REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. E049 OF 2019

SIMBA CORPORATION LIMITED.....APPLICANT

VERSUS

CAETANO FORMULA EAST AFRICA SA.....1st DEFENDANT

SIMBA CAETANO FORMULA LIMITED.....2nd DEFENDANT

RULING

Introduction

1. In order to fully appreciate the Plaintiff's Preliminary Objection dated **23rd** June 2020, the subject of this ruling, it is necessary to bring into view, albeit briefly this file's litigation history. By a Plaint dated **28th** March 2019, the Plaintiff sued the **1st** defendant. (The only defendant then) seeking a permanent injunction restraining the **1st** defendant from terminating the Distribution Agreement executed in June 2014; an order restraining the **1st** defendant from entering into any other arrangements with any other party for distribution of Renault motor vehicles, accessories, spare parts and after sales service; and, an order compelling the defendant from performing its obligations under the Distribution Agreement, the Shareholders Agreements relating to its partnership with the Plaintiff and other related obligations. Alternatively, the Plaintiff sought to suspend the Termination Notice dated **19th** February 2019 pending the reference and determination of the dispute to arbitration. Concurrent with the application, the Plaintiff applied for interim measures of protection pending arbitration.

2. On **4th** April 2019, the **1st** defendant filed a Preliminary Objection dated **3rd** April 2019 objecting to the Plaintiff's suit and the application on grounds that this the court lacks jurisdiction to entertain this case by reason of the exclusion clauses in the Distribution Agreement which provided for disputes to be resolved by courts in Portugal under the laws of Portugal and not the Kenyan law. Further, the **1st** defendant contended that Plaintiff lacks *locus standi* to institute arbitration proceedings in connection with the Distribution Agreement and allowing the orders sought amounts to rewriting the contract between the parties and preventing the defendant from exercising its rights under the Distributorship Agreement. The **1st** defendant also accused the Plaintiff of non-disclosure and therefore not entitled to the orders sought.

3. In a ruling dated **19th** June 2019, this court (Odero J) identified two issues. One, a letter dated **19th** February 2019 viewed by the Plaintiff as terminating the contract while the defendant views it as a proper and lawful exercise of its rights under the same contract, and two, what was the applicable law and the seat of arbitration. The learned judge held that determining the factual issues raised in the Preliminary Objection would require hearing oral evidence and declined the Preliminary Objection.

4. On **10th** June 2019, this court (Odero J) dismissed the Plaintiffs application dated **28th** March 2019 *inter alia* holding that the question of the correct forum for dispute resolution under the Distribution Agreement cannot be determined at the interlocutory stage and that parties would have to call evidence.

5. Vide an application dated **17th** June 2020, the **1st** defendant moved this court seeking: -

> *a. **That** this Honourable Court be pleased to certify this application as urgent, dispense with service and hear it ex-parte in the first instance on priority basis.*
>
> *b. **That** this Honourable Court be pleased to join Simba Caetano Formula Limited as the **2nd** Defendant/Respondent in these proceedings.*
>
> *c. **That** pending the inter-partes hearing of this application, this Honourable Court be pleased to issue a temporary order of*

injunction restraining Simba Corporation Limited and Simba Caetano Formula Limited whether by themselves, their servants, agents, dealers, assigns or any other person acting on their instructions from using, trading and or marketing themselves as being importers and distributors of the RENAULT brand of motor vehicles, spare parts and accessories in Kenya and/or in any manner using the RENAULT trademarks, trade names, signage, related branding and references.

