



**Gifted Hands School Limited v Mogul & 2 others (Tribunal Case
E147 of 2023) [2023] KEBPRT 421 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEBPRT 421 (KLR)

**REPUBLIC OF KENYA
IN THE BUSINESS PREMISES RENT TRIBUNAL
TRIBUNAL CASE E147 OF 2023
A MUMA, MEMBER
JULY 18, 2023**

BETWEEN

GIFTED HANDS SCHOOL LIMITED APPLICANT

AND

MOHAMED RAFFIQUE MOGUL 1ST RESPONDENT

REHAN NABIL MOGUL 2ND RESPONDENT

PHILLIPS INTERNATIONAL AUCTIONEERS 3RD RESPONDENT

RULING

Parties And Their Representatives

1. The Applicant-Gifted Hands School Limited (hereinafter the Tenant) is the Tenant occupying the Landlords' Premises.
2. The Firm of Mahatia Pala & Associates Advocates is on record for the Tenant.
3. The 1st and 2nd Respondents are the Landlords of the Premises occupied and rented out suit premises by the Tenant.
4. The 3rd Respondent is the Auctioneer Firm instructed by the Landlords to levy distress upon the Tenant.
5. The Firm of Mbichi Mboroki & Kinyua Advocates is on record for the Landlords and the Auctioneers.

Dispute Background

6. Vide an undated Reference the Tenant moved this Tribunal on a complaint that the Proclamation Notice dated January 27, 2023 issued by the 3rd Respondent is irregular as the same has been issued without leave of this Tribunal contrary to section 3 of [Cap 301](#).



7. On February 8, 2023, the Tenant filed an application seeking restraining orders against the Respondents prohibiting them from dealing in any way with the proclaimed goods. On February 10, 2023 this Tribunal issued orders in favour of the Tenant.
8. Subsequently, on March 10, 2023, the Landlords filed a Notice of Preliminary Objection contending that the present case is *res judicata* as the same has been previously heard and determined before this Tribunal and the Environment and Land Court.

The Landlord's Case

9. The Landlords filed submissions dated April 27, 2023. They submitted that the Tenant/Applicant's present case before the Tribunal is *res judicata* as the Tenant filed a similar application being BPRT Case No E242 of 2022 wherein the parties and subject matter were the same as in the present case which the Applicant lost.
10. They also submitted that the Tenant Advocates failed to disclose to this Tribunal material facts and in the process, misled the Tribunal thereby disentitling the Applicant to the relief sought.
11. They also submitted that in the present matter, the Tenant filed a Reference and an application dated March 15, 2022 in BPRT Case No E242 of 2022 where it sought similar orders restraining the distressing process. However, the Tenant's Reference and Application were eventually dismissed with costs to the Landlord via a Tribunal Order issued on June 20, 2022. Further, that aggrieved by the said decision, the Tenant appealed to the Environment and Land Court in ELC Appeal No E047 of 2022 which appeal was also dismissed.
12. The Landlords also submitted that the Tenant then filed the present application seeking similar orders as those sought in the previous application dated March 15, 2022 and that from the two applications it was clear that the parties and the matter in issue is the same and the Tenant has only given its second application a cosmetic facelift to make it appear different. The Landlords relied on the cases of *Ndete Sayaya v Duncan Isaaya Ndungu* [2019] eKLR and *Samuel Kipkorir Ngeno & another v Local Authorities Pension Trust (Registered Trustees) & another* [2013] eKLR in support of their case.
13. Ultimately, the Landlords urged the Tribunal to find its Preliminary Objection dated March 10, 2023 merited and that the same be allowed with costs.

The Tenant's Case

14. The Tenant did not file any written submissions but through its Reply to Replying Affidavit sworn by Tabitha Ogango Sungu on April 17, 2023 admitted that the facts deposed by the Respondents fairly represented the events but does not disclose the fact that when the ELC dismissed the Tenant's Appeal, the Auctioneers proceeded to sell the proclaimed goods but did not issue them with the statement of accounts.
15. She also swore that the current proclamation sets in a new cause of action distinct from the previous one which therefore gives the Tenant new set of right.

Issues For Determination

16. I have given full consideration to the Landlords' Preliminary Objection, reply and rival submissions of Counsel. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable.



Analysis And Determination

17. The gravamen of this case is the vexed question of “preliminary objections.” Newbold, JA (as he then was) gave the legal fraternity the most commonly cited definition of a preliminary objection when he famously surmised as follows in [*Mukisa Biscuit Co Ltd v West End Distributors Ltd*](#) [1969] EA 696:

“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”.

18. He went on to further state that;

“The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues.”

19. Such was the eminence of a preliminary objection at the time, a position which still prevails to date owing to its determinative nature in the event that it is successfully canvassed. It is in the matter before me and it is against the foregoing backdrop that the Landlords invite this Tribunal to so consider.

20. The substantive law on *res judicata* is found in Section 7 of the [*Civil Procedure Act*](#) Cap 21 which provides that:

“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”

21. Additionally, the [*Black’s law Dictionary*](#) 10th Edition defines “{*res judicata*” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

22. In the case of [*Christopher Kenyariri vs Salama Beach*](#) (2017) eKLR, the Court clearly stated the ingredients to be satisfied when determining *res judicata* thus;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit
- b) Former suit between same parties or parties under whom they or any of them claim
- c) Those parties are litigating under the same title
- d) The issue was heard and finally determined.



23. In order therefore to decide whether this case is *res judicata*, this Tribunal must look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- (i) what issues were really determined in the previous case;
 - (ii) whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - (iii) whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
24. In *E.T vs Attorney General & another* (2012) eKLR it was held that:
- “The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....’”
24. Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists an Order in BPRT Case No E242 of 2022 wherein the matter was not only heard and finally decided by the Tribunal, which matters therein were directly and substantially in issue as those in the present case and an Appeal was preferred and the same dismissed in the Environment and Land Court at Nairobi in ELC No E047 of 2022.
25. What is the common issue in both suits? The Distress for Rent levied upon the Tenant by the Landlords.
26. Who are/were the litigants? The Tenant and the Landlords are the same in both suits. The only additional party is the Auctioneer who has been lawfully instructed by the Landlords.
27. Section 7 of the *Civil Procedure Act* Cap 21 provides that:
- “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.”
24. As observed above, the parties in both cases are the same and the subject matter/cause of action is similar and the same has been finally determined by courts of competent jurisdiction.



25. I therefore uphold the preliminary objection on the basis that pursuant to section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya this Tribunal lacks jurisdiction to deal with a matter which has already been decided by a court of competent jurisdiction.
26. The highlight of the foregoing is that matters in this case having been decided in this Tribunal in Case NoE242 of 2022 and conclusively settled by the Environment and Land Court in Nairobi ELC Appeal No E047 of 2022, the present case is *res judicata* and an abuse of the court process.

Determination

24. The upshot is that the Landlords' Preliminary Objection dated March 10, 2023 is upheld.
25. The Reference and Application dated February 8, 2023 are therefore struck out for being *res judicata*.
26. The Landlords shall have costs assessed at 20,000/-.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY BY HON. A. MUMA THIS 18TH DAY OF JULY 2023 IN THE PRESENCE OF MATI FOR THE TENANT AND IN THE ABSENCE OF THE LANDLORD.

HON A. MUMA

MEMBER

BUSINESS PREMISES RENT TRIBUNAL

