



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 263 OF 2019**

**LANDMARK FREIGHT SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA BUREAU OF STANDARDS.....DEFENDANT**

**RULING**

1. The plaintiff vide a plaint dated 28<sup>th</sup> November 2019 seeks Judgment against the defendant for the following:

- a) General damages
- b) Special damages of Kshs. 609,605,716/40.
- c) Exemplary damages
- d) Interest on the said damages at such rate and for such a period as the Honourable court deems fit.
- e) Costs of the suit
- f) Any other relief as this Honourable court may deem fit to grant.

2. The defendant filed a statement of defence dated 2<sup>nd</sup> January 2020 denying all the claims. At paragraph 6 of the defence it claims that the suit is res judicata as the issues raised herein were the same as those raised in Nairobi High Court petition No 290 of 2018, and conclusively determined.

3. The plaintiff filed a reply to the defence which is dated 28<sup>th</sup> January 2020. It denied the claim that the suit was res judicata. It reiterated its claims in the plaint.

4. Eventually the defendant filed the notice of motion dated 18<sup>th</sup> February 2020 which is the subject of this Ruling. It seeks the following prayers:-

i) THAT the plaint herein dated 28<sup>th</sup> November, 2019 be struck out with costs on grounds that the same is res judicata to Petition No 290 of 2018; Landmark Freight Services Limited Vs Kenya Bureau of Standards & others.

ii) THAT the plaint herein dated 28<sup>th</sup> November, 2019 be struck out with costs for want of jurisdiction by this Honourable court to hear and entertain the claim herein pursuant to the provisions of Section 16A (1) of the Standards Act which requires such complaints to be filed with the Standards Tribunal.

iii) THAT in the alternative, the plaintiff/ respondent be ordered to deposit security for costs of Kshs. 40,000,000/= pending the hearing and determination of the suit failure to which, the suit shall stand dismissed with costs.

iv) THAT costs be to the defendant/applicant.

5. The same is premised on the 18 grounds on its face plus the supporting affidavit of Lt. Col (rtd) Bernayd N. Njiraini. The main ground which has been reiterated in the supporting affidavit is that the issues raised in the plaint herein were undo dealt with in petition No 290 of 2018- Landmark Freight Services Limited v Kenya Bureau of Standards & others dated 24<sup>th</sup> August, 2018. It is further averred that if the plaintiff/respondent was dissatisfied with the Judgment it ought to have filed an application for review or an appeal.

6. It argues that this court lacks jurisdiction to entertain the claim as it is res- judicata. Secondly by virtue of section 16A (1) of the Standards Act the complaint should have been first filed with the Standards Tribunal.

7. A replying affidavit sworn by Ibrahim Twahiri Mohamed on 18<sup>th</sup> July 2020 was filed on 1<sup>st</sup> July 2020. He avers that the defendant itself is violating the doctrine of res judicata since the issue of lack of jurisdiction was dealt with in petition No 290 of 2018. He depones that this court has the jurisdiction to handle the overall claim. That there would be no need of splitting the claim if at all part of it fell under the jurisdiction of the Standard Tribunal. See the case of **County Assembly of Machakos Vs Governor Machakos County & 4 others [2019] eKLR**.

8. It is his disposition that the plaintiff has set out its clear claim which ought to be determined on merit. The same is not scandalous, frivolous nor vexatious and should not be dismissed. See the case of **D.T Dobie & Company v Muchina [198] KLR** cited in

**i) Carton Manufacturers Limited v Prudential Printers Limited [2013] eKLR**

**ii) County Council of Nandi v Ezekiel Kibet Rutto & 6 others [2013] eKLR.**

9. Later, the plaintiff filed a notice of motion dated 5<sup>th</sup> October 2020 seeking the following orders: -

**i)** This court be pleased to strike out the defendant's statement of defence dated 2<sup>nd</sup> January, 2020 and filed on 3<sup>rd</sup> January 2020.

**ii)** Judgment be entered for the plaintiff as prayed in the plaint dated 28<sup>th</sup> November 2019

**iii)** Costs of this application be provided for

10. It is premised on the 6 grounds on its face and the supporting affidavit of Ibrahim Twahir. The main ground is that the defendant in its defence has not challenged the plaintiff's claim for Kshs. 609,605,716/40 as special damages. Secondly that it has not denied the following;

- Seizing the plaintiff's sugar.

