



Transcend Media Group Ltd v Kenya Power & Lighting Co. Ltd & another (Civil Suit E802 of 2021) [2023] KEHC 1190 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E802 OF 2021
DO CHEPKWONY, J
FEBRUARY 17, 2023**

BETWEEN

TRANSCEND MEDIA GROUP LTD PLAINTIFF

AND

KENYA POWER & LIGHTING CO. LTD 1ST DEFENDANT

SCANAD KENYA LIMITED 2ND DEFENDANT

RULING

1. This Ruling determines the 1st Respondent's Notice of Preliminary Objection dated 22nd October, 2021 objecting to this court's jurisdiction to entertain the instant suit on grounds that the suit offends Sections 28, 167 and 175 of the [Public Procurement and Asset Disposal Act](#), 2015.
2. Further, that the suit is *res judicata*, the issues herein having been canvassed and addressed by court in PPARB No 40 of 2016, Judicial Application No 302 of 2016, PPARB No 70 of 2016, JR Review No 540 of 2017 and PPARB No 64 of 2019.
3. In support of the Preliminary Objection, the 1st Defendant filed submissions dated the 14th February, 2022. Its gravamen is that the Plaintiff's case is purely about Tender No KPI/9AA-02/OT/4-CS/15-16 and should be dealt with and advanced before the Public Procurement Administrative Review Board in the first instance but not before this Honourable Court. As such it is argued that the suit is in breach of the statutory provisions of the Public Procurement and Assets Disposal Act (the "Act"). In support of that line of argument, the 1st Defendant relied on a plethora of cases and legislative provisions which point out that without jurisdiction, the court cannot embark on decision making the subject suit cannot be remedied.



4. It is the 1st Defendant's case that the Public Procurement Administrative Review Board is clothed with jurisdiction to review, hear and determine tendering and assets disposal disputes. Therefore, since there exists a competent alternative dispute resolution mechanism available to the Plaintiff, the court should dismiss the matter for want of jurisdiction at first instance.
5. As to whether the suit is *res judicata*, the 1st Defendant submitted that the suit filed herein is based on the same subject matter between the same parties and same cause of action with earlier suits that have been determined by the Review Board and the High Court in the cases of PPARB No 40 of 2016, Judicial Application No 302 of 2016, PPARB No 70 of 2016, JR Review No 540 of 2017 and PPARB No 64 of 2019. Thus, the 1st Defendant submits that the instant proceedings offend the doctrine of *res judicata* as enshrined under Section 7 of the *Civil Procedure Act*. In the 1st Defendant's view, if the suit herein is not dismissed, the court risks on re-litigating on similar issues which were heard and determined in the former suits and even defeats the rationale on the need for finality to litigation. Based on the foregoing, the 1st defendant craved for the court to dismiss the entire suit with costs.
6. On the other hand, vide the submissions dated 25th May, 2022 the Plaintiff submitted that the challenge on this court's jurisdiction is merely a misconception by the 1st Defendant of the factual and legal foundations of the claim. It submitted that whereas the Public Procurement Administrative Review Board is clothed with powers over procurement disputes, its mandate is limited by Section 174 of the *Public Procurement and Assets Disposal Act*, 2015 which allows a party to seek other appropriate remedies. The Plaintiff has submitted that in the present case, the tender having been terminated. The Review Board was locked out in hearing the dispute by virtue of Section 167 (4) which provides that a dispute with respect to termination of procurement proceedings shall not fall within the realm of the Public Review Board. As such, the review board would not address the question on award of damages resulting from termination of the subject tender in question as it is the High Court with the proper jurisdiction thereof.
7. As to whether the present suit is *res judicata*, the Plaintiff has submitted that the previous suits were not determined in finality because the tender in question was terminated on account of lapse of time by invocation of Section 63 of the *Public Procurement and Asset Disposal Act*. That in addition to that, the causes of action in the former suits are different to one in the present suit which seeks damages incurred out of termination of the tender.

Analysis and Determination

8. I have considered the 1st Defendant's application on a point of Preliminary Objection to the effect that the present suit should be dismissed as the court has no jurisdiction to hear tendering and procurement disputes at first instance. And further that the issues herein have been previously raised and addressed in PPARB No 40 of 2016, Judicial Application No 302 of 2016, PPARB No 70 of 2016, JR Review No 540 of 2017 and PPARB No 64 of 2019, hence this suit is *res judicata*.
9. In the celebrated case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 the court expressed itself on what constitutes a preliminary objection in the following words: -

“----a preliminary objection consists of a point of law which

has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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 a contract giving rise to the suit to refer the dispute to arbitration”.



