. Under a management order dated 9 August 1965 issued under s. 187 of the Agriculture Act (Cap. 318) the Central Agriculture Board took over the management of both the farms L.R. 3805 and L.R. 7059/2. Farm L.R. 7059/2 was sold in February 1967 with the appellant’s late husband’s consent, and the management order in respect of farm L.R. 3805 was revoked in June 1967, and the farm reverted to the owner. Under another management order under the Agriculture Act dated 15 December 1969 the Central Agriculture Board again took over the management of farm L.R. 3805 sometime in January 1970. In September 1970 the appellant’s late husband filed an action against the Attorney-General of Kenya as the representative of the Government of Kenya, claiming (after due amendment) a sum of Shs. 38,306/95 for losses allegedly suffered by him as a result of the management order issued by the government dated 15 December 1969. A consent judgment for the plaintiff in that case in the sum of Shs. 13,600/- together with costs was entered on 22 June 1973. I may mention that the plaintiff was then represented by an advocate in the action. The appellant in March 1973 in her capacity as sole executrix of her late husband, filed a plaint against the Attorney-General of Kenya claiming a sum of Shs. 35,000/- in respect of losses allegedly suffered by her as a result of the two management orders dated 9 August 1965 and 15 December 1969 respectively. A notice of motion to strike off the plaint (with subsequent amendments) was filed by the Attorney-General, as far as I can make out from the record (including the original file) sometime in or about June 1973. At this stage I must point out that the record of appeal filed is most unsatisfactory and sketchy. However, the appellant was not legally represented; she was represented by one Mr. Arnell who acted as her agent. In these circumstances, in order to assist the court the respondent should have filed a supplementary record giving a clear and accurate picture of the proceedings. This however was not done, and it has been quite difficult to ascertain some relevant facts. Sometime in August 1973 after the notice of motion to strike off was filed, the appellant purported to amend her plaint, apparently without seeking or obtaining leave, by deleting the management order dated 15 December 1969, and reducing the claim to Shs. 33,000/-. The judge in his ruling on the motion to strike off would appear to have disregarded the purported amendment, as he stated that the plaint concerned farms L.R. 3805 and L.R. 7059/2, thus clearly implying that the plaint was in respect of two, and not one, management orders. The amended notice of motion to strike off the plaint was based on the ground that the matter in suit was res judicata, and that the plaint was frivolous and vexatious and an abuse of court process. The respondent should have filed a defence to the plaint pleading res judicata, see O. 6 r. 4 Civil Procedure Rules. However, Mr. Sharma for the respondent has submitted that he had filed a notice of motion instead of a statement of defence in order to save time and expense, but he was already in default. The appellant, however, could not have obtained judgment in default as there had been no compliance with the provisions of O. 9A r. 7 of the Civil Procedure Rules. The judge could have rejected the notice of motion, but he had jurisdiction to deal with it, and he did so. At the hearing of the motion Mr. Sharma submitted to the judge that the matter was res judicata, in view of the consent judgment in the earlier suit. However he also raised the issue of limitation and called the judge’s attention to the Public Officers Protection Act (Cap. 186). This issue of limitation was not contained in the notice of motion, nor in the supporting affidavits. Mr. Sharma in answer to this court, explained that he did not raise the issue of limitation in the notice of motion because in the original plaint the appellant was suing in respect of both the management orders, and limitation might not have applied to the management order dated 15 December 1969. The appellant had purported to amend her plaint by deleting the reference to the management order of 15 December 1969, and Mr. Sharma submitted, in that event, the action based solely on the management order dated 9 August 1965 was barred by limitation. I think that is a reasonable explanation. In any case no objection to this issue being raised was taken by the appellant or the judge, and even if prior notice was required, such notice could be considered to have been waived by the appellant. Furthermore the appellant has specially dealt with this issue of limitation in her written arguments in support of her appeal. However the judge did not deal with this issue, although he did mention it in passing in his ruling. The judge allowed the motion on the issue of res judicata with costs and ordered the appellant’s plaint to be struck off and the suit dismissed. From that order the appellant has appealed. S. 7 of the Civil Procedure Act deals with res judicata. It reads: “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 the 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.” A number of “explanations” follow, and only explanation (4) concerns us. It reads: “(4) 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.” The previous case only dealt with the claim in respect of L.R. 3805 and the management order dated 15 December 1969. I think that the appellant’s late husband could have, in that same suit, also dealt with L.R. 7059/2 and the management order dated 9 August 1965 at the same time. However he did not do so. The question is, ought he have done so? The two management orders relate to two different transactions. The management order dated 9 August 1965 referred to two farms L.R. 3805 and L.R. 7059/2, for a period from the date of possession until the order was revoked in 1967. Acts of omission or commission giving rise to losses, if