- Its continued holding of the plaintiff's sugar in contravention of the court order of 29<sup>th</sup> July 2019. No explanation is given for its acting so.

- Any particulars of negligence contained in the plaint.

- The sums being claimed by the plaintiff in the plaint.

11. Finally, it states that the defence is evasive, a mere denial and does not raise any triable issues touching on the issues raised by the plaint.

12. In response to this application the defendant only filed grounds of opposition. A summary of the said grounds is that the defendant opposes the application on the ground that it has filed an arguable defence which raises triable issues. That under Order 10 of the Civil Procedure Rules Judgment can only be entered on a liquidated amount when the defendant fails to appeal on a fixed date after being summoned.

13. Counsel for both parties filed written submissions in respect to both applications. The firm of Koceyo and company advocates for the defendants filed submissions dated 3<sup>rd</sup> July 2020. Counsel informed the court that the said submissions would cover both the application dated 18<sup>th</sup> February 2020 and that dated 5<sup>th</sup> October 2020.

14. He submitted that the claims in this suit are substantially the same as those in petition No 290 of 2018 (supra). That the plaintiff had claimed for compensation which the trial court heard and dismissed. It is his submission that if the plaintiff was dissatisfied it ought to have filed an appeal against the said orders or sought for a review to adduce new evidence pursuant to Order 45 Rules 1 & 2 of the Civil Procedure Rules.

15. On whether the suit is res judicata counsel referred to section 7 of the Civil Procedure Act and cited the case of **ANM v PMN [2016] eKLR** decided by Justice Muigai.

16. He further referred to the case of **Henderson v Henderson [1843 -60] ALL E.R 378** where on the same issue the court observed 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[s] 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 judgment, 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”

17. On whether this court has jurisdiction to entertain this claim, counsel relied on section 16 of the Standards Act which provides that:

“Upon an appeal under this Act, the Tribunal may confirm, set aside or vary the decision or act in question and may make such other order as the Tribunal considers appropriate, including an order with respect to the payment of costs.”

18. He also referred to the case of **Muchene Mbaya v Kenya Bureau of Standards [2017] eKLR** where the court held:

“It bears repeating that, as a matter of Law, a public organ with a statutory duty bears a public duty. Thus, it exercises public power and must notify the person to be affected by, of its decision... This omission is responsible of the kind of a squirm I am seeing in this matter. Nonetheless, the Standards Tribunal still has power to address the kind of failure or omission by the Bureau and may also make such other order or orders that may be appropriate in accordance with section 16C of the Standards Act. The Preliminary objection, therefore, succeeds. But, I do not want to fall into error or cause ambiguity. Accordingly, I refer this dispute to the Standards Tribunal... The petitioner will thereafter take the course cut out in law.”

19. He thus submitted that the claim before this court is on costs which the Standards Tribunal has the mandate to deal with. The claim he submits should have been filed before that forum.

20. Counsel contends that the plaintiff’s suit being what it is has no chances of success. He relied on Order 26 Rule 1 of the Civil Procedure Rules and the case of **Guff Engineering (East Africa Ltd V Amrik Singh Kalgi** which was quoted by Justice Gikonyo in the case of **Saudi Arabian Airways v Sean Express Services [2014] eKLR**. He therefore urged the court in the alternative to order the plaintiff to deposit kshs. 40,000,000/= as security . Otherwise he prayed for the striking out of the plaintiff’s suit with costs.

21. The firm of Mulondo & Company advocates for the plaintiff filed 12 pages of submissions dated 7<sup>th</sup> October 2020 in respect to the application dated 18<sup>th</sup> February 2020 when the directions of the court on 25<sup>th</sup> June 2020 were that the submissions be limited to five (5) pages of font 14. Even the font used is 12. Counsel in his submissions relied on the cases of **Northlin Marketers Vs Airtel Networks (K) Ltd (formerly celtel Kenya Ltd) & 2 others [2014] eKLR**; **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A 263**, and **John Florence Maritime services Ltd & another v Cabinet secretary for Transport & infrastructure & 3 others [2015] eKLR** quoted in **Fadhila Zachran Mohamed v Khadiha Abdulkaman Mwinzangu & another [2018] eKLR** to contribute to the issue of *res judicata*.

