



Odera & 118 others v Homa Bay County Government & 2 others (Judicial Review E032 of 2024) [2024] KEELRC 13320 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELRC 13320 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW E032 OF 2024**

JK GAKERI, J

DECEMBER 4, 2024

BETWEEN

PETER OTIENO ODERA 1ST APPLICANT

REGINAL OWAKA OCHOLA 2ND APPLICANT

ANTONY GAYA TINDI & 116 OTHERS & 116 OTHERS 3RD APPLICANT

AND

HOMA BAY COUNTY GOVERNMENT 1ST RESPONDENT

HOMA BAY COUNTY SERVICE BOARD 2ND RESPONDENT

**COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE HOMA BAY
COUNTY 3RD RESPONDENT**

RULING

1. By Chamber Summons dated 30th August, 2024, the Ex Parte Applicant sought leave to apply for an order of Judicial Review of mandamus against the Respondents and leave was granted to file the substantive motion within 21 days which the Ex Parte Applicant filed on 20th September, 2024.
2. The Ex Parte Applicant prays for an order of mandamus to compel the Respondents to release the sum of Kshs.40,304,792.04 or there about being the balance of the decretal sum together with costs and interest from date of judgment in Kisumu ELRC No.3 of 2018 and costs of the application.
3. On the date of hearing of the application on 30th October, 2024, Mr. Okello for the 1st, 2nd and 3rd Respondents informed the Court that he had filed a Notice Preliminary Objection (herein after Preliminary Objection) dated 30th September, 2024 as well as a response to the Application, contending that the suit is res judicata and no submissions were necessary. He sought a ruling date on the Preliminary Objection.



4. The Court directed Mr. Okello to serve the Preliminary Objection and parties were accorded 7 days a piece to file and exchange submissions as necessary and both Counsels confirmed filing and serve on 19th November, 2024 and a ruling date was given.
5. The Respondents Notice of Preliminary Objection dated 30th September, 2024 states that

The issues raised in Judicial Review Application No. E32 of 2024 by the Applicants against the Respondent are the same issues raised in ELRC JR Application No. E044 of 2023 by the said Applicants against the same Respondents over Judgment in Kisumu ELRC No. 3 of 2018.

That the Judgment in ELRCJR No. E044 of 2023 delivered on 6th March, 2024 settled all the issues raised and ELRC JR No. 032 of 2024 is RES JUDICATA and an abuse of the Court process and ought to be dismissed with costs.
6. Since the Preliminary Objection herein has the potential to dispose of the Ex Parte Applicants application dated 5th September 2024, it shall be canvassed in the first instance.
7. Guided by the sentiments of the Court of Appeal in the often cited decision in Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors [1969] EA 696, and in the absence of any contest, the Court is satisfied that the Respondents' Notice of Preliminary Objection meets the threshold of a Preliminary Objection in law.
8. In their Replying Affidavit sworn by Mr. George Illah on 3rd September, 2024, the affiant deposes that the issues raised in ELRC JR No. E044 of 2023 were heard and determined by Hon. Justice Stephen Radido on 6th March, 2024, and the 1st Respondent had paid a total of Kshs.30,100,620.00 undisclosed by the Applicants.
9. That the Respondent has at no time refused to pay the decretal sum and the amount outstanding is about Kshs.4,358,414.00 and will be forwarded to the Ex Parte Applicant's Counsel once approved by the Controller of Budget.

Respondents Submissions

10. As to whether there exists a judgment between the parties on the issues raised in the instant application and they are Res Judicata counsel for the Respondents submitted that the answer was in the affirmative as ELRC JR No. E044 of 2023 sought to enforce the Judgment in Kisumu ELRC No. 3 of 2018 and the same was heard and dismissed with costs and the instant application was thus res judicata.
11. Reliance was made on the sentiments of the Court in Kenya Commercial Bank V Muiri Coffee Estates Ltd [2016] eKLR on the rationale of res judicata and Independent Electoral & Boundaries Commission (IEBC) V Mama Kiai & 5 Others [2017] eKLR on the elements of res judicata as well as John Florence Maritime Services Ltd & Another V Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR among others to urge that Ex Parte Applicants Application is res judicata.

Applicant's Submissions

12. Counsel for the Ex Parte Applicants argues that owing to the issue of account reconciliation the Court failed to render a final determination on the Judicial Review Application as the sum claimed was uncertain.
13. Counsel further argues that the parties sat down and reconciled the statement of accounts on 16th April, 2024, and the sum of Kshs.40,304,792.04 was acknowledged by both parties.



