



REPUBLIC OF KENYA



Paino & another v Universal Resources International Ltd & 2 others (Civil Suit E051 of 2022) [2023] KEHC 17806 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17806 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E051 OF 2022**

A MABEYA, J

MAY 19, 2023

BETWEEN

STEPHEN SAMUEL PAINO 1ST PLAINTIFF

MICHAEL GERALD LYNCH 2ND PLAINTIFF

AND

UNIVERSAL RESOURCES INTERNATIONAL LTD 1ST DEFENDANT

MARK LLOYD STEPHENSON 2ND DEFENDANT

STEPHEN KIMANYI KIMEU 3RD DEFENDANT

RULING

1. Before court is a preliminary objection brought by the 1st and 2nd defendant and dated 28/2/2022. The objection was predicate on the ground that the suit is res judicata and a violation of section 7 of the *Civil Procedure Act*. That the issues between the parties were exhaustively decided in Milimani Judicial Review No. 100 of 2016 Mark Lloyd Stephenson & Another vs Registrar of Companies (2016) Eklr.
2. The 1st and 2nd defendants filed written submissions dated 20/5/2022. This court has considered those submissions.
3. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd* (1969) EA 696 to consist 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.
4. A preliminary objection raises a pure point of law and is argued on the assumption that all facts pleaded by the other side are correct. It cannot be argued if facts are to be ascertained.



5. In *Quick Enterprises Ltd vs Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.”

6. In the present case, the preliminary objection is grounded on the fact that the issues raised in the plaint dated 14/2/2022 were already decided in Milimani Judicial Review No. 100 of 2016. That suit is therefore res judicata and a violation of section 7 of the *Civil Procedure Act*.

7. The doctrine of res judicata is set out in the *Civil Procedure Act* at Section 7 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 can 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.”

8. In *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another* (Interested Parties) [2020] eKLR, the court analyzed the necessary ingredients for the doctrine of res judicata to be met and held that: -

“A close reading of Section 7 of the *Act* reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv) That the issue in question was heard and finally determined in the former suit.
- iv. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

9. This Court has seen the judgment delivered in in Milimani Judicial Review No. 100 of 2016 on 28/9/2016. This Court notes that the main issue for determination therein was whether the Registrar of Companies ought to have been compelled to receive and register the annual returns of the 1st defendant to effect the changes therein and issue a certificate of directors and shareholders as per the resolutions. The court found in the affirmative and orders of mandamus were issued.

10. In the plaint before Court, the issues for determination are whether the 2nd and 3rd defendant committed fraud against the plaintiffs and 1st defendant and whether any actions or resolutions of the 1st defendant made since 7/12/2012 should be nullified. In the Judicial Review matter, it is the conduct of the Registrar of Companies that was on trial and not the process of the appointment of the new directors of the 1st defendant.



11. The other issue for determination is whether the appointment of the 2nd and 3rd defendant as directors of the 1st defendant company was lawful and legal and whether the same should be cancelled. The final issue is whether the 1st defendant's records should be changed to restore the status of the 1st defendant as of 7/9/2012.
 12. Prima facie, these issues are not remotely similar to the issues before court in Milimani Judicial Review No. 100 of 2016. The instant suit mainly revolves around the appointment of the 2nd defendant to the board of the 1st defendant and 3rd defendant as its director, as well as their conduct as directors post their appointment. There is also the issue of the change of the 1st defendant's composition as well as board.
 13. There is no evidence that these issues were raised and determined in Milimani Judicial Review No. 100 of 2016 or in any other court such as to offend the principle of res judicata.
 14. Further, this court notes that the parties in this suit and those before the JR court are not identical, as the Registrar of Companies was a party therein, but is not a party in the instant suit.
 15. Consequently, it cannot be said that the issue raised was directly and substantially in issue in the former suit, or that the former suit was between the same party or parties under whom they or any of them claim or that the issues in question in the instant suit were heard and finally determined in the former suit.
 16. In this regard, this Court finds no merit in the preliminary objection dated 28/2/2022 and dismisses the same.
 17. Since no other party participated in the preliminary objection, there shall be no order as to costs.
- It is so ordered.

DATED and DELIVERED at Nairobi this 19th day of May, 2023.

A. MABEYA, FCI Arb

JUDGE