d. ***That*** *pending the hearing and determination this application, this Honourable Court be pleased to issue a temporary order of injunction restraining Simba Corporation Limited and Simba Caetano Formula Limited whether by themselves, their servants, agents, dealers, assigns or any other person acting on their instructions from using, trading and or marketing themselves as being importers and distributors of the RENAULT brand of motor vehicles, spare parts and accessories in Kenya and/or in any manner using the RENAULT trademarks, trade names, signage, related branding and references.*

e. ***That*** *this Honourable Court be pleased to issue an order of injunction restraining Simba Corporation Limited and Simba Caetano Formula Limited whether by themselves, their servants, agents, dealers, assigns or any other person acting on their instructions from using, trading and or marketing themselves as being importers and distributors of the RENAULT brand of motor vehicles, spare parts and accessories in Kenya and/or using in any manner the Renault trademarks, trade names, signage, related branding and references pending the hearing and determination of the dispute herein.*

f. ***That*** *pending the hearing and determination of this dispute, this Honourable Court be pleased to issue a mandatory injunction compelling Simba Corporation Limited and Simba Caetano Formula Limited, their servants, agents, dealers, assigns or any other person acting on their instructions or on their behalf to remove all indications, references, signage and related branding associating the RENAULT trademarks or name with Simba Corporation Limited and Simba Caetano Formula Limited and their related networks, and to immediately return the said the signs and other advertising displays bearing the RENAULT trademarks, trade names, signage and related branding to the Applicant.*

g. ***That*** *pending the hearing and determination of this dispute, this Honourable Court be pleased to issue a mandatory injunction compelling Simba Corporation Limited and Simba Caetano Formula Limited, their servants, agents, dealers, assigns or any other person acting on their instructions or on their behalf to comply with the consequences of termination provisions of the Distribution Agreement signed the parties in June 2016 in so far as the provisions relate to consequences or termination or expiration of the Agreement.*

h. ***That*** *this Honourable Court be pleased to grant any other order(s) that it may deem fit in the circumstances.*

i. ***That*** *the costs of this Application be provided for.*

6. The grounds in support of the application are that the **1st** defendant is an importer and distributor of Renault brand of motor vehicles, accessories and spare parts in various countries in Africa including Kenya and by virtue of that position, it is duly licensed by *Renault S.A.S. Societe par actions simplifiee* to use the Renault trademarks, trade names, signage and related branding for the purposes of undertaking the said business.

7. It states that in June 2014, together with the **2nd**defendant, they entered into a non-exclusive Distribution Agreement for the distribution of brand of motor vehicles, accessories and spare parts in Kenya which agreement granted the **2nd** defendant non-exclusive rights to use the title "Renault Distributor" and the Renault Trademarks for the performance of the Distribution Agreement during its term.

8. The **1st** defendant states that by a letter dated **19th**February 2019, it communicated to the **2nd** defendant its intention not to renew the Agreement beyond **30th**June 2019 and that the said agreement lapsed by effluxion of time on **30th** June 2019, a position affirmed by this court and the Court of Appeal. It states that notwithstanding its expiration, the **2nd** defendant has breached post termination provisions of the Distribution Agreement by refusing and/or ignoring to comply with Article **20.3** of the Agreement, which requires it to immediately cease to use the Renault trademark, trade names, signage and references and to remove all indications associated with the Renault trademarks or name and return the same to the **1st** defendant.

9. Also, the **1st** defendant states that the Plaintiff and the **2nd** defendant have jointly and severally continued to deceptively represent themselves as importers and distributors of Renault, associate and use the Renault trademarks, trade names, signage, related branding and references thereby deceiving the general public that they are still the authorized distributors and associates of Renault in Kenya.

10. Further, the **1st** defendant states that the Plaintiff through its official website continues to deceive the general public that it has the franchise for the sale and distribution of Renault and is holding itself out as an authorized dealer of Renault in Kenya. Additionally, it states that the Plaintiff and the **2nd** defendant are perpetuating an illegality and, by virtue of the **2nd** defendant being a party to the Distribution Agreement, its presence in these proceedings is necessary in order to enable this court to effectually and completely adjudicate upon and settle all questions involved in this dispute.

11. It also states that unless the orders are allowed, it stands to suffer irreparable damage because there is a danger that the general unsuspecting public will continue to be misled, and, that the defendants' actions will expose it to claims for breach of contract by Renault.

