



**Oyaro & 3 others v Nyabomite FCS Limited (Civil Appeal E674 of 2021)
[2023] KEHC 21749 (KLR) (Civ) (3 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E674 OF 2021

CW MEOLI, J

AUGUST 3, 2023

BETWEEN

JOSIAH OYARO & 3 OTHERS APPLICANT

AND

NYABOMITE FCS LIMITED RESPONDENT

RULING

1. At the onset, Josiah Oyaro & 3 Others (hereafter the Applicants) lodged the present appeal to challenge the ruling delivered by the Co-operative Tribunal (the Tribunal) on October 7, 2021 in Tribunal Case Number 228 of 2019 (Consolidated with CTC No. 229 of 2019, 230 of 2019 and 231 of 2019) (the Claims). The memorandum of appeal is dated 9th October, 2021. The appeal was accompanied by the Notice of Motion filed of even date and supported by the grounds set out on its body and the facts stated in the affidavit of the 1st Applicant, and seeking various orders, including stay of execution of the aforementioned ruling and a stay of proceedings therein, pending the hearing and determination of the appeal.
2. Nyabomite F.C.S Limited (hereafter the Respondent) resisted the Motion by filing the notice of preliminary objection dated November 18, 2021 containing the following grounds:
 1. The High Court Nyamira while exercising its appellate and final jurisdiction on Nyamira HCA No. 13 of 2020 (Consolidated with HCA 14 of 2019, 15 of 2019 and 16 of 2019) has pronounced itself on Tribunal Case Numbers 228 of 2019, 229 of 2019, 230 of 2019 and 231 of 2019 and this Honourable Court is now functus officio by virtue of section 81(5) of the *Cooperative Societies Act* to hear and determine the application.
 2. The Honourable Court should down its tools by reasons that the matter is now res judicata. (sic)



3. Directions were given for the preliminary objection to be heard first, and the parties were to file and exchange written submissions thereon. The Respondent through its counsel cited the decision in *Raila Odinga & 2 others v IEBC & 3 others* [2013] eKLR to buttress his argument that the court is functus officio in the matter since an application similar to the instant Motion filed by the Applicants before the High Court at Nyamira in HCA No. 13 of 2020 (Consolidated with HCA 14 of 2019, 15 of 2019 and 16 of 2019) (the appeals) was dismissed by a ruling rendered by that court. Counsel further cited Section 81(5) of the Co-operative Act (the Act) to argue that the decision rendered by the High Court at Nyamira in the appeals is final.
4. Counsel invoking Section 7 of the *Civil Procedure Act* contended that the instant Motion is res judicata in view of all the foregoing circumstances, citing the case of *C.K. Bett Traders Limited & 2 others v Kennedy Mwangi & another* [2021] eKLR. Consequently, the court was urged to allow the preliminary objection.
5. On behalf of the Applicants, it was contended by their counsel that the preliminary objection ought to be dismissed for failing to raise pure points of law in line with the principles prescribed in the well-known case of *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696. It was also contended that the preliminary objection and all other documentation filed by the firm of Bw’oigare Getange & Co. Advocates ought to be struck out for failure to comply with the provisions of order 4 rule 1(4) of the *Civil Procedure Rules* as relating to instructions to act for the Respondent herein.
6. The court has considered the grounds captured in the preliminary objection, the rival submissions and authorities cited in that respect.
7. Before it delves into the merits of the preliminary objection, the court will address the issue regarding the legal representation of the Respondent. The provision cited by the Applicants was order 4, rule 1(4) of the *Civil Procedure Rules* which provides that:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”
8. The parties did not elaborate on the applicability of the above provision to the present proceedings. Upon its perusal of the record, the court observed that the documents prepared on behalf of the Applicant were served upon the firm of Bw’oigare Getange & Co. Advocates and at no point in time previously did the issue of legal representation of the Respondents arise. In the absence of any credible evidence to indicate otherwise, the court is of the view that the argument raised by the Applicant challenging the representation of the Respondent is probably a mere red herring.
9. Moving on to the preliminary objection, in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court defined a preliminary objection in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”



10. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when stated:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

11. The preliminary objection here is two-pronged; namely whether the court is functus officio in the matter, and whether the Motion is res judicata. Potentially these matters could qualify as pure points of law. Elaborating on the functus officio doctrine, the Court of Appeal in the case of *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR held as follows:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions...”

12. Further to the foregoing, the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR as well offered the following insights:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

13. It is clear from the foregoing that the doctrine becomes applicable upon a court rendering a decision in a matter. In the present instance the argument advanced is that by virtue of the past verdict of the High Court at Nyamira in a similar application the functus officio doctrine applies to this court. However, neither the purported decision nor related application was tendered before this court for perusal, while the parties appeared to disagree on the purport of the proceedings before the High Court at Nyamira.

14. Similarly, the second prong of the preliminary objection, res judicata, was premised on proceedings and decision by the High Court at Nyamira. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR stated regarding res judicata that :

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“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 the 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.”



Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.”

15. Again, none of the parties availed a copy of the ruling or related proceedings to enable the court to determine whether the res judicata plea was properly raised. Clearly, the parties adopted rival positions with regard to the proceedings before the High Court at Nyamira. As stated in the Mukisa Biscuit Company case (supra) a proper “preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

16. The matters raised in the preliminary objection may be properly canvassed at the hearing of the main application dated 9th October 2021, and the parties are at liberty to file further affidavits in respect of the cited proceedings before the High Court at Nyamira. However, as presented at this stage, the preliminary objection does not raise pure points of law. Consequently, the preliminary objection dated 18th November 2021 must fail and is hereby struck out with costs to the Applicants.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 3RD DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicants: Mr. Mbuthia

For the Respondent: Mr. Getange

C/A: Carol

