



Hi-Plast Limited v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 others (Environment & Land Case 487 of 2018) [2023] KEELC 21471 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 487 OF 2018
OA ANGOTE, J
NOVEMBER 9, 2023**

BETWEEN

HI-PLAST LIMITED PLAINTIFF

AND

THE CABINET SECRETARY, MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES 1ST DEFENDANT

THE MINISTRY OF ENVIRONMENT AND NATURAL RESOURCES 2ND DEFENDANT

THE DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The 3rd Respondent has filed a Notice of Motion dated 23rd June 2022, in which it has sought for the following orders:
 - a. That this suit is barred by the principle of res judicata and ought to be struck out in limine.
 - b. That costs be provided for.
2. The application is based on the grounds on the face of it and the Supporting Affidavit sworn by Erastus Gitonga, advocate for the 3rd Defendant, who deposed that the subject matter of this suit was substantially in issue in the already determined ELC Petition No. 32 of 2017 Kenya Association of Manufacturers vs CS Ministry of Environment and 3 others (2018) eKLR.



3. Counsel for the 3rd Respondent deposed that the common issue running across the two matters is the national plastic ban, including the processes that led to it and its impacts; that this Honourable Court lacks the jurisdiction to preside over and/or to determine this suit, because the suit falls within the ambit of res judicata as contemplated under Section 7 of the *Civil Procedure Act* 2010 and that the claims for damages flowing from the plastic ban are defeated by operation of the law and cannot be sustained.
4. The 4th Respondent also filed a Preliminary Objection dated 28th February 2022, which has raised the following grounds:
 - a. That this Honourable Court does not have jurisdiction to entertain this matter as the issues raised herein were heard and determined in Nairobi ELC Petition No. 32 of 2017 (formerly Milimani High Court Petition No.375 of 2017 Kenya Association of Manufacturers & 3 others v Cabinet Secretary, Ministry of Environment and Natural Resources & 3 others [2018] eKLR.
 - b. That this suit raises no issue capable of being determined by the honourable court as the suit is premised on an operation of law.
 - c. That this suit discloses no reasonable cause of action as against the 1st, 2nd and 4th Defendants.

Submissions

5. Counsel for the 3rd Respondent submitted that the Plaintiff's suit offends the mandatory provisions of Section 7 of the *Civil Procedure Act*; that this court lacks jurisdiction as this suit is res judicata and that there is an existing judgement delivered by this court on 22nd June 2018 in Nairobi ELC Petition No. 32 of 2017 as consolidated with ELC Petitions 30 and 35 of 2017, Kenya Association of Manufacturers and 3 Others vs Cabinet Secretary, Ministry of Environment and Natural Resources and 3 Others [2018] eKLR.
6. Counsel laid out the prayers that were sought in Kenya Association of Manufacturers and 3 Others vs Cabinet Secretary, Ministry of Environment and Natural Resources and 3 Others [2018] eKLR and submitted that the Plaintiffs have reiterated the same and similar issues as deliberated and adjudicated by this court in the former case.
7. On the Plaintiff's issue that the ban was not based on any regulation, Counsel submitted that the court in Kenya Association of Manufacturers vs CS Ministry of Environment and 3 others (2018) eKLR expounded that Article 70 of *the Constitution* recognizes the precautionary principle, and that the court relied on Section 3 and 86 of Environmental Management and Coordination Act to arrive at its decisions.
8. Counsel submitted that the 1st Respondent had both the constitutional and statutory basis to prohibit the use, manufacture and importation of the affected plastic bags under Sections 3 and 86 of EMCA and that on the issue raised by the Plaintiffs that there was no stakeholder participation in the development of the plastics ban, the court in Kenya Association of Manufacturers vs CS Ministry of Environment and 3 others (2018) eKLR held that it was satisfied that the Cabinet Secretary, Ministry of Environment and NEMA conducted public participation before issuing the impugned Gazette Notice.
9. Counsel submitted that the court in Kenya Association of Manufacturers and 3 others vs Cabinet Secretary, Ministry of Environment and Natural Resources and 3 Others [2018] eKLR held that



although the impugned Gazette Notice was not forwarded to the Clerk of the National Assembly as contemplated by Section 11 of the *Statutory Instruments Act*, it was laid on the table of the Honourable Olago Aluoch MP through a public Petition pursuant to Article 119 of *the Constitution* and Standing Order No. 220.

