Mega Pack (K) Ltd v Nesfood Industries Ltd (Civil Case 1121 of 2018) [2026] KEMC 35 (KLR) (15 January 2026) (Ruling)

Neutral citation: [2026] KEMC 35 (KLR)

REPUBLIC OF KENYA

IN THE NAKURU LAW COURTS

CIVIL CASE 1121 OF 2018

PA NDEGE, SPM

JANUARY 15, 2026

BETWEEN

MEGA PACK (K) LTD ..... PLAINTIFF

AND

NESFOOD INDUSTRIES LTD ..... DEFENDANT

RULING

Introduction

1. The Application before this court is dated 08/05/2025 and is brought under the provisions of sections 1A, 3A and 63(e) of the *Civil Procedure Act* and Article 159 of the *Constitution*. The Applicant seeks the following orders;

    i. That this honorable court be pleased to set aside the proceedings/ orders/ directions issued on 14/03/2025 and order the matter proceeds for defence hearing.

    ii. That leave be granted for the Defence to file the documents that are not on record.

    iii. That this honorable court do make further orders as it deems fit to grant.

    iv. That cost of this Application be provided.

2. The Application was premised on the grounds listed on the face of it and supported by the Affidavit of Vilkesh Janendra Shah, a director of the applicant. It is averred in the Supporting Affidavit that the matter herein was scheduled for defence hearing on 14/03/2025 where the Defendant was ready to proceed. That, however, the deponent had challenges accessing the virtual court and could not log in to testify through his phone, tablet and laptop. That afterwards, he got to learn that his gadgets could not log in as a result of his card not being updated. That the court declined prayer for adjournment and the Defence case was closed. That the gadgets not working is not deliberate and is regretted and he is ready to give evidence in Defence of the claim. That their documents seem not to be on record

whereas they were duly deemed as duly filed vide Ruling delivered on 23/12/2022. That it is crucial and in the interest of justice that if the documents are not on record then they should be granted leave to avail the said documents to make the record complete. That the matter herein is highly contested and in fact the court found that there are triable issues and it is only fair that the defendant be granted leave to challenge the same. That the plaintiff will not be prejudiced as they will have their day in court and cross-examine the defence witness.

3. The application was opposed vide the replying affidavit of the Plaintiff/ Respondent's counsel, George Kirumba Mbiyu, sworn on 28th May 2025, where he stated that the application is an abuse of the court process and has no merit, since the applicant is seeking adjournment through the back door. That the reasons in the application are the same as the reasons given in the application for adjournment, in which the court judiciously declined. That as such the reasons in the application are res judicata, having been decided by this honorable court and as such, the defendant should have appealed instead. That granting leave to the defendant will cause prejudice to the plaintiff who has proceeded with this matter in good faith, will lead to costs and delayed justice.

Analysis And Determination

4. I have carefully considered the application, the reply, submissions and authorities cited. In my view the issues that emerge for determination is whether the application is meritorious. This should be considered alongside the plaintiff/ respondent's plea of res judicata.

5. The doctrine of res judicata is enshrined in section 7 of the *Civil Procedure Act*, cap 21 Laws of Kenya. The said provision states 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 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.

6. From the foregoing, the elements that must be satisfied for a plea of res judicata to apply are as follows;

   i) The court that heard the matter must have been competent

   ii) The matter directly and substantially in issue must be the same as that formerly determined.

   iii) The parties must be the same and or litigating under the same titles.

   iv) The matter must have been heard and finally decided.

7. In the case of *Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company & Another (Interested Parties)* [2020] eKLR, at Paragraph 44, the court held as follows;

> 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 five essential elements which are stipulated in the conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;
>
> a. The suit or issue raised was directly and substantially in issue in the former suit.
>
> b. That the former suit was between the same party or parties under whom or any of them claim.

c. That those parties were litigating under the same title.

d. That the issue in question was heard and finally determined in the former suit.

e. 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.

8. The purpose of the doctrine of res judicata was stated in the case of *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others,* [2017] eKLR, where the court stated as follows;

> The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.

9. The Supreme Court reiterated this position in its judgment in *John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* (2021) eKLR, para 54 and held as follows;

> The doctrine of Res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier actions. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

10. To answer the question as to whether the instant application, and the prayers sought are res judicata, I must consider the record and specifically the proceedings of 14/03/2025. I have considered the record and I note that on the said date, Mr. Mbiyu, Advocate appeared for the Plaintiff; while Mr. Wahome Advocate, appeared for the Defendant/ Applicant. The matter was slated for the defence hearing which had been pending since 11/10/2022. Mr. Wahome raised the issue that his witness was unable to log in and prayed for another date. Mr. Mbiyu strenuously opposed the application for adjournment. He submitted and or argued that the plaintiff testified 4 years previously and closed his case. That the defendant has been given three opportunities to present his case which it has failed to utilize. He responded to the issue of the defendant's gadget malfunctioning and submitted that that was not a sufficient ground to adjourn this matter any further.

11. The court considered both arguments and the reasons advanced and made the following ruling:

> I have gone through the proceedings herein and the numerous applications for adjournments by the defence. This matter cannot be adjourned any further cause the reasons given not sufficient. Since morning, the witness could not have been able to join up to now 12.29pm.

12. Mr. Wahome voluntarily conceded and closed the defence case and even went further to agree that parties file and exchange their written submissions on or before 09/05/2025. The records herein show that the plaintiff has since complied and filed his written submissions dated 09/05/2025.

13. As aptly submitted by the learned counsel for the Plaintiff, my orders made on 09/05/2025 are crystal clear that this court determined with finality, the issue of adjournment based on the grounds raised in this application. In my view, that issue was determined by this court with finality. As the parties are the same, and this court having competently determined the issue of adjournment on the ground of the defendant's witness inability to join the virtual court platform on account of a malfunctioning gadget, and the defendant having voluntarily closed its case thereafter, this court is functus officio and is barred by section 7 of the *Civil Procedure Act* from determining the same issue for the second time. Therefore, in so far as the prayers in the application are concerned, the doctrine of res judicata effectively bars this court from determining those prayers. The upshot is that the Notice of Motion dated 08/05/2025 is hereby dismissed for lack of merit and being an abuse of the court process.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS...15th ...DAY OF...January. 2026 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

.....Wahome..... for the Applicant

...Ndungu h/b Mbiyu..... for the Respondent

.....Wakesho..... – Court Assistant

Ndungu: Praying for a judgment date soonest.

Wahome: Praying for a further mention date to enable us file our submissions.

Ndungu: I do agree.

CT: The defendant granted leave to file and serve its written submissions by or on 9.00am of 12/05/26.