



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mureithi v Comarco Properties (EPZ) Ltd & 6 others (Civil Suit  
E006 of 2020) [2024] KEHC 16920 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 16920 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL SUIT E006 OF 2020  
F WANGARI, J  
FEBRUARY 16, 2024**

**BETWEEN**

**ONESMUS NJIMIA MUREITHI ..... PLAINTIFF**

**AND**

**COMARCO PROPERTIES (EPZ) LTD ..... 1<sup>ST</sup> DEFENDANT**

**PETER JON PHILIPS ..... 2<sup>ND</sup> DEFENDANT**

**COMARCO INDIAN OCEAN LTD ..... 3<sup>RD</sup> DEFENDANT**

**SIMON FRAZER PHILIPS ..... 4<sup>TH</sup> DEFENDANT**

**JORGEN HORBOL NIELSEN ..... 5<sup>TH</sup> DEFENDANT**

**REGISTRAR OF COMPANIES ..... 6<sup>TH</sup> DEFENDANT**

**ANGLO AFRICAN AGRICULTURE PLC ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff via the Plaint dated 2/10/2020 sued the Defendants for what he believed to have been fraudulently removed as a director in the 1<sup>st</sup> Defendant Company. The Defendants filed their Statement of Defence dated 10/11/2020 denying the allegations of fraud and stating that the Plaintiff resigned from all his positions in the 1<sup>st</sup> Defendant company.
2. The 1<sup>st</sup> Defendant further filed a Notice of Preliminary Objection dated 14/9/2023, contending that the Plaintiff lacked locus standi to file this suit, the suit was time barred under section 106 of the *Companies Act*, the suit was res judicata, and that this court had no jurisdiction to deal with the matter. The P.O is the subject of this ruling.
3. Directions were taken that the P.O be canvassed by way of written submissions. Only the 1<sup>st</sup> Defendant complied with the directions and filed submissions dated 8/11/2023.



## Analysis and Determination

4. I have duly considered the preliminary objection, submissions together with the authorities relied upon by the 1<sup>st</sup> Defendant as well as the law and in my view, the following issues are for determination;
  - a. Whether the notice of preliminary objection is merited;
  - b. Who bears the costs?

5. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

6. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.
7. I am satisfied that as per the case of Mukisa Biscuit (above) res judicata, issue of jurisdiction and suit being time barred are a points of law which are enough to dispose of a suit as it goes to the root of the dispute before court. It goes to the jurisdiction of the court to pronounce itself on what is before it. The Plaintiff did not respond to the Preliminary Objection.
8. It was contended that the Plaintiff had no locus standi to file this suit as he held no shares in the 1<sup>st</sup> Defendant company. It was submitted that he had zero (0) shares in the company, hence he had no locus standi to bring a derivative action against the Defendants. The 1<sup>st</sup> Defendant relied on the cases of Foss v Harbottle [1843] 2 Hare, and Grace Wanjiru Munyinyi & another v Gideon Waweru Githunguri & 5 others [2011] eKLR, amongst others in support of their case.
9. The Plaintiff did not challenge the evidence as put by the 1<sup>st</sup> Defendant. He was not a minority shareholder. He therefore had no foundation in bringing this suit against the defendants.



10. It further stated that the suit was res judicata. Section 7 of the Civil Procedure Act on res judicata, reads 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.”

10. The rationale of the doctrine of res judicata is to ensure that every litigation must come to an end. In the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, the Court of Appeal enunciated the elements to be satisfied in proving a matter to be res judicata as follows;

[F] or 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 Plaintiff had sued the Defendants in Mombasa ELRC No. 118 of 2012 through Transport Workers Union where he alleged to have been forcefully removed as a director of the 1<sup>st</sup> Defendant company, but the court held that he had voluntarily resigned and an order for reinstatement was not available to him.

12. The above was also stated in the Statement of Defence dated 10/11/2020. The Plaintiff did not file a Reply to the Defence. I find that the suit has without a doubt met the criteria of a matter being res judicata, as the issues raised therein had been heard and determined on merits in the ELRC matter.

13. The suit was also said to be time barred stating that the suit was filed out of time. Section 106 of the Companies Act states as follows;

1. Liability incurred by a company-
  - a. from making or deleting an entry in the register of members; or f
  - b. from failing to make or delete any such entry, is not enforceable more than ten years after the date on which the entry was made or deleted, or the failure first occurred.

14. The Plaintiff in his plaint said that he was fraudulently removed as a director on or about 5/2/2009 and he sought to have the Registrar of Companies to rectify the Company Register of the 1<sup>st</sup> Defendant to reflect him as a director. This suit was filed on 13/10/2020 which was over 10 years above the time limit as provided by section 106 as above.



15. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR.
16. Having arrived at the conclusion that the current suit is res judicata, it was filed out of time and that the Plaintiff had no legal standing to file the suit, and an abuse of court process, the only order that would have lent itself on costs is that the guilty party, that is the Plaintiff, shall bear it.
17. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The Notice of Preliminary Objection dated 14/9/2023 is merited and is hereby allowed.
  - b. Consequent to (a) above, the plaint dated 2/10/2020 and filed on 13/10/2020 is hereby struck out.
  - c. Costs awarded to the Defendants.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

N/A by the Plaintiff

Asige Advocate for the 1<sup>st</sup> Defendant

Salwa, Court Assistant