22. It is his submission that the issues in petition No 290 of 2018 are so different from those in the plaint herein; the parties are the same, the issue of jurisdiction was extensively dealt with by the court and this court has jurisdiction to deal with this case, where the plaintiff is seeking compensation by way of damages arising out of violation of the rights by the defendant. On this he relied on the case of **Apondi v canuald Metal packaging [2005] E.A.12** quoted in **Mini Bakeries (K) Ltd v George Ondieki Nyamanga [2014] eKLR**.

23. Counsel argues that paragraph 77 of the petition did not deal finally with the issue of compensation. That the compensation sought here is for loss incurred subsequently to the filing of the petition, which have never been dealt with by a court of competent jurisdiction.

24. On whether the plaintiff’s suit is scandalous, frivolous and vexatious counsel submitted that the suit raises triable legal issues which ought to be heard on merit. That the character of the defendant has not been demeaned in any way by the plaintiff nor do the pleadings seek to irritate the defendant.

25. Counsel has submitted that the defendant has not put up a case for the plaintiff to deposit any security in terms of Order 26 Rules (1) and 4 of the Civil Procedure Rules. He also relied on the case of **Frednard Maina sila v Al- Haiee Investments Ltd & 9 others [2019] eKLR** which quoted the case of **Keary Developments v Tarmac Construction, [1995] 3 ALL ER 534**. He submitted that the defendant had not proved the plaintiff’s inability to settle costs in the event the court so ordered. Further that there were no indications that the claim would not succeed. He urged the court to dismiss the application with costs.

26. Submissions on the application dated 5<sup>th</sup> October, 2020 are dated 2<sup>nd</sup> July 2021. Counsel gave a background to the suit herein. It is the plaintiff’s case that the defence does not raise any triable issues, as the defendant was ordered by the court in the petition to release the sugar to the plaintiff. That there had been no justification for them to seize the sugar and continue holding it even after a release order had been issued.

27. Counsel has submitted that striking out of pleadings must only be done in the clearest of cases. He cited the case of **Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR** where the court of appeal held as follows:

“In this regard it is appropriate to refer to **Delphis Bank Limited v Caneland Limited [2014] eKLR**, where the Court outlined the cases dealing with applications for striking out and summary judgment as follows: -

“The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application for striking out the defences was based is perhaps *D.T. Dobie & company (Kenya) Ltd vs Muching* which counsel for the appellant referred to us. In the case, *Madan JA*, as he then was, opined in an obiter dictum that;

*“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.’.....”*

28. He contended that the defence does not raise any triable issues for the following reasons:

- i) The defendant has not denied the Ruling of 29<sup>th</sup> July 2019 in petition No 290 of 2018 which directed the defendant to release the sugar to the plaintiff.
- ii) The defence does not explain why the order in clause (i) was not complied with.
- iii) The sugar was for human consumption as per the defendant’s report of 26<sup>th</sup> June 2019 and the Ruling of 29<sup>th</sup> July 2019

29. He argues that the defendant did not file any replying affidavit to the plaintiff’s notice of motion to rebut its evidence in the supporting affidavit. That the grounds of opposition filed are not sufficient. He relied on the case of **Kennedy Otieno Odiyo and 12 others vs Kenya Electricity Generating Company Ltd [2010] eKLR** quoted in **Mustano Rocco V Aniello Sterelli [2019] eKLR** where the court held:

*“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”*

30. Both applications were heard simultaneously.

#### **Analysis and determination**

31. In its application dated 18<sup>th</sup> February 2020 the defendant has asked for the striking out of the plaint for being res judicata. This term is set out in section 7 of the Civil Procedure Act which provides:

*“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 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.”*

32. Res judicata applies to a decision given by a Judge or tribunal with jurisdiction over the cause of action and the parties, which disposes with finality, of a matter decided so that it cannot be re- litigated by those bound by the Judgment except on appeal or review. In the case of **George W.M Omondi & another V National Bank of Kenya Ltd & 2 others [2001] eKLR** the court stated thus:

*“ ..... I wholly agree with the opinion of Kuloba J in Mwangi Nyangau V Meshack Mbogo Wambugu HCC NO 2340 of 1991 (unreported) where he said: -*

*“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 face lift on every occasion he comes to a court, then I do not see what use the doctrine of res judicata plays.”*

33. The key elements that would give rise to res judicata have been dealt with in numerous decisions. In the case of **Uhuru Highway Development Ltd V Central Bank of Kenya [1999] eKLR** these were said to include the following:

- i) The former Judgment or order must be final.
- ii) The Judgment or order must be on merits.
- iii) It must have been rendered by a court having jurisdiction over the subject matter and parties, and
- iv) there must be between the first and the second action identity of parties, of subject matter and cause of action.

