



**African Line Transport Co Limited v Omar & 2 others (Environment & Land Case 265 of 2015) [2023] KEELC 19130 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19130 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 265 OF 2015  
NA MATHEKA, J  
JULY 25, 2023**

**BETWEEN**

**AFRICAN LINE TRANSPORT CO LIMITED ..... PLAINTIFF**

**AND**

**JUSTUS OMAR ..... 1<sup>ST</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**THE COUNTY LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1 The 3rd Defendant raised a preliminary objection dated February 3, 2023 on the following grounds;

1. That the suit herein is res judicata this court having rendered a decision in Mombasa High Court Case 276 of 2003 African Line Transport Company Limited versus the AG sued on behalf of the National Youth Service. Mombasa High Court Miscellaneous Civil Application Number 261 of 2003 and Court of Appeal Civil Appeal No 159 of 2007 over the same cause of action.
2. That the suit herein is barred by Limitation pursuant to Section 4 and 8 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya.

2 This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being:

In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”



3 The above legal proposition has been made in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd.* (1969) E.A. 696 where the court held that;

The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

4 In the case of *Attorney General & Another vs Andrew Mwaura Gitbinji & another* (2016) eKLR the court outlined the scope and nature of preliminary objection as;

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

5 It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the 3<sup>rd</sup> Defendant herein was properly brought before the court.

6 Section 6 and 7 of the *Civil Procedure Act* Cap 21 provides as follows:

Section 6.

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

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.”

7 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.”

8 Therefore, for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. In the case of *Henderson Vs Henderson* (1843-60) ALL E.R.378, the court held 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 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 case, 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.”

9 It follows then that a Court will apply the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.

10 In that respect, the Court of Appeal held in *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others* (2017) eKLR that:

For 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.”

11 The Court went on to state on the role of the doctrine:

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would



be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

- 12 On perusal of the court record I find that from the Defendant’s list of documents the pleadings in HCCC No. 276 of 2003 African Line Transport Company Limited vs The Honourable Attorney General have been attached. I find that in that case the subject matter is Plot No. 4105/VI/MN which is the same in the present case and the cause of action is the same. In the instant case the parties are similar that is African Line Transport Company Limited vs Justus Omari, The National Land Commission and The County Land Registrar. Indeed the Plaintiff admits in their pleadings that HCCC No. 276 of 2003 African Line Transport Company Limited vs The Honourable Attorney General does exist and was dismissed upto the Court of Appeal level in Civil Appeal No. 159 of 2007. I find this suit is *res judicata* HCCC No. 276 of 2003 *African Line Transport Company Limited vs The Honourable Attorney General* and Civil Appeal No. 159 of 2007. Having made this finding there would be no need to go into the matter of the suit being barred by Limitation pursuant to Section 4 and 8 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya. I find that the preliminary objection has merit and I strike out this suit with costs to the Defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY 2023.**

**N.A. MATHEKA**

**JUDGE**