In the same case Sir Charles Newbold, P. stated:

“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 issue, and this improper practice should stop”.

10. With regard to whether the Preliminary Objection raised herein is sustainable, I wish to reiterate that our courts and others in other jurisdiction have stated in affirmation that an objection to the court’s jurisdiction is one of the Preliminary Objections that consist of a point of law. Indeed, in the case of *Owners of Motor Vessel Lillian ‘S’ v Caltex Kenya Limited*. [1989] KLR 1, the court expressed that, without jurisdiction, the court has no power to make even one more step in the matter and there is no basis for a continuation of the proceedings. The best the court can do once it holds the opinion that it lacks jurisdiction in a particular matter is to down its tools. Given that the Preliminary Objection by the 1st Defendant is to the effect that the court lacks jurisdiction, I find the same sustainable and I now turn the question on whether or not the same is merited.
11. It is the Respondent’s case that the suit herein is a preserve of and is to be determined by the Public Procurement Administrative Review Board in first instance whereas for the Respondent, the dispute entails inter alia a claim for damages resulting from unfair tendering process which cannot be awarded by the said board. Thus, whereas the 1st Defendant seeks the court to down its tools on the ground that it lacks jurisdiction to hear and determine this matter, the Plaintiff submits that although the Public Procurement Administrative Review Board provides an alternative remedy, that redress is not appropriate in the circumstances of this case as the tribunal cannot award damages hence the court should exercise restraint. The upshot the Plaintiff’s argument is that the jurisdiction of the Review Board does not apply in the present suit specifically because the tender process has been terminated for having expired and the remedy sought herein is damages it suffered due to the unprocedural termination of the tender.
12. The Public Procurement Administrative Review Board draws its authority and jurisdiction from Section 27 of the *Public Procurement and Asset Disposal Act* of 2015 with its functions set out under Section 28 of the Act as follows: -
 - “(1) The functions of the Review Board shall be—
 - (a) reviewing, hearing, and determining tendering and asset disposal disputes; and
 - (b) to perform any other function conferred to the Review Board by this Act, Regulations or any other written law.
 - (2) In performance of its functions under subsection (1)(a) of this section, the Review Board shall have powers to develop rules and procedures to be gazette by the Cabinet Secretary.
 - (3) The Authority shall provide secretariat and administrative services to the Review Board.”



13. More specifically on the Review Board's Jurisdiction as regards the review of procurement processes, Section 167(1) of the *Public Procurement and Asset Disposal Act* states as follows:-

- “(1) Subject to the provisions of this Part, a candidate or a tenderer, who claims to have suffered or to risk suffering, loss or damage due to the breach of a duty imposed on a procuring entity by this Act or the Regulations, may seek administrative review within fourteen days of notification of award or date of occurrence of the alleged breach at any stage of the procurement process, or disposal process as in such manner as may be prescribed.
- (2) A request for review shall be accompanied by such refundable deposit as may be prescribed in the regulations, and such deposit shall not be less than ten per cent of the cost of the contract.
- (3) A request for review shall be heard and determined in an open forum unless the matter at hand is likely to compromise national security or the review procedure.
- (4) The following matters shall not be subject to the review of procurement proceedings under subsection (1)—
- (a) the choice of a procurement method;
 - (b) a termination of a procurement or asset disposal proceedings in accordance with Section 63 of this Act; and
 - (c) where a contract is signed in accordance with Section 135 of this Act.”

14. Section 167 4(b) of the Act provides that a termination of a procurement or asset disposal proceedings by an accounting officer or a procuring entity under Section 63 of the Act shall not be subject to review proceedings under Section 167(1). Thus, for the jurisdiction of the Board to be ousted, the termination must meet the conditions set in Section 63 of the Act.

15. In this case, it is contended that the 1st Respondent terminated the procurement proceeding in question by invocation of Section 63. I have read through the Complaint dated 30th August, 2021 and find that the cause of action lays on the claim for damages incurred by the Plaintiff pursuant to termination of tendering proceedings.