The Plaintiff's Notice of Preliminary Objection

12. In response to the **1st** defendant's application dated **17th** June 2020, the Plaintiff filed a Notice of Preliminary Objection dated **23rd** June 2010 objecting to this court's jurisdiction to entertain the application citing section **6** of the Arbitration Act.

13. On **27th** April 2021, the Parties recorded a consent allowing the **2nd** defendant to be joined in these proceedings.

The Plaintiff's advocates submissions

14. In support of the Preliminary Objection, the Plaintiff's advocates argued that by an agreement dated June 2014 between the Plaintiff, the **1st** defendant and **2nd** defendant it was agreed *inter alia* that the **1st** defendant shall continue to supply the **2nd** defendant with the products as per the contract. Counsel argued that a Distribution Agreement was to be signed separately between the defendants regulating the terms of the supply and that clause **20.1** of the Shareholders Agreement provided that "any dispute, controversy or claim arising out of or relating to this Agreement or a termination hereof shall be resolved by way of consultation held in good faith between the parties.

15. Counsel argued that Article **18** of the Distribution Agreement provided that the agreement shall remain valid until **30th**June 2016 unless it is either terminated before that date or extended in writing by the defendant **4** months prior to its expiration. He argued that the Distribution Agreement expired on **30th**June 2016 but the parties continued in business, ostensibly, pursuant to the provisions of the Shareholders Agreement as well as understanding between the parties. Counsel submitted that Clause **25.6** of the Shareholders Agreement and Article **29.1** of the Distribution Agreement respectively provided that the Agreements together with the Distribution Agreement and Memorandum of Understanding entered into between Simba Corporation Ltd and Salvado Caetano Auto Africa contains the entire agreement between the parties and supersedes all prior discussions and agreements concerning the subject matter hereof.

16. It was also argued for the Plaintiff that the Distribution Agreement purported to confer jurisdiction to hear any dispute arising thereunder between the parties on Portuguese courts, but, the Plaintiff filed this suit to seek interim measures of relief which application is still pending, although it has been rendered nugatory owing to the fact that the Plaintiff and the **1st** defendant referred the dispute to arbitration where it is still pending. Further, counsel argued that an application for interim measures of protection is pending determination before the arbitrator, hence, the Plaintiff's suit has been rendered nugatory. He argued that the **1st** defendant's suit is new and the question is whether this court has jurisdiction to entertain the Counterclaim and the **1st**defendant's application.

17. Counsel argued that this court has no jurisdiction to entertain the Counterclaim because under Clause **20.2** of Shareholders Agreement referred all disputes between the parties to arbitration, and since the Plaintiff and the defendant consensually referred the dispute forming the subject matter of the defendant's Counterclaim as well as its application to arbitration (and it cannot challenge the validity of the arbitral clause in the Shareholders Agreement), this court is denied jurisdiction to entertain the defendant's Counterclaim as well as the application by dint of the provisions of Section **6** of the Arbitration Act.

18. Further, he argued that since Clause **25.6** of the Shareholders Agreement as well as Clause **29.1** of the Distribution Agreement expressly provided that the Distribution Agreement and the Shareholders Agreement constitute the entire agreement between the parties, it follows that any purported breach of the Distribution Agreement constitutes a breach of the Shareholders Agreement and *vice versa* hence, this court lacks jurisdiction to entertain the same dispute.

19. Additionally, the Plaintiff's counsel submitted that the same cause of action cannot be split into several constituent parts, some of which are referred to arbitration while others are referred to this court for determination. He argued that where the relationship between the parties is regulated by two agreements in circumstances where a breach of one of such agreement constitutes a breach of the other agreement, and where one of the two agreements contains an arbitral clause while the other does not, then any dispute regarding the alleged breach of one or both agreements must be referred to arbitration. He argued that this court has no jurisdiction to enforce a contract which (by the defendant's own admission) has either expired (as claimed by the Plaintiff) or which confers jurisdiction on a foreign court (as claimed by the defendant).

