



REPUBLIC OF KENYA



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**Omar v Attorney General & 3 others (Petition E322 of 2021) [2023] KEHC 466 (KLR)
(Constitutional and Human Rights) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E322 OF 2021

AC MRIMA, J

JANUARY 31, 2023

BETWEEN

GOLICHA GANGE OMAR PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

**PRINCIPAL SECRETARY MINISTRY OF STATE FOR
DEFENCE 2ND RESPONDENT**

CHAIRMAN TENDER COMMITTEE 3RD RESPONDENT

**MINISTRY OF STATE FOR DEFENCE M/S ELDORET STANDARD
BUTCHERY 4TH RESPONDENT**

RULING

Background:

1. The Petition in this matter was instituted as a result of the manner in which the 1st, 2nd and 3rd Respondents herein dealt with Tender No. MOSD/423(348) 2011/12 for supply of Meat (Beef) on Bone to Eldoret units of the Ministry of Defence (hereinafter referred to as ‘the Tender’) sometimes in 2012.
2. The Petitioner was one of the unsuccessful bidders for the tender. He then lodged Review NO. 15 of 2022 before the Public Procurement Administrative Review Board (hereinafter referred to as ‘the Board’). The review was successful and the Board awarded the tender to the Petitioner. That was vide its decision rendered on May 11, 2012.



3. The Respondents, however, declined to execute the award of the Board and the Petitioner filed Judicial Review No. 384 of 2012 compelling the 1st to 3rd Respondents herein to comply with the order of the Board.
4. By a judgment delivered on 5th December, 2013, the judicial review proceedings were unsuccessful for two reasons. First, the initial successful bidder, who is the 4th Respondent herein, had not been enjoined in the proceedings and yet it had already entered into a contract and was supplying the meat. Second, the proceedings were overtaken by events since the contract was already under execution.
5. Resulting from the foregoing, the Petitioner therefore, filed the instant Petition on the basis of the infringement of his rights and fundamental freedoms during the period the Respondents declined to comply with the orders of the Board. The Petition is dated July 26, 2021.
6. In the main, the Petitioner sought for the following prayers: -
 - a. A Declaration that the 2nd Respondent discriminated against the Petitioner in contravening the award and granting the supply of fresh meat (beef) on bone to the 4th Respondent.
 - b. A declaration and finding that the Respondents contravened sections 98(a) (b) (c) and 100 (1) (2) (3) of the *Public Procurement and Disposal of Assets Act*, 2005 with raw impunity to the detriment of the Petitioner's rights in the tender.
 - c. A declaration that the Respondents' illegal actions led to the delay to supply hence the Petitioner's 273 cows died of foot and mouth disease and East Coast Fever which act visited upon the Petitioner with physical and psychological torture contrary to article 29 of *the constitution*.
 - d. The Respondents be ordered jointly and severally to pay the Petitioner damages for discrimination and breach of contract which visited on the petitioner with physical and psychological torture without any colour of right.
 - e. Special damages amounting to Kshs.8,599,500/- for loss of 273 cows to East Coast Fever and foot and mouth disease.
 - f. Loss of income in terms of the 1000Kg of meat supply to Moi Barracks Eldoret unit daily x210 Kshs..the price quoted by the Petitioner, and awarded price by the Public Procurement and Review Board x30 days one month x12 months (one year) it translates to 1000Kg x Kshs.210/- x30days x12 months=Kshs.75,600,000/-.
 - g. As an expression of displeasure by this Honourable Court against the Respondents (individual officers) be condemned to pay exemplary damages, for flouting *the Constitution*, the procurement law and the procedure thereto.
 - h. Costs of this Petition.
7. In answer to the Petition, the 1st, 2nd and 3rd Respondents through the Hon. Attorney General filed a Notice of Preliminary Objection dated 1st September, 2021. The objection was supported by the 4th Respondent.

The Objection:

8. The objection was based on the following grounds: -
 1. This Honourable Court lacks the jurisdiction to entertain the suit.



