



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E512 OF 2020

PERI FORMWORK SCAFFOLDING ENGINEERING (PTY) LIMITED.....PLAINTIFF

VERSUS

MAYFAIR INSURANCE COMPANY LIMITED.....DEFENDANT

RULING ON PRELIMINARY OBJECTION

BACKGROUND

The Plaintiff filed a suit dated **25th November 2020** seeking judgment against the Defendant for the sum of **USD.1, 489, 164.96** and a declaration that the purported cancellation of the guarantees were unlawful, null and void.

The Defendant filed an Amended Defense under protest dated **28th January 2021** and denied being indebted to the Plaintiff for any monies that may have been due under the purported Guarantees. In addition, the proceedings before this court are substantively similar to the proceedings in ***HCC No. 216 of 2019, Peri Formwork Scaffolding Engineering (Pty) Limited –versus- White Lotus Projects*** wherein judgment has already been entered in favour of the Plaintiff for the sum of **USD.1, 700, 158.22** and the Plaintiff is seeking double payment in respect of the same subject matter.

PRELIMINARY OBJECTION

The Defendant file a Notice of Preliminary Objection dated **14th December 2020** to oppose the Plaintiff's entire suit to be determined in *limine* on grounds that; -

1. This Court and any court's jurisdiction are ousted in view of the suit being *res judicata* ***HCC No.216 of 2019, Peri Formwork Scaffolding Engineering (PTY) Ltd –versus- White Lotus Projects limited*** and thus an affront to the mandatory provisions of **Section 7 of the Civil Procedure Act**.
2. This Court and any Court's jurisdiction are ousted in view of the provisions of **Section 173(1) of the Insurance Act** – an appeal from the decision of the Insurance Regulatory Authority properly lies with the Insurance Appeals Tribunal.

PLAINTIFF'S SUBMISSIONS

Whether the Plaintiff's suit is Res Judicata.

In the Court of Appeal decision in ***Independent Electoral and Boundaries Commission –versus- Maina Kiai & 5 Others [2017] eKLR*** interpreted **Section 7** of the Civil Procedure Act.

It was the Plaintiff's submission that the elements of *res judicata* have not been satisfied by the Defendant in its objection that the Plaintiff's suit is *res judicata*.

The Defendant in **High Court Civil Suit No. 216 of 2019** is different from the Defendant in the current proceedings before this Court and therefore the Defendant's claim that the suit is *res judicata* should fail on this ground.

The issues raised in **Civil Suit No.216 of 2019** are different from the issue raised in the current proceedings before this court

Whether the suit offends the doctrine of exhaustion.

The Plaintiff submitted that contrary to the Defendant's submission that the IRA conclusively determined its decision of **17th July 2020** and that the Plaintiff ought to have appealed to the Insurance Appeals Tribunal; the correct position is that **Section 173(1) of the Insurance Act** does not apply under the current circumstances and the court has jurisdiction to hear this suit.

DEFENDANT'S SUBMISSIONS

The Defendant submitted that the Plaintiff's claim is premised on the Developer's failure to remit the balance of materials supplied to the Developer for the project. Notably, this was also the primary issue in the first suit with judgment being delivered in favor of the Plaintiff.

The doctrine or *res judicata* in effect prevents a litigant claiming under the same title from returning to court to claim further reliefs not claimed in an earlier action. It ensures that litigation is brought to an end while maintaining respect for justice and the rule of law. See the Court of Appeal decision, **John Florence Maritime Services Limited & Another -versus- Cabinet Secretary for Transport an Infrastructure & 3 Others [2015] eKLR**

The court's jurisdiction is ousted as the suit is *res judicata* and also because the Plaintiff failed to appeal the decision of the IRA to the Insurance Appeals Tribunal contrary to stipulated procedure.

DEFENDANT'S SUPPLEMENTARY WRITTEN SUBMISSIONS

The Defendant further submitted that parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit. The High Court Constitution & Human Rights Division in **E. T -versus- Attorney General & Another [2012] eKLR** held; -

“The test whether the Plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction.....” parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”

Res judicata under **Section 7 (4)** of the Civil Procedure Act also affects matters which should have been but were not made part of the claim in an earlier suit. A fresh suit cannot be used as a method of execution.

DETERMINATION

After considering the pleadings and submissions by both parties the issues for determination are whether the Plaintiff's suit is *res judicata* and whether this Court's jurisdiction is ousted in view of the provisions of **Section 173(1) of the Insurance Act**.

The principles set out in the Court of Appeal decision in the case of **Mukisa Biscuits Manufacturing Ltd -versus- West End Distributors Ltd [1969] EA 697** where it was stated as follows:

“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.”

It is not in dispute that the Plaintiff filed a suit against **White Lotus Projects Limited** in Nairobi, High Court, Civil Suit No.216 of 2019 where the Plaintiff in the Court's judgment of 27th January 2021, was awarded the sum of **USD.1, 700, 158.22** being the balance of materials supplied for the Developer's construction project known as 'the Pinnacle Project'.