20. Counsel argued that the defendant cannot now challenge the validity of the arbitral clause (because they have already referred the subject dispute to arbitration), hence, this court lacks jurisdiction to entertain the counterclaim and/or the application. He relied on *Mali Developers Ltd v Postal Corporation of Kenya* [1] which held *inter alia* that the Arbitration Act is a complete code for resolution and termination of disputes and that the court can only intervene in arbitral proceedings within the parameters envisaged by Section **10** of the Arbitration Act.

21. Additionally, the Plaintiff's counsel cited *Joab Henry Onyango Omino v Lalji Meghji Patel & Co. Ltd* **[2]** which cited *Niazsons (K) Ltd v China Road & Bridge Corporation (K)**[3]*** for the holding that once parties to an arbitration agreement have chosen to determine their dispute or differences through a domestic forum other than resorting to the courts of law, that choice should not be brushed aside. He also cited *Africa Spirits Ltd v Pevab Enterprises Ltd*,[4] *Yes Housing Cooperative Society Ltd v Kenneth Onsare Maina*,[5] *Vinar Construction Co. Ltd v Uhani Ltd*,[6] *Stefa Trading Ltd v Frigolex East Africa Ltd* [7]and *Martin Otieno Kwach & Charles Ongondo Were T/A Victoria Cleaning Services v Kenya Post Office Savings Bank*[8] and argued that from the above long line of authorities, the High Court can only proceed with the hearing and determination of a dispute that falls within the terms of a reference to arbitration if it determines that there was no arbitration clause or that the arbitration agreement is null and void and therefore inoperative. To fortify his argument, counsel argued that the **1st** defendant has consensually referred the same dispute to arbitration, thereby acknowledging the arbitral clause hence it cannot purport to refer the same dispute to this court.

22. Counsel submitted that in all the affidavits filed on behalf of the defendant as well as its defense and counterclaim, the issues raised in the said defense and counterclaim as well as the said application form part of one and the same cause of action which has already been referred to arbitration by the defendant. He relied on *Handerson v Handerson**[9]*** which held that where a given matter becomes 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.

23. Additionally, counsel cited *Stefa Trading Limited v Frigolex East Africa Limited* [10] which held that where the relationship between the parties is regulated by two agreements, in circumstances where a breach of one agreement constitute a violation of the other agreement and where one of the agreements has an arbitration clause while the other one does not, then any dispute touching on an alleged breach of either

agreement or of both agreements should be referred to arbitration.

24. Counsel submitted that this court has no jurisdiction to enforce an already expired contract or a contract that vests jurisdiction on foreign courts. As a consequence, counsel argued that the defendant's cause of action is completely unmaintainable, whether on the ground that the Distribution Agreement expired on **30th**June 2016 or on the defendant's own contention that the Distribution Agreement vests jurisdiction on the courts of Portugal (which was the basis of the **1st** defendant's preliminary objection).

The 2nd defendant's advocates submissions

25. The **2nd** defendant supported the Preliminary Objection. Counsel argued that the Preliminary Objection raises pure points of law. Citing *Mukisa Biscuits Manufacturing co. Ltd. v West End Distributors,**[11]* he argued that the objection is premised on Section **6** of the Arbitration Act. He argued that Clause **20.1** of the Shareholders Agreement sets out the procedure for settling disputes between the parties and added that by a Notice of Dispute dated **26th** March 2019, the Plaintiff challenged the **1st** defendant's intention not to renew the Distribution Agreement on grounds that it violated the Shareholders Agreement, which dispute has since been submitted to Arbitration.

26. Counsel argued that Clause **20** of the Shareholders Agreement satisfies the requirements of a valid arbitration agreement under Section **4** of the Arbitration Act and does not fall under Section **6(1)(a)**. He argued that the Plaintiff instituted this suit seeking interim injunctive relief pending the final award by the Arbitrator, but the same was not granted even on appeal.