2. The Petition is time barred, pursuant to section 3(2) of the *Public Authorities Limitations Act*, cap 39 Laws of Kenya, in as much as it seeks remedies for breach of contract and damages incidental thereto.
3. The Petition is res judicata and violates Section 7 of the *Civil Procedure Act*, cap 21 Laws of Kenya, for being brought against the same or similar parties or under the same or similar titles, and raising issues that are directly and substantially in issue in the following decided cases:
 - a. Nairobi, PPARB, Application No. 15 of 2012: Golicha Gange Omar vs Ministry of State for Defence;
 - b. Nairobi, HCJR No. 384 of 2012: Republic vs Hon. Attorney General, Principal Secretary, Ministry of State for Defence, and Chairman Tender Committee, Ministry of State for Defence, ex-parte Golicha Gange Omar;
 - c. Eldoret, HCCC No. 2 of 2016: Golicha Gange Omar vs Principal Secretary, Ministry of State for Defence, Public Procurement Oversight Authority, Public Procurement Administrative Review Board, Abdi Omar Adan & Adan Osman Godana T/A Eldoret Standard Butchery, and Hon. Attorney General.
9. The 1st, 2nd and 3rd Respondents filed written submissions to the objection. The 4th Respondent elected not to file any written submissions on the objection, but instead adopted the submissions as filed by the 1st, 2nd and 3rd Respondents.
10. The Petitioner filed its written submissions to the objection.
11. The 1st, 2nd and 3rd Respondents submissions expounded on the grounds and referred to several decisions in support. It was categorical submitted that Section 3(2) of the Public Authorities Limitations Act was a complete bar to the Petition as the claim was based on a contract whose enforcement was caught up by limitation.
12. There was also the contention that the Petition was res judicata Nairobi, PPARB, Application No. 15 of 2012: Golicha Gange Omar vs Ministry of State for Defence; Nairobi, HCJR No. 384 of 2012: Republic vs Hon. Attorney General, Principal Secretary, Ministry of State for Defence, and Chairman Tender Committee, Ministry of State for Defence, ex-parte Golicha Gange Omar and Eldoret, HCCC No. 2 of 2016: Golicha Gange Omar vs Principal Secretary, Ministry of State for Defence, Public Procurement Oversight Authority, Public Procurement Administrative Review Board, Abdi Omar Adan & Adan Osman Godana T/A Eldoret Standard Butchery, and Hon. Attorney General.
13. The Petitioner contended that the Petition was distinct in that it was not based on the alleged contract, but was for purposes of enforcing the Petitioner's rights and fundamental freedoms which action has no limitation period.
14. The Petitioner also declined that the Petition was res judicata. He claimed that the other matters raised different issues from those in the Petition.

Analysis:

15. Going forward, I will consider two aspects of the objection. They are whether the objection is a properly raised in law and, if it is, then whether it is merited.
16. I will begin with the first aspect.



Whether the objection is a properly raised in law:

17. The validity of a preliminary objection is considered on the basis that it conforms with the long-standing legal principle that it is raised on a platform of agreed set of facts, it raises pure points of law and is capable of wholly determining the matter.
18. To that end, the locus classicus decision in *Mukisa Biscuit Manufacturers Ltd -vs- Westend Distributors Ltd* (1969) E.A 696. At page 700, comes to the fore. In that case, the Court defined a preliminary objection and discussed its operation in the following eloquent manner: -

...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.

19. The Supreme Court weighed in on the issue in *Aviation & Allied Workers Union Kenya -vs- Kenya Airways Ltd & 3 others* [2015] eKLR and stated thus: -

.... Thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.

20. Ojwang J, as he then was, emphasized the finding in *Mukisa Biscuit -vs- West End Distributors* case (supra) in Civil Suit No. 85 of 1992, *Oraro -vs- Mbaja* [2005] 1 KLR 141 when he observed as follows: -

..... I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed....

21. In *John Musakali -vs- Speaker Country of Bungoma & 4 others* (2015) eKLR the validity of a preliminary objection was considered in the following manner: -

.... The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law....



