



End To End Limited v Chief Officer, Roads & Public Works, Kwale County & 3 others (Civil Case 104 of 2021) [2024] KEHC 16953 (KLR) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 16953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 104 OF 2021
F WANGARI, J
MARCH 1, 2024**

BETWEEN

END TO END LIMITED PLAINTIFF

AND

THE CHIEF OFFICER, ROADS & PUBLIC WORKS, KWALE COUNTY 1ST DEFENDANT

COUNTY ENGINEER, ROADS & PUBLIC WORKS, KWALE COUNTY 2ND DEFENDANT

KWALE COUNTY GOVERNMENT 3RD DEFENDANT

CREDIT BANK PLC LIMITED 4TH DEFENDANT

RULING

1. The Preliminary Objection dated 27/1/2023, filed by the 1st, 2nd and 3rd Defendants contending that this court lacks jurisdiction to hear and determine the Plaintiff's suit, the Notices of Motion dated 12/10/2021 and 24/11/2021 by virtue of Clause 67.1 in the contract between the Plaintiff and the Defendants, which stipulated that if any dispute was to arise between the parties concerning the contract or works done, the matter would be first be referred to the engineer for determination.
2. It was directed that the PO be disposed of by way of written submissions. The Defendants elide on the doctrine of exhaustion in that the Plaintiff ought to have referred the matter to ADR as per the contract, starting with the Engineer and thereafter the Adjudication Board before filing the suit before this court. On the other hand, the Plaintiff submitted that the clause on ADR was not clear as to how the dispute was to be dealt with, hence the exception to the doctrine of exhaustion.



3. I have duly considered the Preliminary Objection, submissions together with the authorities relied upon by the Defendants and the Plaintiff, 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?

4. 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 v 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...”

5. 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.

6. I have perused through the court pleadings and proceedings prior to the filing of the Preliminary Objection. There is a ruling that was delivered on 5/1/2021 by my sister Judge, Justice Olga Sewe. This was in respect to the Chamber summons dated 25/11/2021 filed by the 1st, 2nd and 3rd Defendants. In the said application, the Defendants sought for orders that the suit be stayed and refer the matter for arbitration for final hearing and determination.

7. In her ruling, the honourable Judge declined to issue the orders for stay, and refer the matter for arbitration on grounds that

“Clause 67 of the Agreement headed “Arbitration” was incomprehensible and therefore not clear on what the exact terms of the Arbitral Agreement were.”

8. The Defendants did not file an appeal against the said ruling. The issues now being raised in this PO are similar to the issues raised and determined in the said Chamber Summons. In 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.
9. I find that this PO is *res judicata* and lacks merits. Further, this court cannot sit on appeal on its own ruling. The PO is seeking indirectly seeking for an appeal of the ruling dated 5/1/2023. It must fail.
13. 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. In exercise of the discretion of the court, costs shall abide the outcome of the main suit.
14. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Preliminary Objection dated 27/1/2023 lacks merits and is hereby dismissed.
 - b. Costs to abide the outcome of the main suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF MARCH, 2024.

F. WANGARI

JUDGE

In the presence of;

N/A by the Plaintiff

Miss Kinuva Advocate for the Defendant

Barile, Court Assistant

