



**Republic v Cabinet Secretary Ministry of Investments, Trade & Industry
& 10 others; Ogogoh (Exparte Applicant) (Miscellaneous Application
E016 of 2023) [2024] KEHC 6655 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6655 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E016 OF 2023**

**OA SEWE, J
MAY 23, 2024**

**IN THE MATTER OF ARTICLES 1,2,10,19,20,21,22,23,25,26,43,46,47,48,50,53,191
& THE FOURTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT

AND

**IN THE MATTER OF THE INTRODUCTION OF 10%
EXPORT AND INVESTMENT PROMOTION LEVY**

AND

**IN THE MATTER OF AN APPLICATION FOR AN
ORDER OF CERTIORARI AND PROHIBITION**

BETWEEN

REPUBLIC APPLICANT

AND

**CABINET SECRETARY MINISTRY OF INVESTMENTS, TRADE &
INDUSTRY 1ST RESPONDENT**

**CABINET SECRETARY NATIONAL TREASURY & ECONOMIC
PLANNING 2ND RESPONDENT**

THE HON. ATTORNEY GENERAL 3RD RESPONDENT

**KENYA NATIONAL TRADING CORPORATION LIMITED 4TH
RESPONDENT**

CHARMA HOLDINGS LTD 5TH RESPONDENT

MULTI COMMERCE FZC 6TH RESPONDENT



PURMA HOLDING LTD 7TH RESPONDENT
ENTERPRISE SUPPLIES LTD 8TH RESPONDENT
EVERTEC GENERAL TRADING COMPANY LTD 9TH RESPONDENT
SHEHENA COMMODITY TRADING LIMITED 10TH RESPONDENT
KENYA COMMERCIAL BANK LTD 11TH RESPONDENT

AND

JULIUS OGOGOH EXPARTE APPLICANT

RULING

1. A Notice of Preliminary Objection was filed herein by the 4th respondent dated 13th March 2024 on the ground that the Court lacks jurisdiction to hear and determine this matter on account of Section 7 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. The Preliminary Objection was premised on the assertion that a court of concurrent jurisdiction has already pronounced itself in a similar matter, being Nairobi High Court Judicial Review Miscellaneous Application No. E 040 of 2023: Law Society of Kenya v Attorney General and 3 Others and Kenya National Trading corporation (hereinafter, the Nairobi suit).
2. The Preliminary Objection was canvassed by way of written submissions. Accordingly, the 4th respondent filed written submissions dated 27th March 2024. Mr. Kisigwa for the 4th respondent detailed the background of the Nairobi suit and pointed out that a ruling has been delivered therein by Hon. Chigiti, J. and that from a perusal of that ruling it is manifest that the 4th respondent is being sued over the same subject matter in this suit. Counsel therefore submitted that this suit is *res judicata* and therefore ought to be dismissed with costs pursuant to Section 7 of the *Civil Procedure Act*.
3. Counsel relied on *Mary Wanene Kangethe v Estate of Paul Kangethe Warubiu (sued on behalf of Paul Kangethe Warubiu, deceased) & 3 others: National Land Commission (Interested Party)* [2021] eKLR and *Nicholas Njeru v Attorney General & 8 others* [2013] eKLR, among others, for the proposition that the doctrine of *res judicata* is founded on public policy and is aimed at ensuring finality to litigation. The 4th respondent also placed reliance on the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd* [1989] KLR 1 to underscore the paramountcy of jurisdiction and submitted that without jurisdiction, the ensuing judgment of the Court would be nothing but a nullity.
4. In the premises, the only issue for determination is whether this suit is *res judicata*.
5. There is no gainsaying that a preliminary objection on the ground of *res judicata* is capable of disposing of a suit *in limine*, for Section 7 of the *Civil Procedure Act* provides that:

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.”
6. In *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR, the Supreme Court of Kenya held:



(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. ...

...

(54) The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine 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....

...

(58) Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v. James Nderitu Gitbae & 2 Others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

(59) That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *E.T v Attorney-General & Another*, [2012] eKLR, thus:

The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the Court. The test is whether the plaintiff in the second suit is trying to bring before the Court in another way and in a form of a new cause of action which has been resolved by a Court of competent jurisdiction. In the case of *Omondi v. National Bank of Kenya Limited and Others*, [2001] EA 177 the Court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the Court quoted Kuloba J., in the case of *Njangu v. Wambugu and Another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before Courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to Court, then I do not see the use of the doctrine of res judicata.....’