22. Finally, in *Omondi -vs- National Bank of Kenya Ltd & others* {2001} KLR 579; [2001] 1 EA 177, guidance was given on what Courts ought to consider in determining the validity of preliminary objections. It was observed: -
- ... In determining (Preliminary Objections) the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion....
23. On whether the issue of jurisdiction is a pure point of law, the Supreme Court in Petition No. 7 of 2013 *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others*, [2014] eKLR, stated that 'jurisdiction is a pure question of law' and should be resolved on priority basis.
24. Having laid the legal basis above, suffice to say that the Court has carefully considered the objection and the submissions thereto. The objection is hinged on two main grounds. They are whether the Petition is time-barred by virtue of section 3(2) of the *Public Authorities Limitations Act* and whether the Petition is barred by dint of the doctrine of res judicata.
25. The ground on limitation is founded on a specific statutory provision. It does not call for any interrogation of the facts and is raised on the basis of agreed facts. The facts are when the alleged contract was entered and the time of filing of the Petition.
26. In the event the ground on limitation is sustained, then the Petition will be wholly disposed of. The ground, therefore, is properly raised and ought to be considered on its merit.
27. Turning to the ground on res judicata, it is imperative to note that the Respondents are yet to file their respective responses to the Petition. They have so far only filed the objection.
28. As stated, the ground on res judicata is based on three alleged cases. They are Nairobi, PPARB, Application No. 15 of 2012: Golicha Gange Omar vs Ministry of State for Defence; Nairobi, HCJR No. 384 of 2012: Republic vs Hon. Attorney General, Principal Secretary, Ministry of State for Defence, and Chairman Tender Committee, Ministry of State for Defence, ex-parte Golicha Gange Omar and Eldoret, HCCC No. 2 of 2016. Golicha Gange Omar vs Principal Secretary, Ministry of State for Defence, Public Procurement Oversight Authority, Public Procurement Administrative Review Board, Abdi Omar Adan & Adan Osman Godana T/A Eldoret Standard Butchery, and Hon. Attorney General.
29. In support of the Petition, the Petitioner annexed copies of the award of the Board in Nairobi, PPARB, Application No. 15 of 2012 and the judgment in Nairobi, HCJR No. 384 of 2012. It is the Respondents who raised the Eldoret, HCCC No. 2 of 2016.
30. Given that the matter in Eldoret, HCCC No. 2 of 2016 was raised in support of the doctrine of res judicata, then there is no doubt the same must have been finalized. However, the Respondents failed short of introducing the pleadings and the decision in the said matter for this Court to ascertain whether the doctrine actually applies in the circumstances of this case.



31. Whereas the Respondents may be excused for not introducing the pleadings and decisions in Nairobi, PPARB, Application No. 15 of 2012 and Nairobi, HCJR No. 384 of 2012 since the Petitioner himself introduced copies of the decisions, that is not the case with Eldoret, HCCC No. 2 of 2016.
32. Whereas the doctrine of res judicata can be successfully raised in constitutional Petitions and may bring a Petition to a close, this Court wonders how it will determine if the instant Petition is res judicata in the absence of at least the decision in Eldoret, HCCC No. 2 of 2016.
33. The manner in which factual issues are raised in Court is a long-standing practise in law and really needs no rehashing. However, at the risk of repetition, the Supreme Court addressed itself on different facets making up the doctrine of res judicata in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR.
34. In the first instance, the Apex Court framed the issues for determination as follows: -
- a) Did the High Court procedurally consider the plea of res judicata?
 - b) Did the finding by the High Court on res judicata infringe on the Petitioner's right to fair hearing condemning them unheard?
 - c) Were the learned Judges of the Court of Appeal justified in holding that the doctrine of res judicata applied to the current case; was the Paluku case the same as the Appellants' herein?
 - d) Is this doctrine of res judicata applicable to constitutional litigation and interpretation, just as in other criminal and civil litigation?
 - e) If the doctrine of res judicata is applicable to constitutional matters with the rider that it should be invoked in constitutional litigation only in the rarest and clearest of cases, on whom lies the burden of proving such rarest and clearest of cases?
 - f) What constitutes such "rarest and clearest" of cases?
 - g) Who bears the costs of the suit.
35. On the procedure for raising the plea of res judicata, the Supreme Court alluded to the position that the plea is anchored on evidential facts and that such facts ought to be properly raised in a matter. In that case, the plea of res judicata had been raised by way of Grounds of opposition and in the Replying Affidavit.
36. The Court, in dismissing the argument that the issue was improperly raised before Court, stated as follows: -
- (53) Instead, and contrary to the Appellants submissions, the plea of res judicata was raised through both grounds of opposition and replying affidavits in response to the Appellants application. It is also evident that through the Replying Affidavits of the 3rd and 4th Respondents, evidence by way of the Judgment of JR No. 130 of 2011 was introduced through an affidavit to bolster the plea of res judicata.
 - (54) It is further evident that the Appellants were not condemned unheard or shut out from the proceedings. The proceedings demonstrate that the Court accorded the Appellants the two justiciable elements of fair hearing: (i) an opportunity of hearing must be given; and (ii) that opportunity must be reasonable.
 - (55) This ground of appeal must therefore fail.



