



Sai Holdings Limited v Prideinn Hotels & Investments Ltd & 3 others (Environment & Land Case 143 of 2013) [2024] KEELC 3355 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 143 OF 2013
NA MATHEKA, J
APRIL 24, 2024**

BETWEEN

SAI HOLDINGS LIMITED PLAINTIFF

AND

PRIDEINN HOTELS & INVESTMENTS LTD 1ST DEFENDANT

SHABBIR MOHAMMED KASSAM 2ND DEFENDANT

MOHAMMED HASNAIN SHABBIR NOORANI 3RD DEFENDANT

GLORY HOTELS & INVESTMENTS LIMITED 4TH DEFENDANT

RULING

1. The Defendants herein raised a Notice of Preliminary Objection on the premise that;
 1. The plaintiff's suit is time barred by dint of Section 4(1) of the [Limitations of Actions Act](#) Cap 22 Laws of Kenya.
 2. That the Honourable court is *functus* official by dint of Section 7 of the [Arbitration Act](#) No. 4 of 1995.
2. The Defendants submitted that the [Arbitration Act](#), 1995 restricts the jurisdiction of the court in Arbitration to only matters provided for under the Act. That Rule 2 of the [Arbitration Rules](#) of 1997 provides that the applications to court under Sections 6 and 7 of the [Arbitration Act](#) shall be made by summons in the suit. That the plaintiff filed a plaint and a notice of motion dated 8th July 2013 under Certificate of Urgency when the Hon. S. Mukunya granted the preservatory orders sought under



section 7 of the [Arbitration Act](#) pending the determination of the dispute through Arbitration. Section 7 of the [Arbitration Act](#) provides that;

" It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during proceedings, an interim measure of protection and for the High Court to grant that measure."

3. That the jurisdiction of the court is therefore limited to either granting and/or declining the preservatory orders sought. They submit that upon the grant of the interim protection orders, there is no pending suit for determination and the Honourable court is *functus officio*. This suit having been filed under Section 7 of the [Arbitration Act](#) and this Honourable court having granted the conservatory orders sought by the plaintiff pending the hearing and determination of the Arbitration, there is no provision in the [Arbitration Act](#) granting jurisdiction to this court to in anyway intervene with the matter. The arbitration collapsed because the arbitrator lacked jurisdiction to hear and determine the dispute under Section 17 of the [Arbitration Act](#). The plaintiff did not file an application against the ruling of the arbitrator within Thirty (30) days as required under section 17 (7) of the [Arbitration Act](#).
4. It is their submission that pursuant to the express provisions under section 10 of the [Arbitration Act](#), the only recourse left to the plaintiff after the failed arbitration is to file a fresh suit under the [Civil Procedure Act](#) Cap 21 and the [Civil Procedure Rules](#) to enable this Honourable court have the requisite jurisdiction to hear and determine the dispute. This file was closed on 8th July 2013 when the preservatory orders were granted under section 7 of the [Arbitration Act](#). That the substantive reliefs sought by the plaintiff vide its amended plaint are based on the alleged breach of the Management Agreement and Lease executed by the parties both of which were terminated on 5th July 2013. Section 4(1) of the [Limitation of Action Act](#) provides;

" (1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued (a) Actions founded on contract.

5. That the plaintiff was allowed to amend its plaint but the same introduced a cause of action that is inconsistent with the original nature of the suit filed under section 7 of the [Arbitration Act](#). The new inconsistent cause of action introduced by the amendment of the plaint is time barred pursuant to section 4 of the [Limitations of Actions Act](#) Cap 22 of the Laws of Kenya. That if the suit as amended is allowed to stand, it will occasion great injustice to the defendants by interfering with their accrued legal right to rely on the defence of limitation. They submit that the suit herein as instituted vide the amended plaint is time-barred, bad in law and incurably defective and pray that the same be struck out.
6. The Plaintiffs submitted that the suit came up for Mention on 20.9.2023 when both parties confirmed that the Court of Appeal had delivered its Ruling on 28.7.2023 in Civil Appeal No. E087 of 2022 dismissing the Defendants' application with costs. The suit was then fixed for Case Management on 9.10.2023 at the request of the Defendants' Advocates. On 9.10.2023 during Case Management the Defendants' Advocates sought an extension of time by 2 weeks to file Statements and documents on the grounds that their instructing client was out of the Country. The matter was adjourned the matter to 30.11.2023 by which time nothing had been filed by the Defendants. On 30.11.2023 the Defendants' Advocate informed the Court that the Defendants had filed a Notice of Preliminary Objection which they would like to be determined before the main trial. As they had not been served with that notice the court ordered that they be served by close of business that day, the Defendants to serve their written submissions thereon within 21 days and the Plaintiffs submissions be filed 21 days thereafter. The matter was fixed for mention on 1st February 2024 to confirm the filing of submissions and for further directions.