27. Counsel argued that following an application by the **1st**defendant challenging its jurisdiction, the Tribunal on **16th** April 2020 held that it had no jurisdiction to hear disputes under the Distribution Agreement because under Articles **24** and **25** of the Agreement, the governing law and jurisdiction is that of Portugal. However, it found that it had jurisdiction to hear and determine a dispute arising under the Shareholders Agreement and that the Plaintiff has a prerogative to premise its claim under the Shareholders Agreement.

The 1st defendant's advocates submissions

28. The **1st**defendant's counsel cited *Mukisa Biscuits Manufacturing Company Limited v West End Distributors,* [12]*John Musakali v Speaker County of Bungoma & 4 others**[13]* and *Oraro vs. Mbaja**[14]* all of which defined a preliminary objection and observed that the principles laid down in the said cases were also followed by this court (Odero J) in the ruling dated **19th** June 2019.

29. Citing Article **165** of the Constitution and section **10** of the Arbitration Act, counsel argued that this court has original and unlimited jurisdiction over the instant dispute and urged this court to find that the **1st** defendants Preliminary Objection lacks merit. He argued that section **6** of the Arbitration Act provides for stay of court proceedings where those proceedings are brought in a matter which is the subject of an arbitration agreement and that the procedure provided under that the said section is by way of an application, hence the Preliminary Objection does not meet the procedural criteria prescribed under the said section.

30. Additionally, counsel argued that the Distribution Agreement does not have an arbitration clause, and, that, the **1st** defendant's claim, both in the application dated **17th** June 2020 and the Counterclaim are anchored on the post termination provisions of the Distribution Agreement. He argued that the Distribution Agreement is not the subject of any arbitration proceedings but the subject of the ongoing arbitral proceedings is the Shareholders Agreement. He argued that there is no basis to refer any claim under the Distribution Agreement to arbitration.

31. Further, counsel submitted that the court has already pronounced itself on the issue of jurisdiction under the Distribution Agreement vide its ruling dated **10th** July 2019 at paragraph **27** in which it stated that the correct forum for dispute resolution under the Distribution Agreement cannot be determined at the interlocutory stage, and parties would have to call evidence in support of their respective positions to enable the court to make a final determination on that point. Counsel also argued that this court also determined that the Distribution Agreement lapsed on **30th** June 2019 which was confirmed by this court and the Court of Appeal.

32. The **1st** defendants counsel also submitted that the Plaintiff's Preliminary Objection does not raise pure points of law because it derives its foundation from information and facts that are contested. He argued that the Plaintiff disputes that the Distribution Agreement and the Shareholders Agreement are related and collateral contracts and in any event in its ruling dated **10th** July 2019, this court held that the said issue was an issue for trial.

33. Additionally, counsel argued that the Distribution Agreement is signed between the applicant and the **2nd** defendant whereas the Shareholders Agreement was signed between the applicant and the **1st** defendant. Counsel submitted that nowhere in the application or in the Counterclaim has the applicant sought to enforce any of the rights and obligations under the Shareholders Agreement, but its claim is squarely premised on the Distribution Agreement. Accordingly, counsel argued that Clauses **20.1** and **20.2** of the Share Holders Agreement have no relevance to the application or the Counterclaim.

34. Counsel submitted that the expiry of the Distribution Agreement is contested; that the **1st** defendant is not a party to the Distribution Agreement; that this court on **10th** July 2019 and the Court of Appeal in its Ruling delivered on **6th** December 2019 upheld the finding that the applicant properly exercised its right not to renew the Distribution Agreement. Further, counsel submitted that the **1st** defendant's assertion that breach of the Distribution Agreement constitutes a breach of the Shareholder's Agreement and *vice versa* is incorrect.

