



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**HCC. NO.1 OF 2019**

**1. ARIDSUN CONTRACTORS LIMITED**

**2. KATUNGATE CONTRACTORS LIMITED**

**3. SYANO ROADS & BRIDGES COMPANY LIMITED**

**4. KONZA WORKS CONSTRUCTION & ENGINEERING LIMITED**

**5. NELLY KAVUU MUTISYA T/A KIVUI GENERAL SUPPLIERS AND CONTRACTORS...PLAINTIFFS**

**VERSUS**

**COUNTY GOVERNMENT OF KITUI.....DEFENDANT**

**RULING**

1. The **Plaintiffs** have sued the **Defendant** for breach of contract and have pleaded they were contracted to offer various services to the **Defendant** after winning the respective tenders to supply services which ranged from constructions of various roads within Kitui County, Construction of drifts to facilitate movements across **Twa River** and **Kilonzi River**. The **Plaintiff's** claim that they delivered the services but were not paid and hence this suit for specific performance and special damages for delayed payments.

2. The **Defendant** in its pleadings alleged that the **Plaintiffs** failed to perform the works assigned to them to the required standard and within the stipulated time. It also pleaded that the **Plaintiffs'** suit was res-judicata because the matter had be adjudicated through **Kitui High Court Judicial Review No.23 of 2018**.

3. The **Defendant** then took up the plea of *res-judicata* and filed a Notice of Preliminary Objection dated 2<sup>nd</sup> October, 2019 in that regard.

4. After filing the Notice of a Preliminary Objection the **Defendant** filed submissions on the Preliminary Objection on 16<sup>th</sup> July, 2020 and it appears that the **Plaintiffs** were served because on 15<sup>th</sup> September 2020 they also filed submissions in response and opposed the Preliminary Objection.

5. The matter was placed before this court on 16<sup>th</sup> September, 2020 when this court directed the Defendant to avail the decision which was the subject of its Preliminary Objection through a Supplementary Affidavit.

6. However on 14<sup>th</sup> October, 2020, the **Defendant** through counsel appeared and told this court that it had chose not to file any Supplementary Affidavit and was comfortable with the submissions filed.

7. The **Defendant** has submitted that its Preliminary Objection is based on the decision of Hon. Justice L.N.Mutende delivered in **Judicial Review No.23 of 2018** and averred that the decision settled the dispute over payment of money owed by the **Defendant** to the **Plaintiff**. It further claims that the decision was delivered on 31<sup>st</sup> January, 2019 and that the decision in their view was final and having adjudicated over the issues of non payment the same matter cannot be re-litigated again in view of clear provisions of **Section 7 of Civil Procedure Act** and the doctrine of *Res Judicata*.

8. The **Plaintiffs** have opposed the plea of *res judicata* and claimed that the issues before the court in **Judicial Review No.23 of 2018** were fundamentally different from the current suit. They contend that the doctrine of *res judicata* cannot apply in this suit.

9. The doctrine of *res-judicata* is embodied in **Section 7** of the **Civil Procedure Act (Cap 21 Laws of Kenya)**. The doctrine implies that once a matter between the same parties over same facts has been adjudicated by a competent court, the matter cannot be re-litigated again because of the need to have a finality in litigation and bring matters to a rest.

10. When a plea of *res judicata* is raised, a court looks carefully at the facts/issues and the decision claimed to have settled the issues in question in order to satisfy itself that indeed the issues are the same and have been fully adjudicated upon by a decision reached. For a court to come to that conclusion it has to go through the pleadings of the previous suit and the instant suit and look at whether the decision tendered finally settled the dispute. It is therefore incumbent upon the party raising the plea of *res judicata* to supply or tender evidence before court to enable court determine if the doctrine is applicable.

11. In this matter, the **Defendant** has made a general plea of *res judicata* and this court for good measure asked the counsel for the defendant to avail evidence that shows that the issues raised in this suit were infact the same raised by the same parties in the Judicial Review matter for which this court rendered itself. The **Defendant** however for reasons best known to itself chose to rely on the submissions which I find insufficient in so far on the fact/pleadings and the decision in **Judicial Review No.3 of 2018** are concern.

In the premises this court finds that in the interest of judicial time, and in the absence of pleadings and the decision in **Judicial Review No.23 of 2018** I will not delve into the Preliminary Objection dated 2<sup>nd</sup> October, 2018. The same in my view in its form is unsustainable and is disallowed.

**Dated, Signed and Delivered at Kitui this 9<sup>th</sup> day of November, 2020.**

**R. K. LIMO**

**JUDGE**