7. Similarly, in the case of *Registered Trustees Africa Gospel Church v Kamunge & 2 others; National Land Commission (Interested Party) (Civil Appeal (Application) E756 of 2022)* [2023] KECA 1117 (KLR) (22 September 2023) (Ruling), the Court of Appeal relied on the Muiri Coffee Case (supra) and held:

16. The object of res judicata is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement or ruling between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. Res judicata



contemplates 5 conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit. (See *Lotta v Tanaki* [2003] 2 EA 556)...

...

18. A litigant is estopped from raising issues that have been finally determined in previous litigation, even if the cause of action and relief are different. The purpose is obviously to prevent the repetition of lawsuits between the same parties, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions by the different courts on the same issue. Res Judicata is one of the factors that limit a court's jurisdiction. This doctrine serves a salutary purpose, which is key to the due administration of justice. It is based on the need to give finality to judicial decisions. Res Judicata can apply in both a question of fact and a question of law, so, where the court has decided based on facts it is final and should not be opened by same parties in subsequent litigation.
19. The key point here is that a judicial decision made by a court of competent jurisdiction holds as correct and final in a civilized society. Res judicata halts the jurisdiction of the court to protect the finality of the decision. The effect is that the court is prevented from trying the case in limine..."
8. With the foregoing in mind, I have given consideration to the matter at hand. Regarding the Nairobi suit, the 4th respondent endeavoured to demonstrate the factual background in its written submissions dated 27th March 2024. It was thus stated that the applicant in Judicial Review Miscellaneous Application No. E040 of 2023 filed a Chamber Summons application dated the 17th April 2023 and sought leave to apply for certiorari, prohibition and mandamus based on a letter dated 20th January 2023 issued by the Principal Secretary, National Treasury, that approved duty-free importation of 125,000 metric tonnes of cooking fat/oil by the Kenya National Trading Corporation.
9. As was stated in *Mukisa Biscuits Manufacturers Ltd v West End Distributors* [1969] EA 696, a preliminary objection consists of:

...a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or 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."
10. It is settled that a Preliminary Objection ought not to be raised where reliance is placed on disputed facts that are yet to be proved, or where the court will be required to embark on an inquiry to ascertain the underlying facts. In the case of *Oraro v Mbaja* [2005] 1 KLR 141 Ojwang J, (as he was then) made the point thus:

... The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.



Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

11. In the instant matter, the pleadings in the Nairobi matter were neither availed nor conceded to by the applicant. Hence, in so far as the Court is then required to embark on an inquiry as to what the subject matter in the Nairobi matter entails, the 4th respondent’s Preliminary Objection would be untenable. I note however that the 4th respondent also placed reliance on the ruling of the court in the Nairobi matter dated 1st September 2023, which is a reported decision.
12. A perusal of the said ruling shows, at paragraphs 64-68, that the Nairobi case, revolved around a letter dated 20th January 2023 and the contention that its issuance was done in violation of *the constitution* by procuring the importation of the finished edible oils into Kenya in secrecy, without floating any international tender or following the fair, equitable, transparent, competitive and cost-effective framework provided under Article 227 of *the Constitution* and the Public Procurement and Assets Disposal Act, 2015. The letter dated 20th January 2023 allowed the duty duty-free importation of 125,0000 MT of cooking fat/oil by the Kenya National Trading Corporation. Further, a Circular No. 7 was issued on the 14th February, 2023 for the purpose of implementing the duty-free clearance of the product.
13. According to the 4th Respondent, the issues raised herein are the same as the ones raised in Judicial Review Miscellaneous Application No. E040 of 2023; and that they are being required to defend themselves over the same subject matter of the importation of 125,000 metric tonnes of edible oils/fat.
14. Having scrutinized the Statement of Facts dated 26th June 2023 and it is clear that the orders sought herein revolve around a letter dated 20th June 2023 that is alleged to have proposed a policy implementation of removal of 35% duty on edible oils and substitution with 10% Export and Investment Promotion Levy. It is plain therefore that the subject matters are distinct as the edible oil there is indicated was to be imported on duty-free terms while the one in the suit herein is based on the letter dated 20th June 2023 where it addresses the removal of 35% duty on edible oils and substitution with 10% export and investment promotion levy.
15. Moreover, from the Ruling delivered in the Nairobi suit, it is evident that even the whole question on the importation of edible oils is yet to be determined substantively, noting that the letter at the centre of the dispute dated 20th January 2023 was expunged by the court for having been acquired illegally. It is, therefore, clear that the Nairobi suit has not been heard and determined substantively, let alone on the merits of the subject matter. It is plain then that this suit is not *res judicata*.
16. In the premises, it is my finding that the Notice of Preliminary Objection dated 13th March 2024 lacks merit and it is hereby dismissed. Costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF MAY 2024

OLGA SEWE

JUDGE