35. Counsel conceded that a dispute, which according to the **1st** defendant arose under the Shareholders Agreement is currently ongoing before an Arbitrator, that the **1st** defendant filed an application seeking interim measures of protection which is yet to be determined by the

Arbitrator. He argued that it is necessary for this court to investigate the facts which cannot be determined by way of a Preliminary Objection and cited *George Owino Mwanya & 4 Others v Charles Achieng Odonga & Another*[15] adopted by this court in the Ruling dated **19th** June 2019 (Simba Corporation Limited v Caetano Formula East Africa, S.A. which was upheld by the Court of Appeal.

Determination

36. The factual matrix which triggered the Plaintiff's Preliminary Objection the subject of this ruling and the grounds in support of the same are graphically similar to the circumstances and facts which triggered the **1st** defendant's Preliminary Objection the subject of the ruling dated **19th** June 2019. Undisputedly, at the core of this suit are two agreements, namely the Shareholders Agreement and the Distribution Agreement.

37. But more important is the fact that a similar Preliminary Objection was raised by the **1st**defendant premised on similar arguments as the instant application. Vide a ruling dated **19th** June 2019 Odero J dismissed the said objection on merits. It was her view that the issues cited in support of the objection involved matters of facts and for the court to determine the same, it would be required to hear oral evidence. The Preliminary Objection failed on those grounds. Without providing details, both parties argued that the said ruling was confirmed by the Court of Appeal.

38. The question which begs an answer is whether this court can determine issues raised and determined by the court now being raised in this subsequent Preliminary Objection. Put differently, is the instant Preliminary Objection *res judicata*. Can the Plaintiff raise an objection citing similar or substantially similar issues which were raised by the **1st** defendant and a ruling rendered on the same? Notwithstanding the fact that the said issue is apparent in the objection before me, the parties did not address it all.

39. The other question to consider is whether *res judicata* arises when a party raises an issue previously raised by the other party and determined by the court. Dictionary and judicial definition of *res judicata* will assist in resolving this question. The *Black's law Dictionary* defines *res judicata* as: -

> *"An issue that has been definitely settled by judicial decision; An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit. The three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties."*

40. In *Qayrat Foods Limited v Safiya Ahmed Mohamed & 6 others*[16] the court cited *James Karanja alias James Kioi (Deceased)*[17] which outlined the ingredients of *res judicata* as: -

> *"For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show: - (a)That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;(b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit; (c)that a court competent to try it had heard and finally decided the matters in controversy between the parties."*

41. The Supreme Court in *Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another* stated the following regarding *res judicata*: -

> *"[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.*
>
> *[54] The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.*
>
> *[58] Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction*
>
> *[59] That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in E.T v. Attorney-General & Another, (2012) eKLR, 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."*

42. From the above excerpts it's clear that if any judicial tribunal in the exercise of its jurisdiction delivers a judgment or a ruling which is in its nature final and conclusive, the judgment or ruling is *res judicata*. If in any subsequent proceedings (unless they be of an appellate nature or review) in the same or any other judicial tribunal, any fact or right which was determined by the earlier judgment or ruling is called in question, the defence of *res judicata* can be raised. This means in effect that the judgment or ruling can be pleaded by way of estoppel in the subsequent case.

43. Perhaps the most lucid exposition of *res judicata* is to be found in the words of Somervell L.J.[18]who stated that *res judicata* covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. It is basic law that a litigant will not be allowed to litigate a matter all over again once a final determination has been made. Generally, a party will be estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue.[19]

44. The requirements for *res judicata* are that the same cause of action, the same relief involving the same parties was determined by a court previously. In assessing whether the matter raises the same cause of action, the question is whether the previous judgment involved the 'determination of questions that are necessary for the determination of the present case and substantially determine the outcome of the case.

