



**High Seas Petroleum Contractors Limited v East African Gas Oil Limited & another  
(Environment & Land Case E082 of 2022) [2023] KEELC 667 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 667 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E082 OF 2022  
SM KIBUNJA, J  
FEBRUARY 15, 2023**

**BETWEEN**

**HIGH SEAS PETROLEUM CONTRACTORS LIMITED ..... PLAINTIFF**

**AND**

**EAST AFRICAN GAS OIL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KITHEMU AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**(Notice of Preliminary Objection Dated 7th August 2022)**

1. East African Gas Oil Ltd, the 1<sup>st</sup> defendant, filed the notice of preliminary objection dated the August 7, 2022, raising the following five (5) grounds;
  - a. That the suit is res judicata and violates section 7 of the *Civil Procedure Act* since a similar matter was determined in Malindi CMC E036 of 2022 and HCCA No 33 of 2020.
  - b. The suit is sub-judice and violates section 6 of the *Civil Procedure Act* and there is a pending matter in Kilifi CMC No 167 of 2019 between the parties herein.
  - c. That the court has no jurisdiction in view of section 7 of the *Magistrate's Court Act 2015* as the subject matter's value is Ksh 13,000,000.
  - d. The suit is bad in law, frivolous and amounts to forum shopping, which is an abuse of the court process.
  - e. That this suit be struck out with costs.
2. The court gave directions on filing and exchanging submissions on the preliminary objection on the November 7, 2022. The learned counsel for the 1<sup>st</sup> defendant then filed their submissions dated the November 17, 2022, on the November 22, 2022, which the court has considered.



3. The following are the issues for the court's determinations;
  - a. Whether the issues herein have already been determined, as between the same parties or those claiming through them, by a court of competent jurisdiction.
  - b. Whether there is pending before a court of competent jurisdiction a suit(s) over the same subject matter and between the same parties, or those claiming through them.
  - c. Whether this court is with jurisdiction in the matter in view of the apparent value of the subject matter.
  - d. Whether the suit amounts to forum shopping and or and abuse of the court process.
  - e. Who pays the costs.
4. The court has carefully considered the grounds on the notice of preliminary objection, pleadings, submissions by learned counsel, superior courts decisions cited thereon and come to the following determinations;
  - a. This suit was commenced by the plaintiff through the plaint dated the July 26, 2022 in which it among others sought for permanent injunction restraining defendants from selling Kilifi/Roka/1887, declaration that advertisement by 2<sup>nd</sup> defendant for sale of land parcel Kilifi/Roka/1887 is illegal, declaration that lease agreement dated July 5, 2016 was lawfully terminated, general damages, costs and interest. That contemporaneously filed with the plaint is the notice of motion of even date seeking for *inter alia* temporary injunction and mandatory injunction. The application was placed before the court on the July 27, 2022, and *ex parte* orders on stay of the intended auction of Kilifi/Roka/1887 for August 4, 2022 among others issued. The 1<sup>st</sup> defendant has since filed their statement of defence dated the August 22, 2022; replying affidavit sworn on the September 12, 2022; list and copies of documents dated the October 14, 2022; and notice of preliminary objection dated the August 7, 2022. The 1<sup>st</sup> defendant has also filed the notice of motion under certificate of urgency dated the August 4, 2022 seeking for the *ex parte* injunction orders of July 29, 2022 to be discharged, vacated, varied and or set aside, and the striking out of the plaintiff's application dated the July 26, 2022 and the entire suit for being a gross abuse of the court process. The application is premised on the eight (8) grounds on its face marked (a) to (h) and supported by the affidavit sworn by Abdullahi Salad, chief executive officer of the 1<sup>st</sup> defendant on the August 4, 2022, deposing inter alia that the application by the plaintiff dated the July 26, 2022 is frivolous, vexatious, an abuse of the court process, disguised as a way of forum shopping and will embarrass the court; that the plaintiff failed to disclose the existence of previous related ligations in other courts at Malindi and Kilifi where it had lost applications for similar orders; that the application is only aimed at causing hardship and inconvenience to the 1<sup>st</sup> defendant and the *ex parte* injunction order should be discharged and or set aside.
  - b. From the pleadings filed by both the plaintiff and the 1<sup>st</sup> defendant, there is no dispute that the subject matter of this suit is land parcel Kilifi/Roka/1887. There is also no dispute that the parties have executed lease instruments relating to the said land. What is however in dispute is whether the parties herein have had previous litigations over the same subject matter.



c. The plaintiff at paragraph 4 of the plaint dated July 26, 2022 averred that;

“...there is no pending suit and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter and cause of action ... “

At paragraph 14 of the same plaint, the plaintiff further averred that;

“There is no suit pending and there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter ....”

