



Mwabora v Hotel Span Limited & 3 others (Miscellaneous Civil Application E336 of 2024) [2025] KEHC 12113 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 12113 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E336 OF 2024**

F WANGARI, J

MAY 29, 2025

BETWEEN

MARIAM SAIDI MWABORA & 70 OTHERS APPLICANT

AND

HOTEL SPAN LIMITED 1ST RESPONDENT

RT DUNNET 2ND RESPONDENT

ACCESS BANK GROUP (SUCCESSOR IN TITLE OF TRANS NATIONAL BANK LIMITED) 3RD RESPONDENT

SPIRE PROPERTIES (K) LIMITED 4TH RESPONDENT

RULING

1. For ruling is the Applicants Originating Summons dated 26th October, 2024. The application is brought pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, Orders 37 Rules 1 and 14 of the Civil Procedure Rules, Article 159 of *the Constitution* and all other enabling provisions of the law. It seeks the following orders: -
 - a. That this Honourable Court be pleased to transfer MCELRC No. 79 of 2013 Mariam Said Mwabora & 70 Others v Hotel Span Limited & 2 Others to the High Court of Kenya at Mombasa and the said matter be reassigned Serial Number High Court Civil Case Number 62 of 2007, Mariam Said Mwabora & 70 Others v Hotel Span Limited & 2 Others;
 - b. That the Honourable Court do grant any further directions that it deems fit and necessary in the interest of justice; and
 - c. That the costs be in the cause.



2. The grounds in support of the application are briefly that the matter was initially filed in the High Court and was assigned Civil Case No. 62 of 2007, *Mariam Said Mwabora & 70 Others v Hotel Span Limited and 2 Others*. However, vide a ruling delivered and dated 25th March, 2013 by Hon. Justice Mwongo, the said suit was transferred to be heard and determined by the Employment and Labour Relations Court.
3. The matter was then assigned serial MCELRC No. 79 of 2013, *Mariam Said Mwabora & 70 Others v Hotel Span Limited & 2 Others* and the same was fully heard by the Employment and Labour Relations Court and judgement was delivered on 8th September, 2017 in favour of the Applicants. The 3rd and 4th Respondents herein being aggrieved with the judgement filed two [2] appeals against the judgement delivered on 8th September, 2017.
4. These were Civil Appeal No. 135 of 2018 and Civil Appeal No. 139 of 2018 in the Court of Appeal. Among the issues raised was that the Employment and Labour Relations Court did not have jurisdiction to hear and determine the matter. Through a judgement delivered on 29th July, 2022 by the Court of Appeal sitting at Mombasa [Gatembu, Mbogholi & Nyamweya JJA], in Civil Appeal 135 of 2018 consolidated with Civil Appeal 139 of 2018, the appeals were allowed.
5. The Applicants being aggrieved with the judgement of 29th July, 2022 filed a Notice of Appeal on 12th August, 2022 and a Petition No. 28 [E030] of 2022 in the Supreme Court against the said decision. The Supreme Court upheld the decision of the Court of Appeal to the effect that the Employment and Labour Relations Court did not have jurisdiction to determine the matter as jurisdiction lay with the High Court.
6. It is the Applicants' position that the case was initially filed in the High Court but later transferred to the Employment and Labour Relations Court for a full hearing. However, it was determined that the Employment and Labour Relations Court lacked jurisdiction over the matter rendering the proceedings legally invalid. Thus in the circumstances, the subject case file should be recalled back to the High Court so that the dispute is heard and determined by a court that has jurisdiction.
7. They add that on account of the decisions of the Court of Appeal and the Supreme Court on the issue of jurisdiction, it is not open for the Applicants to file the transfer application in the Employment and Labour Relations Court as it lacks jurisdiction. They conclude that it is in the interest of justice for the orders sought to be granted as there is no loss without a remedy.
8. The application is further supported by an affidavit of even date sworn by one Samuel Momanyi Omas, who presents himself as one of the Applicants with the authority of the rest. Other than the annexures, the affidavit restates the grounds in support and I see no value in rehashing the same.
9. The application is opposed by way of a Notice of Preliminary Objection dated 17th February, 2025, grounds of opposition of even date and a replying affidavit dated 27th March, 2025 sworn by one David Mwangi Ndirangu, the 3rd Respondent Legal Branch Manager. The objection is that the court lacks jurisdiction since it is functus officio having decided in finality that it was the then Industrial Court that had the jurisdiction to hear and determine Mombasa HCCC No. 62 of 2007.
10. In the replying affidavit, it is averred that this court made a decision on 4th April, 2013 when it held that it was the then Industrial Court that had the jurisdiction to hear and determine Mombasa HCCC No. 62 of 2007 and thus it became functus officio after making the ruling. It is stated that since the said determination was made nearly 13 years ago, there has been no variation or setting aside of the court order.