45. *Res Judicata* is one of the factors limiting the jurisdiction of a court. This doctrine requires that there should be an end to litigation or conclusiveness of judgment where a court has decided and issued judgment then parties should not be allowed to litigate over the same issues again. This doctrine requires that one suit one decision is enough and there should not be many decisions in regard of the same suit. It is based on the need to give finality to judicial decisions. *Res Judicata* can apply in both a question of fact and a question of law. Where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.[20]

46. A judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. *Res judicata* halts the jurisdiction of the court. That is why it is one of the factors affecting jurisdiction of the court. The effect of this is that the court is prevented from trying the case *in limine* i.e. from the beginning.[21] The rule of *res judicata* presumes conclusively the truth of the decision in the former suit.[22] *Res judicata*, also known in the US as claim preclusion, is a Latin term meaning "a matter judged." This doctrine prevents a party from re-litigating any claim or defence already litigated. The doctrine is meant to ensure the finality of judgments and conserve judicial resources by protecting litigants from multiple litigation involving the same claims or issues.

47. *Res judicata* is provided for in Section **7** of the Civil Procedure Act.[23] The scheme of Section **7** 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. [24]

48. In *Gurbachan Singh Kalsi v Yowani Ekori,*[25]the former East African Court of Appeal stated:-

> "*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 a 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…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.*"

49. I have carefully read the grounds upon which the **2** Preliminary Objections are founded and the arguments advanced by the parties in both objections. I have also read the ruling dated **19th** June 2019. I have also read the Plaint, the defence and the counter claim. As stated earlier the Distribution Agreement features prominently in these proceedings and in both objections. There is already a finding by the court on the question of the applicable law and seat of arbitration under the said agreement. The ruling on the earlier Preliminary Objection involved the same parties. Mere addition of parties in the suit or a subsequent suit or omission of a party or party's or introducing a new ground, counter-claim or a new prayer(s) as has happened in this suit does not necessarily render the doctrine of *res judicata* inapplicable because a party cannot escape the wrath of *res judicata* by simply undertaking a cosmetic surgery to his pleadings or introducing new grounds to secure the earlier refused orders.

50. If the added parties, counter claim or prayers peg the claim under the same title as the parties in the earlier suit, or if the added grounds, counter-claim or prayer(s) still stands on the same grounds cited and determined earlier, the doctrine will still be invoked because citing a new ground or adding a new prayer would in that case be for the sole purpose of decoration and dressing and nothing else.[26] *Res judicata* covers issues which could have been raised in the earlier proceedings. The test here as I see it is whether had the earlier objection succeeded, would the Plaintiff have filed another objection. The answer is that had the earlier objection succeeded, the instant objection would add no value.

51. Complementary to the doctrine of *res Judicata* is the conception that, when a judicial tribunal becomes *functus officio* in respect of a particular case, its powers and jurisdiction are exhausted in respect of that issue. A judicial tribunal, after giving a decision as to the merits of a case, ceases to exist as an instrumentality in its previous form or at all, or is deprived of all the judicial functions it previously possessed, it is *functus officio* in respect of the issues decided. (See *Nyandoro & Company Advocates v National Water Conservation & Pipeline Corporation and Kenya Commercial Bank Group Limited (Garnishee*[27]).

52. A court which, after a trial, has given a valid decision determinative of right, liability or status, has no jurisdiction to recall it whatever mistakes may have been made in facts or law.[28]This test is applicable only if there happens to have been a "final" and "determinative"

decision, after a trial; and that a judicial tribunal becomes *functus officio* in this sense only in relation to a particular matter, not in respect of all matters. For a judicial tribunal to become *functus officio*, it must have delivered a valid judgment, decree or order of a final and conclusive nature and *res judicata* must have come into existence. The court pronounced itself on the first Preliminary Objection. This court is being invited to sit on appeal on the same decision. I decline the invitation to travel along this forbidden route. On the above grounds, the Plaintiff's Preliminary Objection collapses.

