



**Bos Shipping (East Africa) Ltd v Mohamed & 9 others (Environment & Land
Case 89 of 2021) [2023] KEELC 16307 (KLR) (22 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 89 OF 2021
SM KIBUNJA, J
MARCH 22, 2023**

BETWEEN

BOS SHIPPING (EAST AFRICA) LTD PLAINTIFF

AND

KHELEF ABDULLA MOHAMED 1ST DEFENDANT

UMAIR MUHAMMAD 2ND DEFENDANT

**SAMUEL MUDAKI MUGARO T/A MISA MUGARO AUCTIONEERS 3RD
DEFENDANT**

**OMONDI LAWRENCE OBONYO T/A LAWRENCE OBONYO LEGAL
ADVOCATES 4TH DEFENDANT**

NGETE HITHCLIFF OYIEKE ALIAS HITHCLIFF N OYAS 5TH DEFENDANT

ALBERT CHEBII 6TH DEFENDANT

INSPECTOR GENERAL OF NATIONAL POLICE SERVICE ... 7TH DEFENDANT

REGISTRAR OF LANDS, MOMBASA 8TH DEFENDANT

ATTORNEY GENERAL 9TH DEFENDANT

EBENEZER SECURITY SERVICES 10TH DEFENDANT

RULING

1. The 4th and 5th defendants have moved the court through the chamber summons dated the June 7, 2022 seeking for *inter alia* the striking out of their names from this suit for the reason that no reasonable cause has been disclosed against them. The application is based on the nine grounds on its face marked (A) to (I) and supported by the affidavit of Hithcliff N Oyas, sworn on the June 7, 2022. It is their case



that they are Advocates of the High Court of Kenya practicing under the name and style of Lawrence Obonyo Legal Advocates. They had been retained by the 2nd defendant and acted on her instructions. That on May 5, 2021 they wrote a letter to the 3rd defendant in respect of the orders dated the January 17, 2020, issued in ELC No 153 of 2019, in respect of plot No 22672. That the plaintiff wrote to them on the May 11, 2021 through counsel that he will hold them personally liable for the actions taken on behalf of their client, and they responded that they were still acting for the client and any summons may be served upon them. That the plaintiff then filed this suit arising out of the execution and joined them as defendants while their principal is known. That as their principal, the 2nd defendant, is a party in this suit, then their names should be struck out.

2. The application is opposed by the plaintiff through the five (5) grounds of opposition dated the July 14, 2022, *inter alia* that the particulars of negligence and illegality by the 4th and 5th defendants are pleaded in the plaint and they cannot hide under the advocate/client privilege or principal/agent relationship; the complaints against the 4th and 5th defendants is based on their actions in CM ELC No 154 of 2019 and not 153 of 2019; that the 4th and 5th defendants have not exhibited any evidence that they had been instructed by Umair Muhammad, the 2nd defendant.
3. The counsel for the various parties appeared before the court on the June 8, 2022 and directions on filing and exchanging replies and submissions on the application were given. During the subsequent mention of July 14, 2022, counsel for the 2nd defendant informed the court that they are not opposing the application. The other counsel requested for more time to file and serve their replies and or submissions. Further directions were given on filing and exchanging submissions on the October 11, 2022 and November 15, 2022 but none was filed. On the February 7, 2023, counsel for the 4th and 5th defendants sought for another mention date for reasons that they were in discussion with counsel for the plaintiff on possibility of withdrawing the application. However, counsel present in court for the plaintiff denounced knowledge of any negotiations and asked the court to set the matter down for ruling on the materials filed. The ruling date of today was fixed and parties directed to file a written consent, if any before then, but to date none has been filed.
4. The following are the issues for the court's determinations;
 - a. Whether the plaintiff's plaint discloses a reasonable cause of action against the 4th and 5th defendants.
 - b. Who pays the costs in the application.
5. The court has carefully considered the grounds on the application, the affidavit evidence, grounds of opposition, pleadings filed and come to the following determinations;
 - a. That the plaint dated the May 12, 2021, particularly paragraphs 43 and 44 details the basis upon which the 4th and 5th defendants have been joined in this suit to include;
 - i. Failing in their professional duties as advocates to ensure the law was followed in carrying out the eviction of the plaintiff;
 - ii. Relying on orders in CM ELC No 154 of 2019 while knowing that the plaintiff and its tenants were not parties and therefore not affected by the order issued on the January 17, 2020;
 - iii. Giving instructions for execution of an order issued in CM ELC No 154 of 2019 in which they knew that they were not on record for any of the parties;



- iv. Giving instructions on execution of an order issued in CM ELC No 154 of 2019 on behalf of Umair Muhammad who was not a party, or named in the order being executed; the party in that suit is one Umair Mohamed;
- v. That failing to ensure compliance with order 22 rule 6 of the Civil Procedure Rules as read with section 28 of the Civil Procedure Act;
- vi. Failing to ensure compliance with order 22 rules 18 and 30 of the Civil Procedure Rules before instructing the auctioneer, and
- vii. That due to the negligence and illegalities by the 4th and 5th defendants that has been pleaded, they have to be personally held liable and cannot hide under the client/advocate privilege or instructions.

The contents of the letter to the 4th and 5th defendants, applicants, dated May 11, 2021 by Willis O Oluga, advocate for the plaintiff, that is annexed to their supporting affidavit, contained the same complaints to those in the plaint. That even though the 4th and 5th defendants have in their application raised the client/advocate privilege in the role they played in the impugned execution process, there is no documentary evidence availed to the court to confirm or infer the existence of such a relationship.

- b. It is noted that the 2nd defendant is yet to file his statement of defence, and in any case has not confirmed the existence of any client/advocate relationship with the 4th and 5th defendants, and the extent of the instructions thereof if any. The only thing the 2nd defendant has done is to inform the court through counsel that he does not intend to oppose the instant application.
 - c. That further to (a) above, the plaintiff has in the plaint, pleaded negligence and illegalities attributed to the 4th and 5th defendants. It has gone further and set out the particulars thereof, which are yet to be responded to, as no statement of defence has to date been filed by any of the defendants. Even without appearing to make any final determinations on the matter at this stage, on the face of the pleadings filed by the plaintiff, it discloses a reasonable cause of action against the 4th and 5th defendants that calls for their response.
 - d. That as the plaintiff is the only party who opposed the chamber summons, and has been successful in defending the same, then it is entitled to the costs thereof under section 27 of the Civil Procedure Act chapter 21 of the laws of Kenya.
6. Flowing from the foregoing, the court finds the chamber summons application by the 4th and 5th defendants dated the June 7, 2022 to be without merit and is dismissed with costs to the plaintiff.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 22nd DAY OF MARCH 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFF : Absent

DEFENDANTS : Absent

COUNSEL : M/s Ogenjoh for Oluga for Plaintiff and Mr. Mathare for Matheka for 2nd Defendant.



GILLIAN – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