It is also not in dispute that the Plaintiff filed a complaint against the Defendant seeking payment of the said sum by the Defendant before Insurance Regulatory Authority (IRA) on 17th July 2020.

By letter from IRA dated 17th July 2020 written to the Plaintiff and in which the Defendant's Advocate was copied, in part the letter reads as follows; -

“Nonetheless, now that we are aware of the subsisting suit and the recoveries made, the authorities find no reasonable ground for compelling Mayfair Insurance to settle your clients claim of USD.1, 685, 339 as payment would amount to over compensation. Consequently, we are unable to deal further with the matter but make recommendation for the current suit HCC No. 216 of 2019 Peri Formwork Scaffolding Engineering (PTY) Ltd versus White Lotus Projects Limited to be pursued for recovery of pending payments and damages.”

Whether this Court's jurisdiction is ousted in view of the provisions of **Section 173(1) of the Insurance Act**.

Section 173 (1) of the **Insurance Act** provides as follows; -

(1) A person aggrieved by a decision of the Commissioner under this Act may, within one month from the date on which the decision is intimated to him, appeal to the Tribunal which may, subject to such terms and conditions as it may consider necessary, uphold, reverse, revoke or vary that decision.

(2) Except as provided in this section the decision of the Tribunal on an Appeal made to it under subsection (1) shall be final and conclusive.

(3) A person aggrieved by a decision of the Tribunal made under subsection (1) may, if it involves a question of law, within one month from the date on which the decision is intimated to him, appeal therefrom to the Court.

(4) A reference in this section to a question of law does not include a reference to a question whether there is sufficient evidence to justify a finding.

The Defendant indicated that this Court's jurisdiction is ousted in view of the **Section 173 (1) of Insurance Act** as outlined above.

The Plaintiff submitted, the issue of guarantees has been heard by the High Court and cited **Globe Developers Limited Case Sinohydro Corporation Ltd & Concord Insurance Ltd Vs Kewal Contractors & 2 Others [2009] eKLR**. Therefore, the Court has jurisdiction.

The Plaintiff in its Plea avers that the proceedings before this court relate to the obligations of the Defendant to the Plaintiff under the Guarantees which are separable and independent of the underlying supply agreement.

The Court gave judgment was issued in **HCC No. 216 of 2019** where Plaintiff was awarded the sum of **USD.1, 700, 158.22** being the balance of materials supplied for the Developer's construction project known as 'the Pinnacle Project'.

The issue regarding supply of materials by defendant in **HCC No. 216 of 2019** to the Plaintiff herein was /is resolved as judgment is in their favor of the Plaintiff herein for a liquidated amount.

The Court concedes this fact that the Court has jurisdiction to hear and determine disputes arising out guarantees. However, in this case the claim is against the Defendant for 2 supply guarantees as security for performance of developers in Supply Agreement. The Developer's breach was determined in **HCC No. 216 of 2019**.

Secondly, IRA found no reasonable ground for compelling the Defendant to settle the Plaintiff's claim and had the Plaintiff been dissatisfied by the Commissioner's decision, it ought to have appealed against the same to the Insurance Tribunal as provided under **Section 173 (1)** of the Insurance Act.

The test for determining the Application of the doctrine of *res-judicata* in any given case is spelt out under **Section 7** of the **Civil Procedure Act**. In the case of ***Independent Electoral & Boundaries Commission –versus- Maina Kiai & 5 Others [2017] eKLR***, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

"(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."

The foregoing elements apply in equal measure to Applications.

In this case, the Plaintiffs are similar, the Defendants are different, the claims are different but subject-matter is the same, the Supply Agreement setting out the obligations of the parties. In this instance, the Plaintiff claims against guarantee performance of developer's obligations in the said contract. The Court found in favor of the Plaintiff. The matter herein and **HCC No. 216 of 2019** are substantially the same, although different contracts but essentially over the supply of materials by the Developer.

In the case of ***Gurbacham -versus- Yowani Ekori [1958] EA 450***, the Court of Appeal of Eastern Africa, while considering the doctrine of *res judicata*, cited at page 453 a passage from the Judgement of the Vice-Chancellor in ***Henderson v Henderson (1), 67 E.R.313*** at page 319 wherein it was stated that:

"In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time."

The Court finds that this suit touches on issues that have been litigated before a competent court by parties to the same transaction and on the

same issues. This suit is in contravention of Section 7 of the Civil Procedure Act. The Applicant's prayer that this court finds that its jurisdiction is ousted and that this suit is *res judicata* is allowed. The Preliminary Objection is upheld.

DISPOSITION

- 1. The Defendant's Notice of Preliminary Objection dated 14th December 2020 is upheld.**
- 2. This Court's jurisdiction is ousted and this suit is *res judicata*.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JUNE 2021

(VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

PLAINTIFF N/A

DEFENDANT N/A

COURT ASSISTANT: TUPET