37. On whether the doctrine of res judicata applies to constitutional Petitions, the Supreme Court endeavoured an extensive discussion and comparative analysis in various jurisdictions. It also captured the various opposing schools of thought on the issue.
38. In the end, the Court found that the doctrine, rightly so, applies to constitutional Petitions. This is what the Court partly stated: -
81. We reaffirm our position as in the Muiro Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.....
- (82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other.
39. On the basis of the foregoing and based on the guidance of the Supreme Court, this Court will not, therefore, consider whether the doctrine of res judicata applies in this matter courtesy of Eldoret, HCCC No. 2 of 2016. As a result, limb 3(c) of the objection is hereby struck out.
40. In the end, the Court will consider the ground on limitation alongside the doctrine of res judicata in respect to only Nairobi, PPARB, Application No. 15 of 2012 and Nairobi, HCJR No. 384 of 2012.

Whether the objection is merited:

Petition time-barred?

41. The ground on limitation is based on section 3(2) of the *Public Authorities Limitation Act*, Cap. 39 of the Laws of Kenya. The provision states as follows: -
- No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
42. The background of the Petition has already been captured. A cursory perusal of the Petition fronts the position that the Petition is a plea on enforcement of the Bill of Rights under *the Constitution*. The Petitioner, in essence, is decrying an alleged infringement of his rights and fundamental freedoms by the actions of the Respondents in the manner in which they dealt with the tender especially when they declined to comply with the award of the Board. Even on its title, the Petition is hinged on articles 3, 10, 22, 27, 29, 47, 50 and 165 of *the Constitution*.
43. The Petition is, hence, not based on any contract. In fact, there was no contract entered between the Petitioner and any of the Respondents. The execution of the contract was to follow upon compliance of the award of the Board, an act which is alleged not to have happened.
44. This Court, therefore, declines the invitation to find that the Petition is based on a contract and is time-barred. The ground is for rejection and is hereby dismissed. The Plea of Res Judicata?



45. The Apex Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others case* (supra) delineated the threshold for proving the applicability of the doctrine. The Court stated as follows: -
- (86) We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was 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 identical parties, subject matter and cause of action
46. Drawing from the above and on the commonality of the parties, there is no doubt that the parties in Nairobi PPARB, Application No. 15 of 2012 and Nairobi HCJR No. 384 of 2012 are not similar to the parties in the instant Petition. For instance, the 4th Respondent has not participated in Nairobi PPARB, Application No. 15 of 2012 and Nairobi HCJR No. 384 of 2012.
47. On the subject matter and causes of action, the ones in Nairobi PPARB, Application No. 15 of 2012 and Nairobi HCJR No. 384 of 2012 are distinct from the cause of action in the Petition. Whereas Nairobi PPARB, Application No. 15 of 2012 and Nairobi HCJR No. 384 of 2012 dealt with the procurement process for the tender, the cause of action and the subject matter in the instant Petition is on infringement of rights and fundamental freedoms.
48. Without even taking this discussion further, there is clarity that the doctrine of res judicata is not applicable in this matter. I, therefore, choose not to go engage further.
49. The upshot is that the limb of the objection based on the doctrine of res judicata fails and is also dismissed.

Way forward:

50. The objection is unsuccessful.
51. This Court is, however, alive to the fact that there was Eldoret, HCCC No. 2 of 2016: Golicha Gange Omar vs Principal Secretary, Ministry of State for Defence, Public Procurement Oversight Authority, Public Procurement Administrative Review Board, Abdi Omar Adan & Adan Osman Godana T/ A Eldoret Standard Butchery, and Hon. Attorney General where even the 4th Respondent herein participated.
52. With a view of ease of reference of the said Eldoret HCCC No. 2 of 2016 in this Petition, it is prudent that this Petition be dealt with at the High Court in Eldoret. As such, an appropriate order shall follow.
53. In sum, the following final orders of this Court hereby issue: -
- a. The Notice of Preliminary Objection dated 1st September, 2021 is hereby dismissed with costs.
 - b. This matter shall be transferred to the High Court at Eldoret for further dealing.

Orders accordingly.



DELIVERED, DATED AND SIGNED AT KITALE THIS 31ST DAY OF JANUARY, 2023.

A. C. MRIMA

JUDGE

