



**Tuffsteel Limited v Alliance Concrete Limited (Commercial Case E132 of 2023)
[2024] KEHC 1007 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E132 OF 2023
A MABEYA, J
FEBRUARY 9, 2024**

BETWEEN

TUFFSTEEL LIMITED PLAINTIFF

AND

ALLIANCE CONCRETE LIMITED DEFENDANT

RULING

1. This ruling is with respect to the preliminary objection dated 4/7/2023. The plaintiff filed an application dated 22/6/2023 seeking leave to amend the plaint. It faulted the defendant for the delay in making payments as agreed in the consent entered on 9/5/2023 and therefore sought to amend the plaint so as to claim the loss of business occasioned by the delay.
2. In its response, the defendant raised a preliminary objection on the grounds that the application was *res-judicata* and that the Court was *functus officio*. Pursuant to the directions of 21/7/2023, the parties filed their respective submissions on the preliminary objection.
3. The defendant submitted that the application was *res-judicata* as the matter had been concluded vide the consent dated 10/05/2023. That the issues raised therein were fully settled. On whether the Court was *functus officio*, it was submitted that the defendant had fully paid the plaintiff and that the plaintiff could not seek an amendment at this stage.
4. On its part, the plaintiff submitted that the preliminary objection was only three lines and did not have sufficient material. That the Court had to evaluate whether the consent judgment was founded on merit. That its previous advocate was not instructed to enter a consent in that manner he did and therefore was tainted with fraud and misrepresentation.



5. I have considered the averments by the parties in the preliminary objection as well as the submissions. The issue for determination is whether the preliminary objection is merited.
6. In *Mukisa Biscuit Manufacturing Company v West End Distributors Limited* [1969] EA, it was held as follows: -

“So far as I am aware, 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 on 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.”
7. From the foregoing, a preliminary objection can only be based on a point of law and when there exist issues of facts that have to be established, a preliminary objection cannot be upheld. In the present case, the preliminary objection is premised on two grounds namely; that the Motion is res-judicata and that the Court is *functus officio*.
8. On res-judicata, the defendant argued that the consent had not been set aside. Section 7 of the [Civil Procedure Act](#), 2010 provides for the doctrine of *res-judicata*. It bars a court from trying a matter that has been determined between the same parties by a court of competent jurisdiction.
9. In [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) (2017) eKLR, the Court of Appeal held that: -

“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 common-sensical 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 and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
10. A matter is said to be *res-judicata* when it is directly and substantially in issue and the issues in the present suit must be substantially in issue in the subsequent matter. The litigating parties must be the same and the matter ought to have been decided in the former suit.
11. Applying the said principles, and in particular Explanation 4 of section 7 of the [Civil Procedure Act](#), if the plaintiff intended to claim loss of business, it should have raised the claim in the original plaint. By having recorded the consent, it shut itself from raising any other claims based on the same set of facts. That consent is still in force and binding on the parties.
12. It was submitted that the plaintiff’s former advocate had no instructions to enter into the consent in the manner he did. I am afraid that there is no evidence on record to that effect. The allegations that the consent was tainted with fraud and misrepresentation is farfetched. There was no affidavit evidence to that effect. To the extent that the consent is still in force and has not been set aside, the same is binding on the plaintiff as it does the defendant.



13. One other thing, can the plaintiff who has already enjoyed the fruits of the said consent in full turn around and trash it? I don't think it can be allowed to do so. The plaintiff cannot approbate and reprobate at the same time. If there was a delay in repayment, why did it not execute the consent.
14. To that extent, I am satisfied that the matter is *res-judicata* for the foregoing reasons.
15. On the second issue of *functus officio*, the defendant submitted that upon issuance of the orders of 10/5/2023, the Court settled the matter in the terms of the consent of the parties dated 9/5/2023.
16. The *Black's Law Dictionary* 8th Edition defines the term *functus officio* as –

“having performed his or her office”) (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
17. In *Raila Odinga & 2 others v. Independent Electoral & Boundaries Commission & 3 others* (2013) eKLR the Supreme Court held that: -

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgement or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”
18. From the foregoing, the doctrine of *functus officio* bars a Court from revisiting a matter once a final judgment has been delivered on merit. In the present case, the Court entered judgment on 10/5/2023 and marked the suit as settled.
19. Section 99 of the *Civil Procedure Act* gives an exception to the doctrine of *functus officio* where the Court is called upon to determine clerical or arithmetic mistakes in a judgment arising from an accidental slip or omission. In the present case, the application does not seek to correct any errors rather it seeks to revive a dispute that has been conclusively determined.
20. In the premises, the Court finds that the consent judgment has not been set aside or varied. It cannot therefore revisit the issues raised in the plaintiff's Motion. Based on this the court finds that it is *functus officio* as the matter had been fully settled.
21. Accordingly, I find that the preliminary objection is merited and is hereby upheld. The application dated 22/6/2023 is hereby struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A. MABEYA, FCI Arb

JUDGE

