



**Meyer v Karanja & another (Commercial Case E814 of 2021)
[2023] KEHC 4037 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E814 OF 2021
A MSHILA, J
APRIL 28, 2023**

BETWEEN

CHRISTIAN MEYER PLAINTIFF

AND

HARRISON KARANJA 1ST DEFENDANT

STANCLAUS AGACHO 2ND DEFENDANT

RULING

1. The Notice of Motion dated 8th June 2022 was brought under Section 1A, 1B, 3A and 7 of the [Civil Procedure Act](#); Order 51 Rules 1, 3 and 4 of the [Civil Procedure Rules](#) for the following orders;
 - a. The present suit be dismissed for being *res judicata* Milimani High Court Commercial Case number E106 of 2018.
 - b. The costs of this application be provided for.
2. The Application was supported by the sworn Affidavit of Stanclaus Agacho who stated that the Plaintiff/Respondent commenced this suit through the Complaint dated 17th September 2021 seeking various reliefs against the Defendants/Applicants. The dispute in the present case is premised on the shareholding of East African Parking Limited.
3. The Defendants/Applicants put the Plaintiff/Respondent on notice that the suit was *res judicata* Milimani High Court Commercial Case number E106 of 2018. The previous suit was instituted around a dispute over the ownership or shareholding of East African Parking Limited.



4. The said suit was compromised through a consent recorded, filed in Court and adopted as an order of the Court which consent stopped any future claims against each party or their respective directors, effectively concluding the question of ownership or shareholding of East African Parking Limited.
5. The above consent subsists as it has not been set aside or varied by the Court. Consequently, the present suit is res judicata since the matters under litigation were settled in the previous suit. It is in the interest of justice that the present suit be dismissed to avert the court entertaining issues which were already settled.

Applicants' Case

6. It was the Applicant's case that at the centre of this case is the consent dated 26th November 2018 and adopted in Milimani High Court Commercial Case Number E106 of 2018 between Crossroads Limited vs. East African Parking Limited and Medici Secure Services Limited.
7. Further, that while it is conceded that the parties herein were not named as parties in the former suit, it is argued that the consent instigating this Application extended to them. Clause (f) of the consent is construed to extend the application to the directors of the parties. The Respondent deposed on being a director and shareholder of the 2nd Defendant in the former suit while the Applicants are the directors of the company subject of these proceedings. Consequently, the Respondent and Applicants are parties to the suits as contemplated in Section 7 of the *Civil Procedure Act*.
8. The issues drawn from the Plaint filed in the former suit show that in making a determination the court would have been drawn in answering the ultimate question of the shareholding of East African Parking Limited. This is therefore a matter that would have arisen for determination from the Respondent through the 2nd Defendant in the former suit. The compromise of the case by the parties, extending to their respective directors, bars relitigating the same.
9. In addition, while the Respondent deposed that there was no determination on his shareholding, the Applicants submitted that a determination must not necessarily be a pronouncement by Court as a consent judgment also amounts to a determination. The consent in the former suit was duly adopted by the court and has not been set aside. Thus, it operates as a judgment duly entered by the court on the matters contained. As argued above the consent covers issue estoppel which included the question of ownership of East African Parking Limited.
10. The Applicant concluded by submitting that the Applicants effectively have demonstrated the satisfaction of all the limbs of the principle of res judicata.

Respondent's Case

11. The Respondent submitted that Order 6 Rule 1 of the *Civil Procedure Rules* that clearly states that where the Defendant has been served with summons to enter appearance, he shall unless an order be made by court, enter appearance within the time indicated in the summons. According to the summons dated 24th September 2021 the 2nd Defendant/ Applicant was to enter appearance within 14 days from the date of service.
12. The 2nd Defendant/Applicant did not enter appearance and file his Statement of Defence within the stipulated statutory timelines and did not seek leave of the court to enter appearance and file the Statement of Defence out of time, therefore the 2nd Defendant/Applicant does not have right to appear and be heard in the present suit nor the current application.



13. The court did not render its final decision on the issue of shareholding wrangles between East African Parking Limited and Medici Secure Services who were Defendants in the matter. Clause (f) therefore of the consent dated 26th November 2018 was only limited to the single contract of Car Parking Management Services.
14. Further, that the consent filed in HCCOMM E106 of 2018 was deliberate and express following a series of correspondence exchanged between the advocates acting for the parties therein with the intent of specifically settling the rights of the parties therein in the Car Parking Management contract between Crossroads Ltd and East African Parking Ltd alone and nothing more.
15. The Applicants have failed to establish that the present suit is barred on account of res judicata for the following reasons;
 - a. Parties in the present case and in HCCOMM E106 OF 2018 are not the same;
 - b. The Subject matter in HCCOMM E106 of 2018 was with regards to a car parking management contract between Crossroads Ltd and East African Parking Ltd while in the current case the Respondent is suing the 1st and 2nd Defendants/Applicants for breach of trust and theft of shares, mismanagement and embezzlement: and
 - c. Therefore, the Plaintiffs/Respondent's claim in the suit herein does not include a claim of rights and or benefits arising out of the Car Parking Management contract between Crossroads Ltd and East African Parking Ltd and assigned to the Plaintiff/Respondent through HCCOMM E106 of 2018.
 - d. No final or any determination was made on the issue of shareholding of the Plaintiff in East African Parking Ltd in HCCOMM E106 of 2018.
 - e. The Consent dated 26th November 2018 was limited to the car parking management contract dated 27th June 2017 and the addendum dated 20th August 2018,
 - f. The parties are not litigating under the same title.