any, during that period, in relation to L.R. 3805, and to L.R. 7059/2 until it was sold, would form a distinct transaction. The management order dated 15 December 1969 refers only to L.R. 3805, and acts of omission of commission giving rise to losses, if any, would also form a distinct transaction. There was no nexus between the two periods; nor was it alleged that identical evidence would be adduced for the acts of commission or omission committed in the two transactions. The acts of negligence committed during the two transactions would have been different acts relating to different matters. In bringing the present suit can it be said that the appellant was trying to bring before the court in another way and in the form of a new cause of action, a transaction which had already been adjudicated upon? I do not think so. I have looked up a few relevant cases, notably *Jadva Karsan v. Bhogal* (1953), 20 E.A.C.A. 74, *Kamunye v. Pioneer Assurance*, [1971] E.A. 263, and *Greenhalgh v. Mallard*, [1947] 2 All E.R. 255, and I have come to the conclusion that the plea of res judicata must fail. In the normal course of events, I would have simply allowed the appeal, as the judge had ruled in favour of the respondent only on the basis of res judicata. However at the hearing of the motion Mr. Sharma for the respondent had submitted that the suit was barred by limitation. I have already referred to this matter. A plea of limitation should have been pleaded in a statement of defence, or in this case, contained in the notice of motion, but Mr. Sharma has explained why this was not done in this instance. The judge therefore was aware of this plea. He however did not deal with it in his ruling. The management order in question was dated 9 August 1965 and farm L.R. 7059/2 was sold in February 1967 and farm L.R. 3805 reverted to the owner in or about June 1967. The cause of action would have arisen, at the latest, in or about June 1967. The subject plaint was filed on 7 March 1973, nearly 6 years later. The appellant in her plaint particularly referred to s. 187 of the Agriculture Act, under which the management order was made. S. 187 refers to “due attention to the need for careful management” and to an owner being “entitled to be compensated by the government for any loss which he may suffer by reason of the making of the order”. Clearly a claim under this would be in tort. There was a submission by Mr. Sharma that the plaint was defective in that it did not allege or specify any particulars of negligence; be that as it may, the claim was clearly one in tort, not contract. The ordinary period of limitation for an action in tort is three years from the date the cause of action arose. If the Public Officers Protection Act applies then the period would be only 6 months. Whatever the period of limitation applicable, the suit is time barred. I have refrained from dealing with the management order dated 15 December 1969, as the appellant had purported to delete it in her amended plaint. The claim on that is obviously untenable; it had been adjudicated upon and a consent judgment was entered in respect of it. The appellant had made some odd allegation about the consent judgment, but that is a matter between the appellant and her then advocate who was acting for her. If we allow the appeal and make the usual consequential order, the matter would have to be sent back to the High Court and then the respondent would be required to file a statement of defence. And when limitation is pleaded, as it would be, in the statement of defence, the claim in bound to be barred by time. That would appear to be a futile exercise. The judge in his ruling held that the suit was res judicata and on that ground allowed the motion and ordered the plaint to be struck off and the suit dismissed with costs. In my view the judge should have allowed the motion and ordered the suit dismissed on the ground that it was time barred, not that it was res judicata. The issue of limitation was argued before the judge and the judge should have dealt with it. That argument was unanswerable. In the peculiar circumstances of this case I would order as follows. The appeal is allowed to this limited extent; that the order of the judge allowing the motion to strike off the plaint and dismissing the suit remains, but that the reason would be that it was time barred, not res judicata. The order for costs is set aside; instead there would be no order for costs in the High Court. Similarly there would be no order for costs in the appeal.

**Spry Ag P:** I have had the advantage of reading the judgment of Mustafa, J.A., with which I agree. I agree that the proceedings leading to this appeal were not res judicata so far as they related to the 1969 Management Order. The two Orders related to separate periods that were not continuous and the earlier Order included land not the subject of the later Order. The claims in both suits appear to have been based on allegations of negligence and the negligent acts or omissions must have been separate and distinct. I agree with Mustafa, J.A., that while the two claims could have been included in one suit, the causes of action were separate and there was no rule of law requiring them to be combined. It might be argued that as the respondent filed no notice of grounds for affirming the decision, the issue of limitation was not properly before this court on the appeal. It would, however, serve no useful purpose to remit the proceedings, only for the suit to be dismissed on the ground of limitation: it would be a waste of time and costs. There is no injustice to the appellant, who has submitted her arguments on the question. I agree that the suit is clearly in tort and that it is therefore barred. As Musoke, J.A., also agrees, there will be an order in the terms proposed by Mustafa, J.A.

**Musoke JA:** I also agree.

*Appeal allowed in part.*

The appellant appeared by agent.

For the respondent:

*R Sharma* (State Counsel)