34. There is no dispute that in petition No 290 of 2018 all parties were heard and a Judgment rendered. The Judgment was therefore on merits and was final. The matter was also between the plaintiff and the defendant and 4 others. The main claim was against the defendant herein. I have in paragraph 1 of this Ruling set out the plaintiff’s claim for damages arising from the seizure of its over 400,000 bags of imported sugar.

35. In the petition No 290 of 2018 the plaintiff herein set out its prayers from prayer No(a)-(h). Of interest in this matter is prayer (f) which states:

*“Compensation for losses suffered as a result of the indefinite seizures of the petitioner’s sugar consignment by the respondents.”*

36. Upon hearing the parties, Justice W. Korir in his Judgment stated this at paragraph 77:

*“On the petitioner’s claim for Kshs, 600 million, I notice that the same appears to be a claim for special damages and without particularization of the claim and evidence to support the same, the claim cannot succeed. The claim for Kshs. 600 million therefore fails and is dismissed.”*

37. The plaintiff which was the petitioner in the petition No 290 of 2018 prayed for compensation for losses suffered as a result of the seizures of the sugar by the respondent. Its claim before this court is still on compensation for losses as a result of the same seizure of sugar. In the plaint the plaintiff claims special damages of Kshs. 609,605,716/40 general damages & exemplary damages among others. I find all this to fall under the title compensation for losses.

38. Justice Korir in the petition dismissed this claim. He did not strike it out. He clearly pointed out why the claim had failed. What the plaintiff has done is to work on the short falls and file a fresh claim here seeking the same prayers. It has camouflaged them by breaking them down and placing them under different heads, a thing it should have done in the petition.

39. At paragraph 24 of the Judgment, Justice Korir stated this:

*“In conclusion, it was argued that the petitioner had laid out a case of clear violation of constitutional rights and legitimate expectation and the petitioner has suffered severe economic loss of Kenya shillings six hundred million (Kshs. 600,000,000/=) as a result. The court was therefore urged to allow the petition as prayed.”*

This confirms that the issue of compensation for losses was besides being pleaded, argued before the trial court.

40. It is therefore my finding that the claims in this suit were part and parcel of petition No 290 of 2018 which was determined on merit. The plaintiff if not satisfied should have filed an appeal and not filed a fresh suit over the same claim of compensation for losses. The plaintiff’s suit is therefore res-judicata.

41. A triable issue is any matter raised by a defendant that would require further interrogation by the court during a full trial. The plaintiff in its application dated 5<sup>th</sup> October 2020 states that the defence filed herein raises no triable issues. Looking at the defence I am unable to say that it raises no triable issues. The defence has raised the issue of res judicata, it has justified its actions at paragraph 10, 12, 14, 15 and 18 among others hence denied the plaintiff’s claim. It has also categorically denied the plaintiff’s claim of losses.

42. In the case of **Job Kiloch v Nation Media Group Ltd, salaba Agencies Ltd & Michael Rioro [2015] eKLR** the court stated thus:

*“Before the grant of the summary Judgment the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary, Judgment or in any other manner. What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as subject liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed but just over that warrants further intervention by the court.”*

43. The issues raised in the defence would not just be swept under the carpet. They would have called for a hearing on merit had the court found that the suit is not res judicata. The upshot is that the application dated 15<sup>th</sup> October 2020 lacks merit and is dismissed with costs.

ii) On the other hand the application dated 8<sup>th</sup> February 2020 has merit as the plaintiff’s suit is found to be res – judicata and is struck out with costs.

Orders accordingly.

**DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF SEPTEMBER, 2021 IN OPEN COURT AT NAIROBI.**

**H. I. ONG’UDI**

**JUDGE**