



**Kamade v Maisha Flour Limited & 2 others (Petition E032 of 2021)
[2023] KEHC 2709 (KLR) (Constitutional and Human Rights) (30 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2709 (KLR)

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

PETITION E032 OF 2021

HI ONG'UDI, J

MARCH 30, 2023

BETWEEN

FLORENCE MWIHAKI KAMADE PETITIONER

AND

MAISHA FLOUR LIMITED 1ST RESPONDENT

TDF GROUP LIMITED 2ND RESPONDENT

AND

BARBUH CASTING INTENDED RESPONDENT

RULING

1. By way of a Notice of Motion dated May 23, 2022 filed pursuant to sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 1 Rule 10, 14 and Order 51(1) of the Civil Procedure Rules, 2010 and Rule 5 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, the 2nd respondent/applicant seeks orders that:
 - a. The honourable court be pleased to order the addition of Barbuh Casting, as a third respondent to these proceedings.
 - b. An Order do issue ordering the petitioner to serve the intended 3rd respondent herein Barbuh Casting, with the petition.
 - c. Costs of this application be in the cause.
2. The application was supported by Susan Mbithe Muendo, the 2nd respondent's director's affidavit and the grounds on the face of the application that:



- i. The 2nd respondent was introduced to the petitioner by Barbuh Casting, as its Model.
 - ii. The Barbuh Casting was the managing agent of the petitioner at all material times.
 - iii. The 2nd respondent never interacted directly with the petitioner but through, Barbuh Casting.
 - iv. The contract in contention herein was negotiated by the 2nd respondent and Barbuh Casting in the absence of the petitioner.
 - v. The agreed consideration for the model to advertise the 1st respondent's product was paid to Barbuh Casting who was then to pay the petitioner.
 - vi. That Barbuh Casting stood out as a representative of the petitioner acting with consent of the said petitioner.
3. The petitioner in response filed her grounds of opposition and a list of authorities dated May 24, 2022. Her opposition was premised on the grounds that:
- i. The application raises issues of res judicata as they are similar to the applicant's application dated February 11, 2021 that sought to enjoin the party and was dismissed with costs by Hon. Justice Makau. Reliance on the point of res judicata was placed on the Supreme Court case of *John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others* (2021) eKLR, and *E.T. vs. Attorney General and another* (2012) eKLR.
 - ii. The application is frivolous and vexatious meant to waste court's time.
 - iii. The application is disguised as one of joinder of the 3rd intended respondent yet it is one seeking review and appeal at the same time. It was noted that the 2nd respondent did not appeal Hon. Justice Makau's Ruling on the issue dated November 18, 2021.
 - iv. The doctrine of estoppel stops the 2nd respondent from making this application as the parties had agreed to proceed to hearing of the matter.
 - v. The 2nd respondent's grievances ought to be solved somewhere else.
 - vi. The application ought to be struck off with costs in favour of the petitioner.
4. The 1st respondent informed the court that they would not be participating in the instant application.

The Parties submissions

The 2nd Respondent/Applicant's submissions

5. The firm of Oyatta and Associates Advocates on behalf of the applicant filed written submissions and a list of authorities dated June 29, 2022. Counsel identified the issues for determination as:
 - i. Whether the instant application is res judicata.
 - ii. Whether the 3rd intended respondent should be enjoined in the suit.
6. On the first issue, Counsel submitted that contrary to the petitioner's allegation the application referred to was dismissed on a technicality hence the Court did not hear it on its merit. In view of this, it was argued that the application was not res judicata. In support Counsel cited the case of *Okiya Omtatah Okoiti v Attorney General & another* (2022)eKLR where it was held that a Court when



determining a constitutional petition is empowered to look beyond the process and not only examine but delve into the merits of a matter.

7. Further reliance was placed on the cases of, *Jackson Juma v R* (2019) eKLR, *Edward Okong'o Oyagi & 2 others v Attorney General* (2019) eKLR, *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR and *Geonet Technologies Limited v Ministry of ICT, Innovation and Youth Affairs, State Department of ICT & Innovation & 2 others; Com Twenty One Limited (Interested Party)* (2022) eKLR. Counsel argued thus that the 2nd respondent's stake in view of the authorities cited was at stake if the instant application was dismissed.
8. Turning to the second issue, Counsel submitted that the petitioner had not disclosed to the court how she secures her contracts. He noted that this information lies with the intended 3rd respondent which would be evidenced once enjoined. To buttress this position Counsel relied on the case of *Carret Peter Mayor v Co-operative Bank of Kenya & another* (2022) eKLR where an application with similar facts was allowed by this court. Counsel submitted that enjoining the intended 3rd respondent was important due to the contractual obligation that was allegedly breached leading to instigation of this suit.