16. In the Plaintiff's view, by terminating the tender, the 1st defendant breached the terms of process contract between them and jointly conspired with the 2nd Defendant to occasion upon the Plaintiff such loss as particularized and listed in the Complaint. Since the Plaintiff's claim disputes the 1st Defendant's acts in terminating the tendering proceedings by invocation of Section 63 of the Act, without further ado I am satisfied that the circumstances set out in Section 63 were satisfied so as to oust the Public Procurement Administrative Review Board's Jurisdiction. The recourse therefore lies with the High Court, and I am persuaded that the instant suit is properly before this court. The challenge on this court's jurisdiction on the ground that the dispute herein is a preserve of the Public Procurement Administrative Review Board fails.



17. I now turn to consider the second ground which is whether this court lacks jurisdiction on account of the suit being res-judicata. Section 7 of the [Civil Procedure Act](#) outlines the principles guiding an application for *res judicata*. It provides as follows: -

“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 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.”

18. The requirements for *res judicata* to arise as stated in Section 7 above are that: -

- a. There must have been a previous suit between the same parties.
- b. The issues before the court must have been finally determined in that previous suit.
- c. The issue must have been determined by a court having competent jurisdiction.

19. In the case of [Abok James Odera v John Patrick Machira](#) Civil Application No Nai. 49 of 2001, it was held that to successfully plead the doctrine of *res judicata*, there must be: -

- (i) a previous suit in which the matter was in issue;
- (ii) the parties were the same or litigating under the same title;
- (iii) a competent court heard the matter in issue;
- (iv) the issue had been raised once again in a fresh suit.

20. In the persuasive English case of [Lal Chand v Radha Kishan](#), AIR 1977 SC 789 the court expressed thus: -

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

21. The defunct East African Court of Appeal in the case of [Lotta v Tanaki](#) [2003] 2 EA 556, held as follows: -

“The doctrine of *res judicata* is provided for in Order 9 of the [Civil Procedure Code of 1966](#) and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of Section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit



must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit”.

22. Thus from the foregoing, the principle of *res judicata* which is well entrenched and has taken a firm root in our jurisprudence seeks to protect litigants and the courts from never-ending cycles of litigation. Nonetheless, it must be shown that the issue in question was directly and substantially in issue in the former suit, that the parties in the two suits are the same litigating under the same title in both suits, and lastly that the former suit was heard and determined in finality by a court of competent authority.
23. In the present case, the 1st Defendant avers that the dispute and issues herein were previously heard and determined by the Judicial Review Board and the High Court in the cases of PPARB No 40 of 2016, Judicial Application No 302 of 2016, PPARB No 70 of 2016, JR Review No 540 of 2017 and PPARB No 64 of 2019. Further, that the previous matters were between the same parties regarding the same subject matter as sought to be relitigated in this matter.
24. For the Plaintiff, the previous suits were not determined in finality because the 1st Defendant terminated the tender in question on account of lapse of time by invocation of Section 63 of the *Public Procurement and Asset Disposal Act*. That, in addition to that, the causes of action in the former suits are different from the one in the present suit which seeks damages incurred on account of termination of a tender.
25. I have considered the previous suit being PPARB No 40 of 2016, Judicial Application No 302 of 2016, PPARB No 70 of 2016, JR Review No 540 of 2017 and PPARB No 64 of 2019 alongside the Plaintiff filed herein.
26. Thus, although the parties in the previous suits are similar as in the present suit, the pleadings, causes of action and decisions in the said suits are different from the cause of action in the present suit. The dispute in those suits revolved around the tendering process while the present suit is about damages arising out of termination of tender and cannot be resolved in the former suits. In the circumstances, the grounds for *res judicata* which compliment each other have not been fully established herein. Accordingly, the plea of *res judicata* fails and the same is disallowed.
27. In the premises, having considered the submissions by all the parties and the issues raised herein, I find the Notice of Preliminary Objection dated 22nd October, 2021 unmerited and proceed to dismiss it with no orders as to costs.
28. Mention on 7th March, 2023 before the Deputy Registrar for Pre-trial Directions.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Maingi counsel for Plaintiff



M/S Walela holding brief for Mr. Ochieng counsel for 1st Defendant

M/S Onyango holding brief for Mr. Kipkorir counsel for 2nd Defendant

Court Assistant - Sakina

