



**Kigunda v Kenga Equitorial Hotels t/a Mombasa Continental Resort  
(Cause E085 of 2022) [2024] KEELRC 1882 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1882 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E085 OF 2022**

**AK NZEI, J  
JULY 18, 2024**

**BETWEEN**

**DIANA GACERI KIGUNDA ..... CLAIMANT**

**AND**

**KENGA EQUITORIAL HOTELS T/A MOMBASA CONTINENTAL  
RESORT ..... RESPONDENT**

**RULING**

1. The defended suit herein was instituted by the Claimant vide a statement of claim dated 21/10/2022 and filed in this Court on 2/11/2022. The Respondent filed Response to the Claimant's claim on 13/5/2023, denying the Claimant's claim but admitting this Court's jurisdiction to hear and to determine the dispute herein.
2. Trial opened before me on 23/10/2023 when the Claimant testified partly. Pursuant to an application by the Claimant's Counsel on the aforesaid date, both parties were granted leave to file further documents, and the matter was fixed for further hearing on 19/2/2024. On 19/2/2024, however, Counsel for the Respondent submitted orally in Court that there had been a similar suit filed by the Claimant against the Respondent, being this Court's Cause No. E155 of 2017 which the Court (Byram Ongaya, J) had previously heard and determined. Counsel sought to be allowed to file a formal notice of Preliminary Objection, which request the Court granted, with concurrence of the Claimant.
3. On 6/3/2024, the Respondent filed a Notice of Preliminary Objection dated 5/3/2024 seeking to have the Claimant's suit herein struck off on grounds:-
  - a. That the case is *res-judicata* pursuant to the provisions of Section 7 of the *Civil Procedure Act* (Cap 21) as a similar claim between the same parties with the same cause of action was already heard and determined before the Honourable Mr. Justice Byram Ongaya in Mombasa ELRC



Cause No. 155 of 2017 – Diana Gaceri Kigunda v Kenya Equatorial Hotels t/a Mombasa Continental Resort [whereby] judgment was delivered.

- b. That the Claimant is estopped and precluded from raising the same issues in a subsequent suit between the same parties arising from the same cause of action essentially seeking to relitigate the same matter twice.
4. I have perused the Respondent's Response to the Claimant's claim dated 12/5/2023 and I have noted that matters stated in the Respondent's Preliminary Objection herein are not pleaded in the said primary pleading or even implied.
5. The *Black's Law Dictionary (10<sup>th</sup> Edition)* defines the term *res-judicata* as:-
- “An issue that has been definitively settled by Judicial decision.
- An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been-but was not-raised in the first suit. The three essential elements are:-
1. An earlier decision on the issue.
  2. A final judgment on the merits, and
  3. The involvement of the same parties, or parties in privity with the original parties...”
6. It is clear from the foregoing that for this Court to make a determination on whether or not the suit herein is *res-judicata*, it will have to read and to appreciate all the matters of fact pleaded both in the suit herein and in Mombasa ELRC Cause No. 155 of 2017, the proceedings taken and evidence adduced in the said suit, and the Court's judgment thereon. This Court will further have to read through all the witness statements and evidential documents filed in the present suit and the proceedings already taken thereon. This cannot, by all means, fall within the scope of determining a preliminary objection.
7. It was held as follows in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] EA :-
- “...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 urged as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
8. Sir Charles Newbold observed as follows in the *Mukisa Biscuits* case (supra):-
- “...A Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion...”
9. As already stated in this Ruling, ascertainment of whether matters pleaded in the alleged previous suit and eventually determined by this Court (Byram Ongaya, J) and those raised in the present suit are similar cannot be the subject of a Preliminary Objection; and more so when matters raised in the



preliminary objection have not been pleaded by the party raising the preliminary objection, and do not arise by clear implication out of the pleadings as filed and/or presented.

10. For record purposes, I have noted from the Court's record herein, and particularly from the oral submissions made in Court by Counsel for both parties on 23/10/2023, that ELRC Cause No. 155 of 2017 was filed and determined during the subsistence of the Claimant's employment with the Respondent. Further, I have noted from the Claimant's statement of claim filed herein that the instant suit was filed upon termination of the said employment. The issue of whether or not the suit herein is *res-judicata* can only be ascertained upon full trial herein.
11. In view of all the foregoing, and upon considering submissions filed on behalf of both parties, I find no merit in the Respondent's Preliminary Objection dated 5/3/2024, and the same is hereby dismissed with costs to the Claimant.
12. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18<sup>TH</sup> JULY 2024**

**AGNES KITIKU NZEI**

**JUDGE**

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

.....Claimant

.....Respondent