The Petitioner/Respondent's submissions

9. The petitioner informed the court that she would not be filing any written submissions. She sought to wholly rely on her grounds of opposition and list of authorities dated May 24, 2022.

Analysis and Determination

10. From the foregoing account two issues emerge for determination. These are:
 - i. Whether this court has jurisdiction to entertain the instant application.
 - ii. Whether the application for joinder should be allowed.

Whether this Court has jurisdiction to entertain the instant application

11. The jurisdiction of this court to entertain the instant application was challenged by the petitioner on the basis of the doctrine resjudicata. She pointed out that the 2nd respondent had made a similar application before this court which Hon. Justice Makau dismissed. On the other hand, the 2nd respondent/applicant argued that the former application had been dismissed on a technicality and so had not been heard on merit.
12. Evidently, the question of jurisdiction should always be answered first before making any determination since this determines a court's authority in exercising its mandate. This was aptly observed by the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR where it was held that:

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- “19. ...Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...In another locus classicus in this subject, this Court pronounced; Owners of the *Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):



“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

13. I will first consider whether the doctrine of resjudicata found under section 7 of the Civil Procedure Act is applicable here.

14. The Supreme Court in the case of Kenya Commercial Bank Limited v. Muiri Coffee Estate Limited & another Motion [2016] eKLR with reference to the doctrine held as follows:

“(52) *Res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights...”

15. The concept of *res judicata* applies to former suits that have already been finalized and determined by a court of competent jurisdiction. In the instant case, the suit is still ongoing. Moreover the former application alluded to was not in another Court of competent jurisdiction but adjudicated before this Court. Considering this, I am inclined to disagree with the petitioner’s notion that the instant application is res judicata. I say so because the elements of 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 does not fit the bill in the instant application. Although the parties and issue are the same, the matter is still ongoing and before the same Court.

16. A perusal of the Ruling dated November 18, 2021 by Hon. Justice Makau discloses that the 2nd respondent sought the following orders:

- a. The honourable Court be pleased to order the addition of Barbuh Casting, as a third party to these proceedings.
- b. Leave do issue to the 2nd respondent to serve upon the 3rd party an appropriate notice attached to the affidavit of the respondent in support of the application.
- c. Costs of this application be in the cause.

17. The application was heard and dismissed. The instant application contains similar prayers to the former application save for renaming of Barbuh Casting, as the intended 3rd respondent and that the petitioner serve him with the petition. In essence the core of this application is identical, to the one dated 11th February 2021. It is my considered view that the 2nd respondent in filing the instant application seeks to have this Court sit on appeal of its own decision.

18. The Supreme Court of Kenya while expounding on the said doctrine gave the following guidance in the case of Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR:

“

“(18) ...We, therefore, have to consider the concept of “*functus officio*,” as understood in law. Daniel Malan Pretorius, in “The Origins of the *functus officio* Doctrine,



with Specific Reference to its Application in *Administrative Law*,” (2005) 122

SALJ 832, has thus explicated this concept:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

(19) This principle has been aptly summarized further in *Jersey Evening Post Limited v A1 Thani* [2002] JLR 542 at 550:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”

19. As guided by the Supreme Court decision above, a Court vested with adjudicative or decision-making powers as a general rule, exercises those powers only once in relation to the same matter. The underlying principle being that once such a decision has been given, it is final and conclusive in that background. It is worthy to note that although a court becomes functus officio at that point, an aggrieved party retains the right to appeal the decision to a superior court, or have the decision reviewed.
20. I see no distinguishing aspects in the case before this court. Once this court made a determination in its Ruling dated November 18, 2018 on the joinder of Barbuh Casting, this Court officially became functus officio on the said issue. From the materials placed before this Court, it is perceptible that the 2nd respondent did not appeal the decision nor sought a review. Instead it sought to have another bite at the cherry when a new Judge took over the matter. In my view, this is a classic case of abuse of the Court process.
21. The upshot is that the Notice of Motion dated May 23, 2022 lacks merit and is dismissed with costs. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.

H. I. Ong’udi

Judge of the High Court

