



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Furncon Limited (Civil Suit 80 of 1999)
[2022] KEHC 11139 (KLR) (Civ) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11139 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 80 OF 1999

JK SERGON, J

AUGUST 4, 2022

BETWEEN

NELSON MUGUKU NJOROGE PLAINTIFF

AND

FURNCON LIMITED DEFENDANT

RULING

1. This ruling emanates from the Notice of Motion dated 6th May, 2020 brought by the defendant/ applicant herein and supported by both the grounds set out on its face and the affidavit sworn by Solomon Njoroge Kiore. The applicant sought for the following orders:
 - i. Spent.
 - ii. That
 - iii. Honourable Justice Sergon do recuse himself from any further hearing or handling of this matter.
 - iv. That the court file be placed before the Presiding Judge of the Division for further orders and directions.
 - v. That costs of the application be provided for.
2. The plaintiff/respondent resisted the Motion by putting in the notice of preliminary objection dated 22nd March, 2022 raising the following grounds:
 - a. That the application herein is res judicata since the matter was heard and concluded vide the judgment dated 23rd September, 2002, an application filed on 18th December, 2015 seeking for review and to set aside the ruling of 11th December, 2015 was dismissed with costs to the



plaintiff, the defendant filed an appeal in the Court of Appeal vide Civil Appeal Number 34 of 2017 whereby the appeal was dismissed with costs.

- b. The Honourable Court has no jurisdiction to entertain the application dated 6th May, 2020 as it has become functus officio having fully discharged its duty in the matter.
 - c. The application is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith, even suo motu.
3. At the interparties hearing of the Motion, the parties' advocates made brief oral arguments to echo the averments made in the respective relevant documents filed.
 4. I have considered the grounds set out on the face of the Motion, the facts deponed in the affidavit supporting the Motion, and the preliminary objection. I will first make a determination on the preliminary objection.
 5. The first preliminary issue for determination concerns itself with whether the instant Motion is res judicata.
 6. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR offered the following interpretation on the legal term 'res judicata' in the manner hereunder:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“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 the 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.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.”
7. Upon my perusal of the record, I have not come across anything to indicate that the subject of recusal had previously been raised in respect to the present case involving the parties herein and that a determination was made on the said subject, in order for the principle of res judicata to become applicable herein.



8. For all the foregoing reasons, I am not satisfied that the instant Motion is res judicata.
9. The second preliminary issue raised before me is on whether this court is functus officio and therefore lacks jurisdiction to entertain the instant Motion.
10. On the part of the respondent, it is argued that there is nothing pending before the High Court for determination since a final determination was made in the suit.
11. From my study of the record, I note that judgment was entered in the suit by the High Court on 23rd September, 2002, in favor of the respondent and against the applicant.
12. From my further study of the record, I note that the matter thereafter proceeded on appeal to the Court of Appeal wherein the appellate court dismissed the applicant's appeal for want of merit, with costs by way of the judgment delivered on 20th December, 2019. There is nothing to indicate that the appeal has since been set aside or in any manner varied.
13. In view of all the foregoing circumstances, it is clear that this court lacks jurisdiction to entertain the instant Motion. I therefore find that the preliminary objection succeeds to that extent and I will allow it.
14. Consequently, the Notice of Motion dated 6th May, 2020 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
4TH DAY OF AUGUST, 2022.**

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Respondent

..... for the Defendant/Applicant