10. Counsel relied on the case of William Koross vs Hezekiah Kiptoo Komen & 4 Others [2015] eKLR which outlined the principles that underlies res judicata. They also relied on Ngugi vs Kinyanjui & 3 others [1989] KLR 146 (para 147) and the Court of Appeal Cases of Siri Ram Kaura vs M.J.E. Morgan CA 71/1960 (1961) EA 462, Uhuru Highway Development Ltd vs Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidification) and Kamlesh Mansukhlal Pattni.
11. The 3rd Respondent's Counsel submitted that the Plaintiff's suit is founded on the same cause of action, the same issues, same facts and same circumstances that have been dealt with and that constitutes abuse of court process. They relied on the Black's Law Dictionary definition of 'abuse'.
12. Counsel sought to rely on the doctrine of ex turpi causa non oritur actio, which provides that a Plaintiff will be unable to pursue legal relief and damages if it arises in connection with their own tortious act. They submitted that the Plaintiff's business transaction was declared illegal and punishable under the laws of Kenya and that based on the operation of the law, the Plaintiffs are now seeking damages as against the transgression of a positive law.
13. Counsel for the 4th Respondent filed Submissions in support of the two applications dated 21st October 2022. Counsel relied on the case of Mukisa Biscuits vs West End [1969] EA 696 which defined a preliminary objection as that which raises a pure question of law. They also relied on the case of Owners of the Motor Vessel 'Lillian S' where the court held that jurisdiction is everything.
14. Counsel submitted that this suit is res judicata, contrary to Section 7 of the *Civil Procedure Act*; that the matter in dispute has already been considered by a competent court of law and that this suit is an attempt to relitigate a matter that has already been tried and concluded in Kenya Association of Manufacturers vs CS Ministry of Environment and 3 Others (2018) eKLR.
15. Counsel relied on the cases of Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others (2017) eKLR, which laid out the elements of res judicata, and E.T.V vs Attorney General & Another (2012) eKLR.

Analysis and Determination

16. The 3rd and 4th Defendants have challenged the jurisdiction of this court to hear and determine this suit on grounds of res judicata. They claim that the issues that have been raised by the Plaintiffs through this suit were heard and settled by the court in Kenya Association of Manufacturers vs CS Ministry of Environment and 3 Others (2018) eKLR. The Plaintiffs did not file any response or submissions in response.
17. The legal framework of res judicata is set out in Section 7 of the *Civil Procedure Act* as follows:

“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.”



18. The Supreme Court case of John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR delimited the operation of the doctrine of res judicata as follows:
- “We reaffirm our position as in the Muiiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata 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.”
19. The Supreme Court further laid out the elements that should be met for one to invoke res judicata in a civil suit:
- “For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
 - b) The Judgment or order was on merit;
 - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
 - d) There must be between the first and the second action identical parties, subject matter and cause of action. (See Uhuru Highway Developers Limited v Central Bank of Kenya & others [1999] eKLR and See the decision of the Court of Appeal in Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011 (2013) eKLR).”
20. Guided by the above decisions, it is the duty of this court to consider the suit herein as against Kenya Association of Manufacturers vs CS Ministry of Environment and 3 Others (2018) eKLR, in order to determine whether this suit is res judicata.
21. In considering the question of whether the parties in the two suits are the same, or litigating under the same title in the case herein, the Plaintiff has enjoined the Cabinet Secretary, the Ministry of Natural Resources and Environment, the Director General, National Environment Management Association and the Attorney General.
22. The case of Kenya Association of Manufacturers vs CS Ministry of Environment and 3 Others (2018) eKLR was a consolidation of three suits, whose parties included the Kenya Association of Manufacturers, Fredrick Gichuhi Njenga, Stephen Mwangi and Okiya Omtatah Okoiti as the Petitioners and the Cabinet Secretary, Ministry of Environment and Natural Resources, the Attorney General, National Environment Management Authority and Multytouch International as the Respondents.
23. It is therefore apparent that while the Plaintiff herein was not a party to the suit in Kenya Association of Manufacturers vs CS Ministry of Environment and 3 Others (2018) eKLR, it has joined as Defendants the very same parties involved in the latter suit.
24. Explanation 6 to Section 7 of the *Civil Procedure Act* provides that where parties have litigated with respect to a public right, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.



