



**Chairman Board of Governors Ng’iya Girls High School & 2 others v Ochieng t/
a Mecko Enterprises & 5 others (Miscellaneous Application 445 of 2013 & 167 of 2018
(Consolidated)) [2024] KEHC 2703 (KLR) (Commercial and Tax) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 445 OF 2013 & 167 OF 2018 (CONSOLIDATED)**

**MN MWANGI, J
MARCH 1, 2024**

BETWEEN

**CHAIRMAN BOARD OF GOVERNORS NG’IYA GIRLS HIGH
SCHOOL APPLICANT**

AND

MESHACK OCHIENG T/A MECKO ENTERPRISES 1ST RESPONDENT

**THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF
EDUCATION 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

**SECRETARY COORDINATOR ECONOMICS STIMULUS PROGRAMME
PUBLIC WORKS 4TH RESPONDENT**

CABINET SECRETARY NATIONAL TREASURY 5TH RESPONDENT

**AS CONSOLIDATED WITH
MISCELLANEOUS APPLICATION 167 OF 2018**

BETWEEN

HON ATTORNEY GENERAL 1ST APPLICANT

PRINCIPAL SECRETARY, MINISTRY OF EDUCATION 2ND APPLICANT

AND

MESHACK OCHIENG’ T/A MECKO ENTERPRISES RESPONDENT



RULING

1. There are two applications before this Court. The first application is the Chamber Summons dated 5th June, 2023, filed by the applicant, Meshack Ochieng' t/a Mecko Enterprises, seeking the following orders-
 - i. Spent;
 - ii. That this Honourable Court be pleased to certify the Certificate of Order against the Government pursuant to applications numbers 22 and 23 (Order 29 Rule 3 ex parte Cap 21) in Miscellaneous Application Number 445 of 2013 dated 24th day of April, 2023;
 - iii. That the Honourable Court be pleased to make further or such other orders as it may deem fair and just; and
 - iv. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of it and on the supporting affidavit sworn by the applicant on 5th June, 2023. The grounds are that Hon. Lady Justice Kamau J., issued a ruling on 19th December, 2014. That subsequently, the applicant filed Civil Appeal No. 54 of 2015 in the Court of Appeal against that decision and that the appeal was withdrawn by consent of the parties and a Certificate of Order was made on 12th November, 2020 in accordance with the consent order from the Court of Appeal under Rule 81 of the Court of Appeal Rules.
3. The application is opposed by the respondent, the Attorney General, by way of a replying affidavit sworn by Dr. Belio Kipsang on 11th September, 2023 and written submissions dated 25th September, 2023.
4. The second application is the Chamber Summons dated 1st December, 2023, filed by the applicant, Meshack Ochieng' t/a Mecko Enterprises, seeking the following orders-
 1. That the Honourable Court be pleased to grant directions in accordance with Order 29 Rule 3 Forms 22 and 23 Appendix 'A' of *Civil Procedure Rules*, 2010 for Section 21(1) of *Government Proceedings Act*, Cap 40;
 2. That upon granting such directions the Honourable Court be pleased to transfer the said directions in the form of Certificate of Order against the Government extracted from the ruling of the Hon. Lady Justice J. Kamau made on the 19th December, 2014 to the Judicial Review Court;
 3. That the Honourable Court be pleased to dispense and grant instant orders and/or directions pending the directions on HCCOMM Misc. No. 167/2018 coming up for mention on the 19th December, 2023; and
 4. Costs be in the cause.
 5. The application is premised on the grounds on the face of it and on the supporting affidavit sworn by the applicant on 1st December, 2023. The grounds are:
 - i. Compelling conflict choice of law between Section 35 *Arbitration Act*, Cap 49 under Article 159(2)(c) 3(a)(b)(c) of *the Constitution* (sic);



- ii. Compelling enforceability mandamus order in affidavit of service dated 1st December, 2023 with attachments; and
 - iii. Compelling cases Misc. No. 445 of 2013 distinct from Misc. No. 167/2018, Misc. No. 029/ 2020, Misc. No. 005/2022 and CA No. 54/2015 in terms of (1)(2)(3)(4)(5) at Nairobi Court of Appeal (sic);
 - iv. Compelling issue parties have exchanged their written submissions demonstrated in the affidavit of service dated 1st December 2023 with attachments (sic);
 - v. Compelling and missed out of ruling of Hon. Lady Justice M. W. Muigai on the 14th day of April, 2019 is distinct from the ruling made by Hon. Lady Justice Kamau J. on the 19th day of December, 2014 (sic). Demonstrated in affidavit of service dated 1st December, 2023 with attachments;
 - vi. Compelling threshold to all parties under Order 29 Rule 3 form 22 and 23 Appendix 'A' for Section 21 (1) of *Government Proceedings Act*, Cap 40, demonstrated by affidavit of service dated 1st December, 2023 with attachments.
6. The application is also supported by the applicant's written submissions dated 15th December, 2023 and supplementary written submissions dated 17th December, 2023.
 7. When parties appeared before this Court for highlighting of submissions on 19th December, 2023, Mr. Ochieng' appeared in person. Mr. Kiarie, learned State Counsel, appeared for the Hon. Attorney General.
 8. Mr. Ochieng' urged this Court to grant him a Certificate of Order against the Government under Article 23 and Article 165(4) of *the Constitution* of Kenya and to uphold the ruling of Hon. Lady Justice Kamau J., of 19th December, 2014. He submitted that there was a consent judgment and a Certificate of Order against the Government, which ought to have been issued within twenty-one (21) days from the said ruling in order for closure, but the certificate was not issued because the applicant moved to the Court of Appeal.
 9. As regards the application dated 5th June, 2023, brought under Sections 2 and 3 of the Vexatious Persons Act, Mr. Ochieng' submitted that leave was granted by the Court to file the application.
 10. Mr. Ochieng' urged this Court to transfer the files to the Judicial Review Division as the present Court cannot enforce its own order, as it can only enforce the Certificate of Order against the Government by way of mandamus through Judicial Review proceedings.
 11. Mr. Kiarie submitted that there is no need for this matter to be referred to the Judicial Review Division as it arose from the arbitration of 30th September, 2013. That subsequently, the Government challenged the compound interest awarded to the applicant herein, and Hon. Lady Justice Kamau set aside the compound interest. Mr. Kiarie asserted that the Government paid the decretal sum and that Mr. Ochieng' is not disputing that he was duly paid. Mr. Kiarie asserted that Hon. Lady Justice Kamau's decision of 20th February, 2019 has not been set aside, appealed or reversed. He therefore argued that the issue of compound interest is res judicata, hence there is no cause of action against the respondent. He urged that the applicant's prayer for a Certificate of Order against the Government to be dismissed.
 12. Mr. Kiarie submitted that on 20th May, 2019, Hon. Lady Justice M. Muigai barred the applicant from filing pleadings without leave of the Court and directed him to be filing file