On its part, the 1<sup>st</sup> defendant at paragraphs 4 and 5 of their statement of defence dated the August 22, 2022 averred that;

“4. The 1<sup>st</sup> defendant denies in toto the contents as set in paragraph 4 of the of the plaint and avers that it is absurd and misleading for the plaintiff to state there is no pending suit while there exists several suits between parties herein pending and some determined both in Malindi and Kilifi law courts as follows;

a. Plaintiff filed a suit in Kilifi on April 18, 2019 against the 1<sup>st</sup> defendant in CMCC No 167 of 2019 High Seas Petroleum Contractors Limited v East African Gas Oil Limite which suit is still pending final determination.

b. Plaintiff preferred an appeal in Malindi in HCCA 33 of 2020 High Seas Petroleum Contractors Limited v East African Gas Oil Limited & another which was dismissed for want of prosecution.

c. Plaintiff in collusion with one Tobius Kombe filed another suit on the March 23, 2021 in Malindi CMCC E036 of 2022 Tobius Kombe Kahindi t/a Eddartech Enterprises v High Seas Petroleum Contractors Limited & East African Gas Oil Limited which was dismissed May 20, 2022 with costs for misrepresentation and failure to disclose material facts.

5. The 1<sup>st</sup> defendant avers that the instant suit herein is both res judicata and subjudice where similar suits touching on the suit property seeking same orders has already been determined and there are other suits of similar nature pending in Kilifi court.”

That as the plaintiff has to date not filed a reply to the 1<sup>st</sup> defendant’s statement of defence dated the August 22, 2022 and filed on the August 25, 2022, as is required under order 7 rule 17(1) of *Civil Procedure Rules*, the court will take the contents of the above paragraphs of the defence as uncontroverted or unchallenged. The said matters of fact are taken to be undisputed, and it is therefore the finding of the court that the pleadings by the plaintiff at paragraphs 4 and 14 of the plaint are not only untrue and misleading, but also a misrepresentation of facts aimed at obtaining exparte injunctive orders that it did not deserve or merit to get had all facts have been disclosed or known to the court.



d. The contention by the 1<sup>st</sup> defendant through its statement of defence that the previous litigations between the plaintiff and 1<sup>st</sup> defendant have since been determined and or are pending before Malindi and or Kilifi law courts has not been disputed or rebutted. That further, the 1<sup>st</sup> defendant's averments that those other suits related to the same subject matter that is in issue in this suit has also not been denied through the filed pleadings. It follows therefore that this suit is subjudice due to the pending suits, and *res judicata* for reason of the decided litigations previously filed between the same parties and over the same subject matter. In the case of *Alka Rosbanlal Harbanslal Sharma & another v Theresa Costabir & 2 others* [2019] eKLR, the court stated as follows;

“ 27. Granted the above findings of the Court of Appeal, I must confess I was rather taken aback by the temerity of the plaintiffs in filing this third suit against the defendants herein. Those very claims they make herein in respect of the ownership of the suit premises on account of the loan advanced by the deceased were long declared by the appellate court as *res judicata*. This court as it were does not have the wherewithal to annual and/or even modify those findings.

28. As the learned judges of appeal stated in *John Florence Maritime Services Ltd & another v Cabinet Secretary for Transport and Infrastructure & 3 others* (2015) eKLR:-

“...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 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, inadvertence, or even accident, omitted part of their case. The plea 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 judgement 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....”

29. As it were, the rationale behind *res judicata* is based on the 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.

30. From the material placed before me, the inescapable conclusion is that the proceedings before me offends the doctrine of *res judicata* as embodied in section 7 of the *Civil Procedure Act*. This suit and the application filed therewith have been brought in gross abuse of the court process.”

That just like in the above case, the plaintiff in the instant suit has previously filed other suits in other courts of competent jurisdictions. Some of those suits have been decided against the



plaintiff and others are pending. The filing of this suit without disclosing the existence of those other suits, is to say the least the clearest manifestation of abuse of the court process by a party.

- e. That if the fact of the existence of those other suits was known to the counsel through whom the plaintiff filed this suit, then the counsel clearly failed in their duty as an officer of the court, and need to take a step back and reflect on their conduct for the sake of the practice. In any case, the plaintiff and its advocate are obligated under sections 1A and 1B of the Civil Procedure Act chapter 21 of Laws of Kenya, “to assist the court in furthering the objectives of the Act which includes to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act”. That objective cannot be attained when the plaintiff, through its counsel, file a multiplicity of suits over the same subject matter and parties, resulting to misuse of available judicial time and resources, that are limited.
  - f. That as it is the plaintiff who brought the defendants to the court, while knowing very well that the issues and parties herein are the same to those in the previous suits, and as the court has found merit in the preliminary objection, then in accordance with section 27 of the Civil Procedure Act, the plaintiff will pay the 1<sup>st</sup> defendant’s costs in the suit and application, as it had filed its responses/defence.
5. Flowing from the above determinations, the court finds and orders as follows;
- a. That the 1<sup>st</sup> defendant’s preliminary objections dated the August 7, 2022 on the grounds of both the matter being subjudice and *res judicata*, hence an abuse of the court process is upheld.
  - b. That the plaintiff’s suit commenced through the plaint dated the July 26, 2022, and the notice of motion of the same date be and are hereby struck out.
  - c. That for avoidance of doubts, the temporary injunction/stay and status quo orders granted *ex parte* on the July 27, 2022 are hereby vacated.
  - d. The plaintiff to pay the 1<sup>st</sup> defendant costs in the suit, notices of motion and preliminary objection.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 15<sup>th</sup> DAY OF FEBRUARY 2023.**

**S.M.KIBUNJA, J.**

ELC MOMBASA.

In The Presence Of;

Plaintiff : Absent

Defendants: Absent

Counsel : Mr. Onduso for Defendant.

Court Assistant : Wilson.

S.M.KIBUNJA, J.