11. It is stated that the doctrine of res-judicata bars this court from re-opening or re-litigating a matter that was decided on merits. Accordingly, it is averred that the present application lacks merit, bad in law and an abuse of court process thus should be dismissed or struck out. The 3rd Respondent prays that the application be dismissed.
12. Due to the preliminary objection, directions were taken to deal with it first. Parties thereafter opted to file their respective submissions which they duly did. The Applicants' submissions are dated 2nd April, 2025 while those of the 3rd Respondent are dated 21st March, 2025. They cited several decisions of this court, Court of Appeal and the Supreme Court to advance their respective rival positions.
13. I have duly considered the respective submissions and I am grateful to the parties for their industry in filing well researched submissions. They serve as a useful guide to this court in arriving at a just determination either way.

Analysis and Determination

14. I have carefully considered the application, the responses and in particular the Notice of Preliminary Objection, the parties' respective rival submissions, the authorities cited as well as the law and the only issue for determination is whether the objection is well taken. Corollary to this is the issue of costs.
15. The locus classicus on matters preliminary objection is the decision of Mukisa Biscuits Manufacturing Ltd v West End Distributors [1969] EA 696. The court observed thus: -

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...”
16. Sir Charles Newbold P. stated: -

“...A preliminary objection is in the nature of what used to be a demurrer. 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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop...”
17. In Hassan Ali Joho & Another v Suleiman Said Shabhal & 2 Others [2014] eKLR, the Supreme Court held as follows: -

“...A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...”
18. The same court Hassan Nyanje Charo v Khatib Mwashetani & 3 Others [2014] eKLR held as follows: -

“...Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”



19. The 3rd Respondent's objection is based on the doctrine of res judicata thus it contends that the court is functus officio. The statutory underpinning of res judicata is section 7 of the [Civil Procedure Act](#) which provides 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.”

20. In *Henderson v Henderson* [1843] 67 ER 313, res judicata was described 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, and will not [except under special circumstances] permit the same parties to open the same subject of litigations 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, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...”

21. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. It is my view that all the relevant facts as summarized above are not in dispute and the matter did not call for the exercise of the Trial Court's discretion. Resultantly therefore, the objection is a pure point of law.
22. Having found as above, it is imperative to interrogate whether application as framed suffers from the doctrine of res judicata. In their application, the Applicants confirm that Mombasa HCCC No. 62 of 2007 was fully heard and determined by the Employment and Labour Relations Court when the matter was transferred to that court on 4th April, 2013. In fact, the matter has been litigated all the way to the apex court.
23. This being the case, is it now open for the Applicants to re-introduce the matter on account that the Employment and Labour Relations Court did not have jurisdiction to hear and determine the matter? In answering this question, I have to consider this court's [R. Mwongo, J] ruling delivered on 4th April, 2013.
24. It is not in dispute that the Applicants are the ones that moved the court to have the matter transferred to the Employment and Labour Relations Court. This can be discerned from their application dated 16th February, 2012. It is also confirmed that the Applicants were successful and the Employment and Labour Relations Court awarded them the terminal benefits they were seeking. Having benefitted from the judgement, I am not persuaded that this a matter that the Applicants ought to have a second bite of the cherry.



25. The Applicants are estopped from trying to have another round of litigation. Section 120 of the Evidence Act provides as follows: -

“When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

26. When the ruling was rendered in their favour on 4th April, 2013, the Respondents did not appeal the court’s ruling meaning they were satisfied with the same. They therefore brought themselves within the jurisdiction of the Employment and Labour Relations Court. The matter was fully heard and a determination made in 2017. If the Applicants were dissatisfied with the 2017 decision, they should have appealed and raise the issue of jurisdiction.

27. It would be onerous if I were to allow the Respondents to be vexed once again. The case was filed over eighteen [18] years ago. A party should not be made to defend stale claims when evidence in support may have dissipated. That would be the situation if I were to allow the application. I have also looked at the Court of Appeal decision rendered on 22nd July, 2022. The appellate court held for a fact that the Employment and Labour Relations Court had no jurisdiction to entertain the issue of the validity and or legality of the appointment of the receiver.

28. This being the case, can it be a basis for the Applicants to re-introduce their claim on account that the matter was not considered? I am not at all convinced. If I were to allow the application, it would open a can of worms. It would be akin to allowing a party to litigate in instalments. This would make a mockery of the doctrine of res judicata. I think I have said enough to show that the notice of preliminary objection dated 17th February, 2025 is well taken.

29. On costs, the same follows the event. However, it must be remembered that award of costs is discretionary and the court reserves the discretion whether to award the same or not. Though the application has failed, it was not brought in bad faith and the Applicants had bona fides in bringing the same. I therefore direct that each party shall bear own costs.

30. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Notice of Preliminary Objection dated 17th February, 2025 is hereby upheld;
- b. Resultantly, the Originating Summons dated 26th October, 2024 is hereby struck off; and
- c. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF MAY, 2025.

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F. WANGARI

JUDGE

In the presence of;

Mr. Gikandi Advocate for the Applicants

N/A for the Respondents

Ms. Norah, Court Assistant

