



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE.**

**WINDING UP CAUSE NO. 1 OF 2012.**

**IN THE MATTER OF :**

**INTESTATE PETROLEUM CO. LTD.:..... APPLICANT.**

**VERSUS**

**AFRICA OIL CORPORATION LTD. & OTHERS ::::: RESPONDENTS.**

**RULING.**

Way back in the year 1969, in the case of **MUKISA BISCUIT CO. VS. WESTEND DISTRIBUTORS (1969) EA 696**, the President of then East African Court of Appeal, **Sir Charles Newbold**, noted the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection.

This practice, it seems, has refused to go more than forty (40) years down the line.

It was observed in the aforementioned decision that:-

***"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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

It was further observed that:-

***"A preliminary objection consists 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."***

The present preliminary objection is dated 5th September, 2012 made by Maosa Kengara Monena, Erick Patrick Adero Obati, Moses Onyango Omboyo, Lucy Muthoni Gatimu and Edward Kings Onyancha Maina, described herein as compellable contributors to the respondent company, Interstate Petroleum Co. Ltd. The purpose of the objection is to have this Winding Up Cause No. 1 of 2012, dismissed with costs on grounds that:-

***(1) This court lacks any tinge of jurisdiction to entertain, try and dispose of this Winding Up Cause 'ab-initio'.***

***(2) The petitioners per-se lack any tinge of "Locus-standi" to institute this Winding Up Cause.***

**(3) The legal Counsel on record in this Winding Up Cause suffer from conflict of interest.**

**(4) The Winding Up Cause as drawn and filed is incurably incompetent and irredeemably defective "ab-initio".**

**(5) The Winding Up Cause is premised on deceitful and fraudulent concealment and misrepresentation of material facts.**

**(6) This Winding Up Cause is "res-judicata" "ab-initio".**

**(7) The petitioners in this Winding Up Cause have come to court in unclean hands "ab-initio".**

It is only grounds one (1) and six (6) above which are legitimate and pure points of law capable of being raised as preliminary points and which may dispose of the entire Winding Up Cause if determined in the positive. Grounds two (2), three (3), four (4), five (5) and seven (7) are factual matters which may need to be ascertained by evidence and would not therefore fall for determination by this court at this juncture lest prejudice be caused to either party at the hearing of the main cause. In essence, these grounds ought to be part of the substantive objection by the respondent company to the Winding Up Cause.

Be that as it may, and with regard to ground one (1) of the objection, the gist of the fifth contributor's submissions is that on the 15th February, 2012, this court struck out and dismissed a previous Winding Up Cause No. 1 of 2011, in which the parties are not dissimilar to the parties in this present Winding Up Cause and in which the subject matter was similar to the subject matter in this cause i.e. the alleged-failure by the respondent company to pay a sum of Ksh. 4,915,221/= vide a certificate of taxation issued on 29th May, 2011.

It is therefore contended by the fifth contributor that this court is "**functus officio**" to its own ruling and as such lacks the necessary jurisdiction to deal with this matter and could be acting in breach of section 7 of the Civil Procedure Act.

Apparently, grounds one (1) and six (6) of the objection are intertwined in as much as section 7 of the Civil Procedure Act is invoked to argue that this court lacks necessary jurisdiction in this matter.

Indeed, if a matter falls within the doctrine of "**res-judicata**" this court would be divested of jurisdiction to deal with it as jurisdiction is everything and without it, a court has no power to make one more step. The court would have no basis for continuation of proceedings pending other evidence and the moment it holds the opinion that it is without jurisdiction, it must down tools in respect of the matter (see, **OWNERS OF THE MOTOR VESSEL "LILIANS" Vs. CALTEX OIL (K) LTD (1989) KLR 1**)

However, "**res-judicata**" and jurisdiction are two distinct subjects. Jurisdiction is more fundamental and can be raised at any time while "**res judicata**" is essentially a matter of pleadings normally raised at the trial of the case.

The term "**functus-officio**" was used by the fifth contributor. It denotes lack of further authority or legal competence to perform an accomplished act. Its existence would thus imply lack of jurisdiction.

