

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CASE NO. E105 OF 2024**

**MILLY GLASS WORKS LIMITED ..... PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 22nd January 2025, Kenya Railways Corporation (the Defendant/Applicant) prays for the following orders:

- a) **That the suit as contained in the Plaint dated 9/12/2024 be dismissed for being Res judicata to the decision of the ELC in ELC No. 135 of 2012 and the subsequent decision of the Court of Appeal in Civil Appeal No. E083 of 2022;**
  
- b) **That Judgment be entered against the Defendant in the Counterclaim/Respondent Milly Glassworks Limited for the sum of Kshs 62,293,000/= plus interest at Court rates from the date of Judgment until payment in full;**

**c) That the costs of this Application and the suit in general be awarded to the Applicant.**

2. The application which is supported by an Affidavit sworn by the Applicant's Ag. General Manager Legal Services and Corporation Secretary Stanely Gitari is premised on the grounds inter alia that;

**i. This Court does not have jurisdiction to hear and determine the main suit as contained in the Plaintiff dated 9/12/2024 since it is *Res Judicata* to the decision of the Court of Appeal in Civil Appeal No. E083 of 2022;**

**ii. The Judgment sought by the Applicant in the counterclaim is for a straight forward liquidated sum of Kshs 62,293,000/=;**

**iii. The Respondent does not have any reasonable defence to the counterclaim since the Respondent admits in the Plaintiff that:**

**a) The only evidence of payment of the money owed to the Applicant from 2012 to 2022 is the Judgment of the Environment and Land Court in ELC Case No. 135 of 2012;**

**b) The decision of the ELC in ELC Case No. 135 of 2012 was overturned in its entirety by the Court of Appeal in Civil Appeal No. E083 of 2022 which affirmed the right to the Applicant to demand for rent at Kshs 10,200,000/= from 1/1/2012; and**

**c) The Court of Appeal in ELC No. E083 of 2022 determined that the Applicant is entitled to demand rent at Kshs 10,200,000/= from 1/1/2012.**

3. Milly Glass Works Limited (the Plaintiff/Respondent) is opposed to the application. In a Replying Affidavit sworn on its behalf by its Managing Director Mohamed Rashid on 29<sup>th</sup> January 2025, the Respondent avers that the application lacks any evidentiary basis and that it must be struck out. It is further the Respondent's case that summary judgment is not available to the Applicant as Order 36 of the Civil Procedure Rules does not apply to counterclaims.
4. The Respondent further avers that in dismissing the Plaintiff's application to amend in Mombasa ELC Case No.

135 of 2012, the Court had held that recovery of any rent should be the subject of a new suit. It is the Respondent's case that the said decision is the subject of a further appeal to the Supreme Court.

5. In addition to the Replying Affidavit, the Respondent has filed Grounds of Opposition dated 29<sup>th</sup> September 2025 stating as follows:

**1) By the Ruling delivered by the Court on 4<sup>th</sup> July 2025, the Preliminary Objection that was based on *res judicata* was dismissed by the Court hence prayer 1 of the Notice of Motion dated 22<sup>nd</sup> January 2025 is itself rendered *res judicata* by virtue of the said Ruling; and**

**2) The Defendant in the Counterclaim has filed a Defence to the Counterclaim which raises several triable issues which cannot be therefore the subject of the Summary Judgment.**

6. I have carefully perused and considered the Defendant's application as well as the response thereto by the Plaintiff. I have similarly perused and considered the submissions

placed before the Court by the Learned Advocates representing the parties.

7. By their application before the Court, the Defendant prays for orders that the Plaintiff's suit be dismissed on account that the same is *res judicata* to the decision made in Mombasa ELC Case No. 135 of 2012 and the subsequent decision of the Court of Appeal in Civil Appeal No. E038 of 2022. In addition, the Defendant prays that summary judgment be entered in its favour against the Plaintiff for the sum of Kshs. 62,293,000/= together with interest until payment in full.
8. The issue of whether or not this suit was *res judicata* was first raised by the Defendant/Applicant in their Notice of Preliminary Objection dated 17<sup>th</sup> January 2025. That Preliminary Objection was dealt with and dismissed in the Ruling delivered by this Court on 4<sup>th</sup> July 2025. From the record, the Defendant did on 10<sup>th</sup> July 2025 lodge an Appeal against the said determination. This court having pronounced itself on the issue, the same cannot be raised

again by way of an application for the Court's consideration.  
That issue is now clearly *res judicata*.

9. On the prayer for summary judgment, Order 36 Rule 1 of the Civil Procedure Rules provides as follows:

**“(1) In all suits where a Plaintiff seeks judgment for—**

**(a) a liquidated demand with or without interest; or**

**(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,**

**where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.”**

10. From my reading of the above provisions, it was evident that such judgment may only be granted where the Defendant had appeared but not filed a Statement of Defence. In the matter before me, the Plaintiff has filed a Defence to the Counterclaim and unless that Defence were struck out, the application for summary judgment cannot be entertained.
11. In any event, as was held by the Court of Appeal in ***Job Kilach -vs- Nation Media Group Ltd & Others (2015) eKLR:***

**“Before the grant of summary judgment, the Court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “triable” as, “subject or liable to judicial examination and trial”. It therefore does not need to be an issue**

**that would succeed, but just one that warrants further intervention by the Court.**

**A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. In the case of Giciem Construction Company v Amalgamated Trade & Services LLR No 103 (CAK) this Court stated:**

**As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”**

12. In the matter before me, the Applicant avers that the Respondent does not have any reasonable defence to the Counterclaim as it admits the only evidence of payment of money owed to the Applicant from 2012 to 2022 is the

judgment of this Court in ELC. Case No. 135 of 2012 which judgment was overturned by the Court of Appeal. I was however not persuaded that the issues raised in the said ELC Case No. 135 of 2012 were the same as the issues raised in this suit.

13. In the matter herein, the Plaintiff/Respondent in its Defence to the Counterclaim dated 29<sup>th</sup> September 2025 raises a triable issue regarding the amount of Kshs. 62,293,000/= which the Defendant claims as the amount of rent in arrears. In my mind whether or not that is the correct amount of rent due from the Plaintiff for the period 2012 to 2022 can only be determined upon the full hearing in which the parties are granted an opportunity to adduce their evidence.
14. In the premises, I was not persuaded that there was any merit in the Motion dated 22<sup>nd</sup> January 2025. The same is hereby dismissed with costs to the Plaintiff/Respondent.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 23<sup>rd</sup> day of April, 2026.**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Gikandi Advocate for the Plaintiff/Respondent
- c) Mr. S. Karina Advocate for the Defendant/Applicant

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