53. Even if I were to be persuaded that the Preliminary Objection is not *res judicata*, (which I am not), in the ruling dated **19th** June 2019, the learned judge was emphatic that the issues raised in support of the earlier objection were essentially issues of facts which would require hearing oral evidence. Substantially, if not wholly identical issues have been cited in the instant objection. The only difference is that they are now being raised by the opposite party. It is settled law that a preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. In fact, a reading of the arguments propounded in support of the objection disclose that they are substantially issues of fact. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law. Thus, a preliminary objection may only be raised on a "pure question of law." To discern such a point of law, the court has to be satisfied that there is **no** proper contest as to the facts. In the instant case there are numerous contested issues of facts. For example, its disputed that the Distribution Agreement had lapsed. This issue will require evidence to be determined. In a proper preliminary objection on a pure point of law, the facts are deemed agreed, as they are *prima facie* presented in the pleadings on record. That is not the position in the instant case.

54. In law, a question of law, also known as a point of law, is a question that must be answered by applying relevant legal principles to interpretation of the law.[29] Such a question is distinct from a question of fact, which must be answered by reference to facts and evidence as well as inferences arising from those facts. In law, a question of fact, also known as a point of fact, is a question that must be answered by reference to facts and evidence as well as inferences arising from those facts. Such a question is distinct from a question of law, which must be answered by applying relevant legal principles. The answer to a question of fact (a" finding of fact") usually depends on particular circumstances or factual situations.[30] The facts relied upon in support of the objection are essentially disputed and as Odero J held, determining the contested issues of facts requires evidence.

55. It is common ground that the parties referred the dispute to arbitration. Essentially, both parties submitted to arbitration. If any party is unhappy with the tribunal's finding on the Distribution Agreement, or the applicable law, the proper cause of action would be to challenge the decision in accordance with the Arbitration Act. For now, the dispute is pending before the arbitrator. In any event, this court has pronounced itself on the issues raised in the instant Preliminary Objection. It is immaterial that the same issue is being raised by the oppositive party. The Preliminary Objection now before me is an clear invitation to this court to arrive at a different decision on the same issues which is impermissible and a recipe for court to issue conflicting orders which does not augur well for judicial comity. Accordingly, it is my finding that the Preliminary Objection dated **23rd** June 2020 fails. I dismiss it with no orders as to costs.

Orders accordingly

SIGNED AND DATED AT NAIROBI THIS 23RD DAY OF JUNE, 2021

JOHN M. MATIVO

JUDGE

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[1]{2014} e KLR

[2] Civil Appeal No. 119 of 1997.

[3] {2001} e KLR.

[4] {2014} e KLR.

[5] {2020} e KLR.

[6] {2015} e KLR.

[7] {2014} e KLR.

[8] {2014} e KLR.

[9] {1843} 3 Hare 100 at page 114.

[10] {2014} e KLR.

[11] {1969} EA

[12] {1969} EA 696.

[13] {2015} eKLR

[14] {2005} KLR 141.

[15] {2017} e KLR.

[16] {2020} e KLR.

[17] {2014} e KLR.

[18] In *Greenhalgh vs Mallard* (1) (1947) 2 All ER 257.

[19] *Caeserstone Sdot-Yam Ltd vs World of Marble and Granite 2000 CC and others* 2013 (6) SA 499 (SCA) paras 20-21.

[20]http://www.kenyalawresourcecenter.org/2011/07/res-judicata.html -Accessed on 16 December 2017.

[21] Ibid.

[22] Ibid.

[23] Cap 21, Laws of Kenya.

[24] See ***Lotta v Tanaki* {2003} 2 EA 556.**

[25] Civil Appeal No. 62 of 1958.

[26] *Republic vs Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 others* [2017] eKLR.

[27] Miscellaneous Civil Application No. 241 of 2019.

[28] (1943-4) 68 C.L.R. at p. 590.

[29] Proffatt, John (1877). *A Treatise on Trial by Jury, Including Questions of Law and Fact* (1986 reprint ed.). Buffalo, NY: William S. Hein & Co. ISBN 9780899417073.

[30] *"Question of fact". Legal Information Institute. Cornell University Law School.*