Issues For Determination

16. Having considered the Application, response and the written submissions, this Court has framed only one issue for determination;
 - a. Whether The Suit Is *Res Judicata*?

Analysis

17. The doctrine of res judicata is set out in the [Civil Procedure Act](#) at Section 7 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 can 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 *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

19. It was the Applicant’s argument that the present suit is res judicata since the matters under litigation were settled in the previous suit Milimani High Court Commercial Case number E106 of 2018. The previous suit was instituted around a dispute over the ownership or shareholding of East African Parking Limited.

20. The Court of Appeal held in The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that:

“[F] or the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

21. Is the suit or issue being litigated directly and substantially in issue in the former suit? In the previous suit, the Plaintiff at Paragraphs 12 -14 of the Plaint dated 5th October 2018 raised the issues of shares and even mentions a contract signed between the parties with regard to shareholding and directorship in the 1st Defendant Company. That being said, the present suit revolves around the issue of ownership of the 1st Defendant. Essentially, the issues raised were substantially in issue in the former suit.

22. Was the former suit between the same parties or parties under whom they or any of them claim? Are the parties litigating under the same title? The parties are not litigating under the same title and on the face of it the parties in the present case and in HCCOMM E106 of 2018 are not the same. However, in the present suit the Plaintiff states that he is the sole investor of the 1st Defendant (former suit) while the 1st Defendant was a trustee shareholder of the company and the 2nd Defendant a director of the same company.



23. It is notable that at Para 12-14 of the former suit brought out the ownership wrangles of the 1st Defendant (former suit) between Christian Meyer (plaintiff in present suit) and the 2nd Defendant (present suit).

24. In *Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR the Court quoted the case of *E.T vs. Attorney General & Another* (2012) eKLR wherein the court noted thus:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu Vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

25. Was the issue heard and finally determined in the former suit? Was the court that formerly heard and determined the issue, competent to try the subsequent suit or the suit in which the issue is raised? It was not in dispute that there was a consent filed in HC COMM E106 of 2018 in settling the former dispute and by consent it was stated that;

“By consent: -

- a. The 1st Defendant irrevocably and absolutely assigns to the 2nd Defendant all its rights obligations in the contract dated 27th June 2017 and the addendum dated 20th August 2018 between the Plaintiff and the 1st Defendant;
- b. In consideration of the said assignment of contract and addendum: -
 - i. The 2nd Defendant shall pay to the 1st Defendant a total sum of Kenya Shillings Four Million (Kshs.4, 000, 000/=) only on or before 30th November 2018 or immediately upon receipt of payments from the Plaintiff, whichever is later,
 - ii. The 1st Defendant will forego all its claims, rights and interest in all such equipment the subject of the contract dated 27th June 2017 and the addendum dated 20th August 2018.
- c. The 2nd Defendant will purchase from the 1st Defendant One Million imported paper tickets suitable for CAME PS1 equipment at a cost of Kenya Shillings Two Million (Kshs. 2, 000, 000/-) payable on or before 31st December 2018.
- d. The 1st Defendant fully indemnifies the 2nd Defendant with respect to compatibility of the purchased paper tickets with the CAME PS1 equipment and in the event of incompatibility, the 1st Defendant shall refund the entire



purchase price paid under paragraph (c) to the 2nd Defendant and take back its paper tickets.

- e. In case of default by either of the Defendants, with respect to paragraph (b) hereinabove, the assignment of the contract dated 27th June 2017 and the addendum dated 20th August 2018 by the 1st Defendant to the 2nd Defendant will automatically be rescinded and parties returned to their previous respective positions.
- f. Parties hereto will have no claim whatsoever as against each or their respective directors with specific respect to the subject matter of this suit;
- g. Each party to bear its respective costs;
- h. This matter is hereby marked as settled.”

26. From the above-mentioned consent, the parties consented to have no claim whatsoever as against each or their respective directors with specific respect to the subject matter of this suit.

27. It is therefore this court’s considered view that the present suit bears the elements of *res judicata*.

Findings and Determination

28. For the forgoing reasons this court makes the following findings and determinations;

- i. This court finds that the instant suit has the elements of *res judicata*;
- ii. The suit is found to be incompetent and it is hereby struck out
- iii. The costs to be borne by the Plaintiff/Respondent.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE

In the presence of

Miss Omuya for the plaintiff/Respondent

No appearance for the Applicants

Sarah-----Court Assistant

