



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 378 OF 2019**

(Before Hon. Justice Hellen S. Wasilwa on 17<sup>th</sup> September, 2020)

**KENYA EXPORT FLORICULTURE, HORTICULTURE AND ALLIED  
WORKERS UNION (KEFHAWU) .....CLAIMANT/APPLICANT**

**VERSUS**

**VEGPRO (K) LIMITED.....RESPONDENT**

**RULING**

1. The Kenya Export Floriculture, Horticulture and Allied Workers Union, the Respondent herein, filed a Notice of Motion dated 6/2/2020 seeking to cite the Applicant, Vegpro (K) Limited, and its Chief Executive Officer Mr. Bharat Patel for contempt of this Court's Order issued on 4/7/2019 and 16/9/2019.

2. Subsequently, on 24/2/2020 the Applicant filed a Notice of Preliminary Objection dated even date wherein it raised the following grounds:-

**1. The prayers sought in the Application are incapable of being granted as such, it would serve no purpose to allow the application for injunctive orders.**

**2. THAT the proceedings herein offend the principle of res judicata as provided for in section 7 of the Civil Procedure Act Cap 21 Laws of Kenya in view of the fact that the issues raised in the present application which the subject matter was directly and substantially in issue and in these proceedings herein and a ruling was delivered on 27/1/2020.**

**3. That in the alternative to paragraph 2 above herein, the proceedings herein are barred by virtue of the operation of the doctrine of issues estoppel.**

**4. This Honourable Court lacks jurisdiction to hear this matter as it became "functus officio" upon delivery of its Ruling on 27/1/2020 and therefore it cannot determine the matter or any issue arising from this Ruling as to do so the Court will be sitting on appeal on its own decision. The matter could only have been addressed on a review before this Court or on appeal to the Appeal.**

**5. THAT the present application as taken out, drawn and filed is frivolous, vexatious incompetent, misconceived, fatally defective, is a blatant abuse of the Court process, unsuitable, bad and a nullity in law, merely intended to frustrate the Applicant and the alleged contemnor, therefore it's of no legal consequence at all.**

**Respondent's case**

3. The Respondent filed its Ground of Opposition on 11/3/2020 and inter alia raised the following grounds:-

**1. THAT the prayers sought in the application are merited and the Honourable Court has jurisdiction to grant them.**

**2. THAT the proceedings herein do not offend the principle of re judicata as provided for under section 7 of the Civil Procedure Act Cap 21 Laws of Kenya as the Applicant did not seek citing and punishment of the Applicant herein and its director for contempt of Court hence the parties herein are different.**

3. THAT the proceedings herein are not barred by virtue of the operation of the doctrine of issue estoppel.

4. THAT the Honourable Court has jurisdiction to hear this matter and that the Court is not functus officio as the main suit has not been determined and the order of 4/7/2019 which the contemnors are accused of disobedience has neither been obeyed by the contemnors nor vacated.

5. THAT the parties in this application are different from parties in the previous application as in the present application, it is the Applicant and its Director/CEO Bharat Patel who are being cited for contempt.

6. THAT the present application has specified the right parties to be held accountable contempt of Court for disobedience of Court Orders of 4/7/2019. It is the duty of the Court to ensure it safeguards its integrity and independence by ensuring that its orders are obeyed in order to maintain the rule of law and hence the Court cannot be functus officio in a matter where its order has not been obeyed or vacated.

7. THAT where an order of the Court has not been obeyed by a litigant who has not previously cited for contempt before Court in respect of the same order, that litigant cannot plead lack of jurisdiction and or the doctrine of functus officio against the judge whose orders the litigant has elected to blatantly disobey and rubbish with impunity.

4. The Preliminary Objection was canvassed by way of written submissions and both parties filed their submissions.

#### **Applicant's submissions**

5. The Applicant submitted that the Respondent has attempted to reintroduce and highlight issues which had already been put to rest. It relied on the case of **John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR** where the Court held:-

**“The rationale behind res judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter...”**

6. It further relied on the case of **Hon. Mr. Justice D.K. Njagi Marete v Judicial Service Commission & 3 Others No. 88 of 2019 (unreported)** and submitted that in view of these 2 decisions, both dimensions of res judicata apply to the Notice of Motion dated 19/9/2019 which was amended on 9/10/2019 seeking to have its Chief Executive Officer, Farm manager, Human Resource Managers cited for contempt of Court.

7. It avers that the Court in its Ruling noted that there was no indication that the cited persons had acted personally to prevent execution of the Court's order. It was its submission that in its Application dated 6/2/2020, the Respondent now seeks to remedy the fatal defect in the previous application citing it and its Chief Executive Officer for contempt of Court.

8. It argued that the Respondent has failed to demonstrate or distinguish any issues that are different as alleged in the present application so as to render the doctrine of res judicata inapplicable.

9. It submitted that the Respondent ought to have brought all of its claims in one single application for adjudication. In support of this, it relied decision in the **John Florence Maritime case** that the court requires parties to litigation to bring forward their entire case and not to permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward.