draft pleadings to demonstrate that he is not wasting the Court's time. Mr. Kiarie contended that the application dated 5th June, 2023 was filed by the respondent in HCCC Misc. 167 of 2018 after Mr. Ochieng' disobeyed the ruling of 20th May, 2019 by Hon. Lady Justice M. Muigai. Mr. Kiarie also submitted that in HC Judicial Review No. E1156 of 2020, Hon. Justice Ngaah noted that the Certificate of Order and decree dated 12th October, 2020 were forgeries and ought to be brought to the attention of the Presiding Judge of the Commercial and Tax Division.

13. In a brief rejoinder, Mr. Ochieng' argued that the doctrine of res judicata does not apply to consent orders under Section 7(5) of the [Civil Procedure Act](#).

Analysis And Determination.

14. Having considered the application, the response thereto and the parties' respective submissions, the issues that arise for determination are-
 - i. If the first application is res judicata;
 - ii. Whether this Court should grant a Certificate of Order against the Government;
 - iii. Whether this matter should be transferred to the Judicial Review division for enforcement of the said Certificate of Order; and
 - iv. Whether the second application is properly before the Court.
15. I will first deal with the preliminary issue of whether the second application dated 1st December, 2023 is properly before this Court. I have read the ruling by Hon. Lady Justice M. Muigai of 20th May, 2019 in HC Misc. Civil Application 167 of 2018, from which I note that the learned Judge declared that no other suit or pleadings shall be filed by the applicant herein on the current issue without leave of the Court. I note that the application dated 1st December 2023 was filed by the applicant without leave of the Court and against the order of the Court of 20th May, 2019. Accordingly, the application dated 1st December 2023 is hereby struck out pursuant to Order 2 Rule 15 of the Civil Procedure Rule, 2010, with costs to the respondent.
16. The first application dated 5th June 2023 before this Court was deemed to be properly on record through an order of this Court of 10th August, 2023. The next issue to consider is whether the said application is res judicata.
17. Section 7 of the [Civil Procedure Act](#) provides for the doctrine of res judicata, 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.

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.



Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

18. The rationale for the doctrine was discussed by the Court in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR, as follows-

“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.” (emphasis added).

19. Through the instant application, the applicant seeks a Certificate of Order against the Government based on this Court’s ruling of 26th February, 2013 in which the Court found that the applicant was not entitled to compound interest. The applicant’s contention is that the Certificate of Order against the Government ought to have been issued by the Court within twenty-one (21) days but it was not, because he proceeded with an appeal before the Court of Appeal. On this issue, Hon. Lady Justice M. Muigai, in her ruling of 20th May, 2019, made the following observation-

“I note from the content of the instant Court file, that the Respondent/Applicant filed appeal in Court of Appeal but there is no evidence of hearing of appeal and determination of the matter in Court of Appeal. There is a consent which ought to have been enforced as an order of the Court of Appeal. It cannot be the subject of hearing in the High Court but enforced as it is an order of Court order from Court Appeal. There cannot be any legal proceedings to amend, vary or review orders of Court of Appeal in the High Court. The High Court is bound by Court of Appeal orders.

I note that the Applicant was paid the principal sum of Ksh 30,571,250.10 and costs of Ksh 1,301,883.70 a fact which he admitted to in Court. The only issue the Respondent is pursuing is interest which the various Courts in High Court have ruled upon. The issue is res judicata unless appealed against in Court of Appeal.”

20. I find that the elements of res judicata have been satisfied in that Lady Justice J. Kamau decided the matter involving the same parties, on the same issue now before this Court. The applicant seems to litigating and re-litigating on the same issue. There however has to be an end to litigation. After taking the whole matter into consideration, it is my finding that the application dated 5th June, 2023 is res judicata.
21. The upshot is that the application dated 5th June, 2023 is dismissed with costs.



It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 1ST DAY OF MARCH, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Meshack Ochieng - applicant (present in person)

No appearance for the Hon. Attorney General

Ms B. Wokabi - Court Assistant.