The fifth contributor did also invoke section 66 of the Civil Procedure Act by arguing that this present Winding Up Cause not only is it "**res-judicata**" but also an indirect way of appealing against the ruling of this court made on the 15th February, 2012.

Section 66 of the Civil Procedure Act provides for appeals from decrees of the High Court to the Court of Appeal.

The first, second, third and fourth contributors through the learned counsel, **Mr. Kiarie**, left the matter to the court while the petitioners opposed this preliminary objection on the basis of the grounds of opposition dated 22nd September, 2012 and filed herein on the 24th September, 2012 as well as the

averments contained in a replying affidavit dated 8th March, 2013 and filed herein on 11th March, 2013 deponed by the petitioners' General Manager.

On jurisdiction and "**res-judicata**", **M/s. Macharia**, Learned counsel for the petitioners submitted that the previous Winding Up Cause No. 1 of 2011 was determined on preliminary points as evidenced in the ruling of this court made on 15th February, 2012. That, in addressing the objection that led to the striking out of the cause, the court did not consider the merits or demerits of the petition, the question at the time being whether the petition as drawn was competent. That, the objection raised therein was on the form of the petition and not therefore capable of "**res-judicata**".

The petitioners prayed for the dismissal of this objection and so did the supporting creditor represented herein by Learned counsel, **Mr. Omondi** who more or less concurred with the submissions by the petitioners and reiterated that the previous Winding Up Cause No.1 of 2011 was not heard on the merits and what the court did in its ruling of the 15th February, 2012, was to simply strike out the petition for being improper as drawn. Therefore, "**res-judicata**" would not apply in the circumstances.

The fifth contributor is responding to the submissions, by the petitioners and the supporting creditor contended that the ruling of this court made on 15th February, 2012 is a bar by dint of section 7 of the Civil Procedure Act and hence, the doctrine of "**res-judicata**". That, the ruling is an order of the court and however irregular must be discharged since it has not been reviewed nor appealed against.

The basic issue that arises for determination in this objection is whether this Winding Up Cause falls within the doctrine of "res-judicata" and hence the jurisdiction of this court in view of the ruling made by this court on the 15th February, 2012, in a previous Winding Up Cause No. 1 of 2011 pitting the same parties and in particular the petitioners, the respondent company and the five contributors.

The ruling is part of the documents filed herein by the respondent company and/or the five contributors.

In essence, the ruling was a determination on a preliminary objection raised by the five contributors against the petition on the basic ground that it was as drawn incurably defective, incompetent and bad in law.

The objection was upheld by this court to the extent that the material petition was struck out and dismissed with costs to the objector.

The fifth contributor by this present objection implies that the dismissal of the previous petition by this court renders any subsequent petition against the respondent company by the petitioners "**res-judicata**" and beyond the jurisdiction of this court.

The suggestion given by the fifth contributor is that the petitioners ought to have appealed against the ruling of this court instead of filing a fresh petition due to the dismissal of the previous petition.

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".***

The foregoing provision of the law and indeed the doctrine of "**res-judicata**" would not apply in the present circumstances for the reasons that the ruling made by this court on 15th February, 2012, merely prevented the hearing on the merits of the material petition as presented, meaning that the actual matters directly and substantially in issue between the petitioners and the respondents were not heard and finally determined by the court. Simply put, the substance of the petition and the substantial objection thereto were factors which were not availed to the court for hearing and final determination due to the dismissal

of the petition on account of nothing more than formality.

Where a suit has been dismissed on a preliminary point without the parties being given the opportunity of being heard on the merits, the suit would not come into the focus of "**res-judicata**".

The present preliminary objection is therefore unsustainable. The respondent company and its contributors cannot be heard to say that this present petition is "res-judicata" or that this court has no jurisdiction to deal with it or that this court is "**functus-officio**".

Obviously, having not heard the previous petition on the merits, this court cannot be said to have fully accomplished its lawful authority and mandate by rendering a final decision on the matters in dispute.

In sum, the present preliminary objection is dismissed with costs to the petitioners and the supporting creditor.

Ordered accordingly.

**[Read and signed this 5th day of June, 2014]**

**J.R. KARANJA**

**JUDGE**