10. It submitted that *res judicata* is a complete estoppel against any suit that runs afoul of it and there is no way of going around it as it asserts a jurisdictional bar and injunct upon a court or a body exercising a quasi-judicial role from entertaining such a suit. It relied on the case of **Mohammed Dabo Hatu v Dhadho Gaddae Godhana & 2 Others [2017] eKLR** where the Court cited the case of **Anthony Raymond Cordeiro 8b 2 Others V Adrian Noel Carvalho & 5 Others, Civil Suit No. 627 Of 2012** that by virtue of estoppel the Court would not allow a matter to be re-litigated.

11. It is its submission that the Court became *functus officio* on the issue of contempt of court of the Orders of 4/7/2019 when it rendered its Ruling on 27/1/2020. In support of this position, it relied on the cases of **Owners of the Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd (1989) KLR 1** and **Raila Odinga & 2 Others v Independent Electoral Boundaries Commission & 3 Others [2013] eKLR** on jurisdiction and the doctrine of *functus officio* respectively.

12. It submitted that the application is an abuse of the process of the Court and relied on the case of **Twin Buffalo Safaris Limited v Business Partners International Limited [2015] eKLR** that where a suit is without substance or groundless or is instituted with some ulterior motive to gain some collateral advantage, which the law does not recognise as a legitimate use, the Court will not allow its process to be a forum of such adventure. In conclusion, it urged the Court to dismiss the application dated 6/2/2020.

#### **Respondent's submissions**

13. The Respondent submitted that the Preliminary Objection fails to meet the well-established legal principles guiding deployment of Preliminary Objections in proceedings. It submitted that the parties in the 1<sup>st</sup> contempt application are different from the parties in the 2<sup>nd</sup> contempt application and that this is a fact which requires evidence to be led. It submitted that the Preliminary Objection is a mix of facts and law thus they require much probing of evidence.

14. It relied on the case of **National Bank of Kenya Limited v Peter Kipkoech Karat & Another [2005] eKLR** where the Court held that the legal position regarding Preliminary Objections was laid down in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) EA 696**.

15. It relied on Order 51 Rule 14 (1) of the Civil Procedure Rules and submitted that where a respondent fails to file a Replying Affidavit, the Court should proceed to determine the application as unopposed since a Preliminary Objection cannot be used to lead evidence.

16. It submitted that courts punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. It relied on the case of **Hon. Martin Nyaga Wambira and Another v Justus Kariuki Mate & another [2014] eKLR and Carey v Laiken [2015] SCC 17** on the duty to obey the law and maintenance of the rule of law.

17. It argued that the powers of the court must be viewed from the supremacy clause under Article 2 (1) of the Constitution as any attempt to limit the power to punish for contempt violates a foundational constitutional value on judicial authority. It cited the case of **Equity Bank Limited v West Link Mbo Limited [2013] eKLR** where the Court of Appeal held that inherent power is possessed by a Court implicitly without it being derived from the Constitution or statute thus the Court does not get the power to punish for contempt from a statute.

18. In conclusion, it urged the court to find that the Preliminary Objection is incompetent and an abuse of Court process.

19. I have examined the Preliminary Objection raised by the Applicant herein. The principle of res judicata flow from the provision of Section 7 of the Civil Procedure Act which provides as follows:-

**“7. Res judicata**

**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.”**

20. The doctrine has also been substantially been litigated in many cases. See **IEBC vs Maina Kiai and 5 Others** Nairobi Civil Appeal No. 105/2017 where the Court of Appeal rendered itself as follows:-

**“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;**

**a. The suit or issue was directly and substantially in issue in the former suit.**

**b. That former suit was between the same parties or parties under whom they 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.”**

21. The purpose of the doctrine is to ensure litigation comes to an end in order to avoid endless litigation over the same issue.

22. In the current application, the Applicant raised this Preliminary Objection in the ground that this Court had already determined this issue under its ruling delivered on 27/1/2020.

23. Indeed this Court delivered a ruling in an application where the Claimant wanted the Respondent cited for contempt of Court. I rendered my ruling and indicated that I could not find the cited Respondents guilty because they were not the guilty party.

24. I also indicated that the Respondent who was the guilty party and who the Claimant now seeks to had not been cited and so the application failed.

25. In this decision, I was already pronounced myself on guilt of the Respondent but who I could not punish for not being cited. In the circumstances, I already rendered my position and it would be prejudicial to the Respondents for this Court to revisit it.

26. In **Mburu Kinyua vs Gachini Tuti [1978] KLR 69** Madan J quoting with approval Wigram V.C in **Henderson v Henderson** (supra stated as follows:-

**“where a given matter becomes the subject of litigation in, and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case (emphasis is circumstances) – Courts will not permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, in advertence or even accident, omitted part of their case”.**

27. This is actually the scenario concerning the Claimant's application, which I believe the issue the Claimant now wants to litigate should have been done earlier but was omitted due to advertence.

28. It is my finding that the Preliminary Objection has merit. I allow it and dismiss the Applicant's application accordingly.

**Dated and delivered in Chambers via zoom this 17<sup>th</sup> day of September, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**In the pre**

Asewe for Claimant – Present

Respondt Absent