7. The Plaintiffs submitted that the cause of action in this suit is a Lease dated 2011 between the Plaintiff as Landlord, the 1st Defendant as Tenant and the 2nd 3rd and 4th Defendants as Guarantors. The commencement date of the lease is 5.7.2013 as pleaded in paragraph 11 of the Plaint. Limitation period for leases and contracts of guarantee is 6 years. In paragraph 8 of the amended Defence a contention by the Defendants that the lease did not become effective from 5th July 2013 and that the Defendant received notice on 8.7.2013 that the lease had become effective. That 1st Defendant abandoned the hotel within days after the commencement of the lease and the suit was filed within 3 days after that abandonment. The suit was not filed in 2019 when the 6 years would have lapsed. The suit was filed 3 days after the breach of the lease.
8. On the allegation that the Court is *functus officio* under Section 7 of The [Arbitration Act](#), 1995 the Court cannot be *functus officio* before it has heard the suit and delivered its Judgment. This Court had stayed proceedings pending arbitration. The dispute was referred to arbitration. It is a common ground that the Defendants successfully challenged the jurisdiction of the Arbitrator and so the suit returned to where it started in this Court. The stay merely paused the proceedings and after the Arbitrator declined jurisdiction parties resumed these proceedings. That the entire Preliminary Objection is res judicata. The court dealt with those issues when you determined the Plaintiffs application to amend the Plaint. The Defendants appealed to the Court of Appeal against the Ruling and they sought stay of these proceedings in that appeal but their application was dismissed with costs.
9. This court has considered the application and the submissions therein. Before I delve into the Preliminary Objections raised by the Defendant, it is important that I establish if they meet the test laid down in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the court stated that;

" A Preliminary Objection is in the nature of what used to be a demurer. 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."
10. In [Oraro vs Mbaja](#) 2005 eKLR, Ojwang J (as he then was) described it as follows;

" I think the principle is abundantly clear. A "Preliminary Objection" correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for it's authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed."
11. It is clear therefore that a Preliminary Objection must only be based on pure points of law and if for any reason facts are involved, then they must not be contested.
12. On the issue of the suit being time barred by dint of Section 4(1) of the [Limitations of Actions Act](#) Cap 22 Laws of Kenya the Plaintiffs submitted that the cause of action in this suit is a Lease dated 2011 between the Plaintiff as Landlord, the 1st Defendant as Tenant and the 2nd 3rd and 4th Defendants as Guarantors. The commencement date of the lease is 5.7.2013 as pleaded in paragraph 11 of the Plaint. Limitation period for leases and contracts of guarantee is 6 years. The Defendant's contention is that the plaintiff was allowed to amend its plaint but the same introduced a cause of action that is inconsistent with the original nature of the suit filed under section 7 of the [Arbitration Act](#). The new inconsistent cause of action introduced by the amendment of the plaint is time barred pursuant



to section 4 of the [Limitations of Actions Act](#) Cap 22 of the Laws of Kenya. I find that this matter is res judicata as it was already dealt with in the ruling which allowed the amendment of the plaint and the defendant appealed against the said ruling. I find that the suit was filed within the time prescribed under section 4 of the [Limitations of Actions Act](#) Cap 22 of the Laws of Kenya and the amendment was of no consequence as to the time line.

13. On the issue of this court being *functus officio*, by dint of Section 7 of the [Arbitration Act](#) No. 4 of 1995 the doctrine of *functus officio* was considered by the Court of Appeal in [Telkom Kenya limited v John Ochanda \(suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited\)](#) (2014) eKLR, where the court held that;

" *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."

14. In [Telkom Kenya Ltd v John Ochanda \(suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd\)](#) (*supra*), the Court of Appeal held as follows on the *functus officio* doctrine-

" *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon--

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in *Re-St Nazarine Co*, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---"

16. The Supreme Court of Kenya in the case of [Raila Odinga & 2 Others vs Independent Electoral & Boundaries Commission & 3 Others](#) (2013) eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "[The Origins of the Functus Officio Doctrine, with Special Reference to its Application in Administrative Law](#)" (2005) 122 SALJ 832 which reads;

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

17. Section 99 of the [Civil Procedure Act](#) provides exceptions to the doctrine of *functus officio* in the following terms-

" Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties."

18. It is clear that the doctrine of *functus officio* does not bar a court from entertaining a case it has already decided but prevents it from revisiting the matter on a merit-based re-engagement once final judgment has been entered and a decree issued, as is the case herein.



19. The court also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* (2002) JLR 542 at 550 to the effect that;

" A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

20. It is not disputed that the court stayed proceedings in this matter for the parties to pursue Arbitration. However, the arbitration collapsed because the Arbitrator lacked jurisdiction to hear and determine this dispute. The Plaintiff states that in fact it is the Defendants that had successfully challenged jurisdiction of the arbitrator. The matter has now come back to this court and it cannot be therefore *functus officio* as no determination has been reached by the court. Section 1A(2) of the *Civil Procedure Act* provides that

" the Court shall, in the exercise of its powers under this *Act* or the interpretation of any of its provisions, seek to give effect to the overriding objective"

while under section 1B some of the aims of the said objectives are;

" the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties."

21. I do not agree with counsel for the Defendants when he states that that pursuant to the express provisions under section 10 of the *Arbitration Act*, the only recourse left to the plaintiff after the failed arbitration is to file a fresh suit under the *Civil Procedure Act* Cap 21 and the *Civil Procedure Rules* to enable this court have the requisite jurisdiction to hear and determine the dispute. I find the preliminary objection is not merited and I dismiss it with costs.

22. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF APRIL 2024.

N. A. MATHEKA

JUDGE