25. In the same manner, in challenging the legality of the gazette notice banning the use and manufacture of plastic bans, the parties in the 2018 suit were suing on behalf of all persons interested in such a right, including the Plaintiff in this case.
26. The Plaintiff has sought general damages, special damages, costs of the suit and interest on the damages at court rates. The Plaintiff avers that it was engaged in the business of manufacturing plastic and polythene bags, which business it had carried on for 15 years.
27. According to the Plaintiff, in an unforeseen move, on 14th March 2017, via a gazette notice No. 31, Vol CXIX, the 1st Defendant declared a ban on the use, manufacture and importation of all plastic bags used for household and commercial packaging, which ban was to take effect 6 months from the date of the notice.
28. The Plaintiff's claim is that this ban is illegal as it was not based on any regulations; that there was no stakeholder participation and/or public participation in the development of the policy and that the process leading up to the gazette notice did not comply with *the Constitution* and the *Statutory Instruments Act*.
29. On the other hand, in Kenya Association of Manufacturers v CS Ministry of Environment and 3 others (2018) eKLR, the Petitioners had challenged the constitutionality of the gazette notice banning the manufacture, use and importation of plastic bags, on grounds of lack of public participation, lack of requisite statutory authority and in contravention of Sections 5, 6, 8 (1), 11(1) and (2) of the *Statutory Instruments Act*, No 23 of 201.
30. This dispute was heard and determined by a three-judge bench, which entered a judgement on merit on 22nd June 2018. It is further not disputed that the court in the 2018 case had the jurisdiction to hear and determine the said suit. With respect to the issue of public participation, the court weighed the evidence before it and was satisfied that the 1st and 3rd Respondents conducted public participation before issuing the impugned Gazette Notice.
31. The court also held that the requirement for parliamentary scrutiny of statutory instruments was met.
32. The cause of action and subject matter in this case and in the former case, Kenya Association of Manufacturers vs CS Ministry of Environment and 3 Others (2018) eKLR, appear to be identical, the only difference being that the Plaintiff in this case has sought remedies for damages, rather than declaratory orders.
33. The Plaintiff cannot purport to seek an alternative remedy from that initially claimed in the former suit, where the substantive question on the legality of the ban had already been settled. This would not only open up the court to an avalanche of suits by disgruntled business people, but would also run contrary to the legal principle of *ex turpi causa non oritur actio*, which was defined in *Republic vs Ministry of Roads & Another Ex part Vipingo Ridge Limited & Another* (2016) eKLR as follows:

“In *Standard Chartered Bank Limited Vs. Intercom Services Limited & 4 Others* (Civil Appeal No. 37 of 2003), unreported, the Court of Appeal referred to the English case of *Holman Vs. Johnson* (1775-1802) All ER 98 at page 99, where Lord Mansfield C.J. said-

““The principle of public policy is this, *Ex dolo malo, non oritur actio*. No court will lend its aid to a man who found his cause of action on immoral or on illegal act. If from the Plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court



goes, not for the sake of the defendant, but because they will not lend their aid to such Plaintiff.”

34. This was further expounded in *Scott vs Brown, Denning & McNab Company (3)* [1892] 2QB 724 at page 728 as quoted in *Michael Mwaura Njoroge vs Peter Kamau Munene; Beatrice Kori (Interested Party)* [2019] eKLR:

“Ex turpi causa non oritur actio. This old and well known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has paraded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”

35. The legality of the ban of manufacturing plastic bags has already been handled by a court of competent jurisdiction. That being so, this court cannot delve into the issue of whether the Plaintiff is entitled to damages for the said ban, because damages cannot arise from an illegality. This court therefore finds that the current suit is *res judicata*.

36. The matter suit is therefore dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF NOVEMBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms. Njeri Kariuki for Interested Party/Applicant

Mr. Mullama for Cheboi for Plaintiff

Ms Kubai for 1st, 2nd and 4th Defendants

Court Assistant: Tracy

