



**G H Tanna and Sons (Holdings) Ltd v Mount Kenya University (Civil Case 264 of 2019) [2024] KEHC 12685 (KLR) (Civ) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL CASE 264 OF 2019  
AN ONGERI, J  
OCTOBER 8, 2024**

**BETWEEN**

**G H TANNA AND SONS (HOLDINGS) LTD ..... PLAINTIFF**

**AND**

**MOUNT KENYA UNIVERSITY ..... DEFENDANT**

**RULING**

1. The defendant filed a Notice of Preliminary Objection dated 28/5/2024 in the following terms;
  - i. That the dispute in this matter relates to use and occupation of all that parcel of land known as Land Reference No. 209/4320 as captured in the lease dated 20<sup>th</sup> June 2013.
  - ii. That Article 162(b) of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act* No. 19 of 2011 vests the exclusive jurisdiction to hear and determine disputes relating to the environment, use and occupation of land and title to land in the Environment and Land Court.
  - iii. That this court therefore lacks the jurisdiction to hear this matter and must down its tool.
  - iv. That suit is therefore an abuse of the court process and must be struck out in limine with costs.
2. The parties filed written submissions in the Notice of Preliminary Objection as follows; the defendant submitted that the PO herein raises an objection to the jurisdiction of this court to hear and determine this matter pursuant to the provisions of Article 162 (2) (b) of *the constitution* as read together with Section 13 of the *Environment and Land Court Act* No. 19 of 2011.
3. The defendant submitted that the dispute herein arose as a result of the defendant's termination notice dated 30/6/2016 through which it notified the plaintiff that it was terminating the lease over the suit



property. The defendant filed ELC No. 739 of 2017 seeking to have the defendant refund the security deposit under the lease. In response the plaintiff filed a defence and counterclaim however by way of amendments to the counter claim the plaintiff removed all the earlier prayers and left only bare denial defence to the defendant's claims.

4. The net effect was the withdrawal of the plaintiff's counterclaim in the ELC matter, the plaintiff filed this suit on 2/12/2019 seeking the very same prayers it was seeking in the counter claim. It was the defendant's argument that by terminating the counterclaim and filing this suit the plaintiff herein severed a dispute that arose from the same lease between the same parties and on the same subject matter into two suits, one pending before the ELC court and this one pending before this court.
5. The defendant submitted further that the predominant issue in this matter is the occupation and use of the suit property by the defendant during the period of the lease. The court will have to determine if the defendant was in occupation and whether the occupation and use of the suit property was consistent with provisions of the lease and section 71 (5) of the *Land Act* and other relevant statutes and consequences thereof including the payment of damages and any outstanding rent.
6. The defendant argued that this matter should be determined by the ELC court according to Article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*.
7. On the allegation that the issue of jurisdiction is res judicata, the defendants admitted that they filed the application dated 2/6/2023 seeking to have the suit struck out for want of jurisdiction but the application was never fully heard and determined by this court. The court alternatively sought to fix the suit for hearing without determining the application on its merit. Thus, the issue of jurisdiction was never heard nor determined.
8. The plaintiff alternatively submitted that the PO is res judicata. On 2/6/2022 the defendant filed an application seeking to strike out the suit for want of jurisdiction. On 17/7/2023 the application came up for hearing where each party explained their respective positions. The court agreed that it had jurisdiction to hear and determine the dispute and ordered that the matter proceed. Having assumed jurisdiction and issued several directions then it would be inequitable for the court to allow the PO.
9. The plaintiff further submitted that after the court issued directions on 17/7/2023 it became functus officio as regards Jurisdiction. Having rendered itself on the issue of jurisdiction the court cannot proceed to reopen the issue and consider the same afresh given that in doing so would amount having this court sit as an appellate court on its previous decision and directions.
10. The plaintiff submitted that this suit is properly placed before this court since the suit is purely a monetary claim for the recovery of monies that accrued from the breach of an agreement that did not have a break clause. The suit does not relate to ownership, occupation or use of the premises.
11. The issues for determination in the NOPO are;
  - i. whether the preliminary objection is res judicata.
  - ii. Whether this court has jurisdiction to hear this matter.
12. Section 7 of the *Civil Procedure Act* provides as follows on the issue of res judicata;

“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”.

13. The Supreme Court in *Communications Commission of Kenya & 5 others - v- Royal Media Services Limited & 5 others* [2014] eKLR expressed itself as follows on the issue of res judicata:

“(317) The concept of res judicata operates to prevent causes of action, or issues from being re-litigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....

[319] There are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title..”

14. I find that this case has not been litigated in this court and therefore the issue of res judicata does not arise.
15. The court noted that the case before this court was for breach of contract and refund of deposit and directed on that basis that the hearing should.
16. The plaintiff/respondent did not disclose that there was another suit pending being ELC No. 739 of 2017 also seeking to have the defendant refund the security deposit under the lease together with an interpretation of the issue of the occupation and use of the suit property by the defendant during the period of the lease.
17. I find that the preliminary objection is not res judicata since the parties were not heard before the determination to proceed with the hearing was made.
18. On the issue as to whether this court has the jurisdiction to handle this case, I find that it is not in dispute that defendant/applicant filed ELC No. 739 of 2017 seeking to have the refund of the security deposit under the lease.
19. Further, that in response the plaintiff/respondent filed a defence and counterclaim which was subsequently removed and this suit was filed on 2/12/2019 seeking the very same prayers in the counter claim.
20. The case before this court is for breach of contract and refund of deposit while the defendant/applicant’s case in the ELC court is on the issue of the occupation and use of the suit property by the defendant during the period of the lease.
21. It is not in dispute that this case arose from the same lease between the same parties and on the same subject matter in the two suits, one pending before the ELC court and this one pending before this court.
22. The defendant/applicant submitted that the court will have to determine if the defendant was in occupation and whether the occupation and use of the suit property was consistent with provisions of the lease and section 71 (5) of the *Land Act* and other relevant statutes and consequences thereof including the payment of damages and any outstanding rent.



23. The defendant/applicant further argued that this matter should be determined by the ELC court according to Article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*.
24. Article 162(2) and (3) provides as follows: -
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
    - (a) employment and labour relations; and
    - (b) the environment and the use and occupation of, and title to, land.
  - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
23. The legislation contemplated under Article 162(3) is the *Environment and Land Court Act*.
24. Section 13 thereof outlines the Environment and Land Court’s jurisdiction as follows: -
- (1) The Court shall have original and appellate jurisdiction to hear and determine all dispute in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land.
25. I find that this court has no jurisdiction to hear this case and the same should proceed in the ELC Division.
26. In the case of Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. stated as follows;
- “...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
27. I allow the Notice of Preliminary Objection dated 28/5/2024 and I accordingly strike out this suit with no orders as to costs.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
8<sup>TH</sup> DAY OF OCTOBER, 2024.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