14. Reliance was made on the decision in John Florence Maritime Services Ltd & Another V Cabinet Secretary Transport and infrastructure & 3 others (Supra) on the elements of res judicata to submit that in ELRC JR No. E044 OF 2023, it was premature for the Court to grant the orders sought as the amount in question was still uncertain and the ex parte applicants were constrained to file another application for the Respondent to be compelled to release the reconciled amount plus interest as Judicial Review is the only remedy available to the ex parte Applicants.
15. Counsel submitted that the Preliminary Objection was unmerited and ought to be dismissed with costs.

Analysis and determination

16. To their credit, the Ex parte Applicant's agree that they filed and prosecuted ELRC JR E044 of 2024 seeking Judicial Review Orders of Mandamus to compel the Respondents to pay the sum of Kshs.31,931,786 as the outstanding balance in ELRC No. 3 of 2018 which is not exactly the case as in the Amended Notice of Motion dated 17th January, 2024, the ex parte Applicants sought the Respondents compelled to pay the sum of Kshs.38,309,412.80 and costs of the application.
17. The issue before the Court was how much was due to the Ex Parte Applicants as they prayed for Kshs.31,931,786.00 which figure the Respondents disputed stating that they had already paid Kshs.30,100,620.00 and the ex parte Applicants admitted that the sum of Kshs.17,000,000.00 had been paid and Kshs.10,000,000.00 was admitted in the mother suit.
18. The Court was persuaded that Judicial Review Orders cannot be made where the amount alleged to be due is uncertain and dismissed the Amended Notice of Motion as incompetent and Judicial Review Orders sought were unavailable to the ex parte Applicants.
19. Counsel for the Ex Parte Applicants admits that the Ex Parte Applicants field the suit herein for the same Orders sought earlier simply because the amount due is now certain.
20. In their Supporting Affidavit for the Notice of Motion, the Ex Parte Applicants depose that the amount reconciled on 16th April, 2024 is Kshs.40,304,792.04.
21. The Respondents on the other hand depose that the sum of Kshs.30,100,620.00 has already been paid to the Ex Parte Applicants, a fact they had not disclosed to the Court. That the outstanding sum is far less, Kshs.4,358,414.00.
22. The upshot of the foregoing is that the sum allegedly due to the ex parte Applicants remain uncertain as it was on 6th March, 2024 when Justice Stephen Radido delivered the Judgment in ELRC JR No. E044 of 2023.
23. While the Respondents submitted that the Ex Parte application is res judicata and ripe for dismissal, the Ex Parte Applicants submitted that the Preliminary Objection unmerited and sought its dismissal with costs having admitted that they filed ELRC JR No. E044 of 2023 on the same matters.

Section 7 of the *Civil Procedure Act* provides that –

No Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue on 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.



24. As correctly submitted by the Respondents Counsel and enunciated by Courts, the principle of res judicata serves an important public policy consideration.
25. In *Kenya Commercial Bank V Muiri Coffee Estates Ltd (Supra)* the Supreme Court expressed itself as follows:

“Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of *Hon. Norbert Mao v. Attorney-General*, Petition No. 9 of 2002; [2003] UGCC3...

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 action. 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...

Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept...

26. The essence of the res judicata doctrine was also explained by Wigram, V-C in *Henderson v. Henderson* (1843) 67 E.R. 313.
27. In the *KCB V Muiri Coffee Estates Ltd's Case (Supra)* The Supreme Court further stated:

“Hence, whenever the question of res judicata is raised, a Court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The Court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a Court of competent jurisdiction. This test is summarized in *Bernard Mugo Ndegwa v. James Nderitu Githae & 2 Others*, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.

That Courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *E.T v. Attorney-General & Another*, (2012) eKLR...”

28. The elements of res judicata were restated by the Supreme Court in *I.E.B.C V Maina Kiai & 5 Others (Supra)* as follows:
- a. The suit or issue was directly and substantially in issue in the former suit.
 - b. The former suit was between the same parties or parties under whom or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.



- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
29. In the instant suit and as submitted by the Respondents advocate, the grounds cited in ELRC JR No. E044 of 2023 are the similar to those in ELRC JR No. E032 of 2024, the parties are identical, title is the same. The suit was heard and determined and the Court has jurisdiction to hear and determine this suit.
30. In sum, it is the finding of the Court that ELRC JR No. E032 of 2024 is res judicata and is struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 4TH DAY OF DECEMBER, 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

