



REPUBLIC OF KENYA



KENYA LAW
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**Medilinc Africa Ltd & 2 others v Chagadwa & another (Civil Suit E138 of 2021)
[2023] KEHC 2399 (KLR) (Commercial and Tax) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E138 OF 2021
A MABEYA, J
MARCH 24, 2023**

BETWEEN

**MEDILINC AFRICA LTD 1ST APPLICANT
JOLANDA ALEXANDRA 2ND APPLICANT
GERDA MARGO SYBELLA 3RD APPLICANT**

AND

**ELIZABETH WANJIRU 1ST RESPONDENT
WILKINS LOVEGA CHAGADWA 2ND RESPONDENT**

RULING

1. Before court is the applicants' notice of motion dated May 11, 2022 brought inter alia under sections 159, 160, 161 of the *Companies Act 2015*, section 21 of the *Accountants Act 2008*, section 108 of the *Penal Code*, Section 3 and 5 of the *Judicature Act*.
2. The applicants sought an order that the forensic audit report filed by the 1st respondent and listed as number 4 in the plaintiffs' list of documents and any pleading where the said forensic audit report is mentioned and/or pleaded be struck out from the court records.
3. It also sought to review and set aside the ruling dated August 19, 2021 which was allegedly founded on the said alleged fraudulent forensic audit report arising from the 2nd and 3rd applicant's preliminary objection dated March 23, 2021 and dismiss the suit.
4. There was also a prayer that the 1st and 2nd respondent be cited for contempt of court by perjury and be committed to jail and that the respondents pay a fine in accordance with section 161 of the *Companies Act*.



5. The grounds for the application were that the 1st applicant is a registered company in Kenya whose shareholders are the 2nd and 3rd applicants and the 1st respondent. That the 1st respondent filed the present suit against the 2nd and 3rd applicants claiming amongst other claims unfairness of the two applicants who are 75% majority shareholders in making a resolution to wind up the 1st applicant.
6. That the 1st respondent claimed that the 2nd and 3rd applicant misused the 1st respondents' funds amounting to Kshs 400,000/-. That the 1st respondent's only evidence of such claims was a Forensic Audit Report claimed to have been done and sanctioned by the 1st respondent.
7. The applicants pleaded that the 1st applicant through its shareholders did not make any resolution to appoint any person to conduct a forensic audit. That the forensic audit listed in the 1st respondent's list of documents and filed together with the initial pleadings is fraudulent and should not be tolerated by the court.
8. That the report which was created by the 2nd respondent is a sham and has not followed requisite structure of a proper forensic report. That the 2nd respondent is not a qualified auditor or accountant registered with the Institute of certified Public Accountants of Kenya.
9. That the fraudulent document filed by the 1st respondent was meant to deflect the course of this judicial proceeding which interferes with the administration of justice. That this court already made two rulings the dated March 18, 2021 and August 19, 2021 based on the fraudulent documents.
10. In opposition, the 2nd respondent filed a preliminary objection dated May 16, 2022 stating that the application was res judicata and offends the provisions of Order 12 Rule 3 and 6(2) of the [*Civil Procedure Rules 2010*](#). The parties filed submissions on the PO which I have considered.
11. The 2nd respondent submitted that the applicants had filed an application dated April 1, 2022 which was dismissed for non-attendance on May 11, 2022. That the said application was similar to the present application thereby violating the res judicata principle.
12. The 1st respondent fully associated himself the 2nd respondent' submissions and urged the Court to uphold the objection.
13. On the other hand, the applicants submitted that the application was not heard and determined on its merits and therefore the present application did not violate the principle of res judicata.
14. The record shows that on May 11, 2022, the court dismissed the application dated April 1, 2022 for non-attendance. The law on dismissal for non-attendance is provided for under Order 12 Rule 3(1) of the Civil Procedure Rules which provides: -
 - (1) If on the day fixed for hearing, after the suit has been called for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
 - 6(1) Subject to sub-rule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit or may apply to the court to reinstate the suit.
15. In [*San Electricals Ltd v Sitima Enterprises Limited & 4 others \[2015\] eKLR*](#), it was held: -
 - ' That provision of Order 12 Rule 6(2) of the Civil Procedure Rule is unambiguous. It is trite that no fresh suit can be brought in respect of the same cause of action where a suit has been dismissed under Rule 3 of the Order 12 reproduced above.



I have no doubt that the application dated December 17, 2009 sought the same orders as those sought in the application dated November 9, 2009 which was dismissed for non-attendance to prosecute. Need I therefore say no more than to state that none of the advocates referred the court to that very explicit provision of the law. I must emphasise that dismissal of suit or application for want of attendance under Order 12 is very different from dismissal of suit or application for want of prosecution under Order 17, in as much as the effect could be the same. In the case of *Salwem Ahmed Hasson Zaidi V Faud Hussein Humeidan* [1960] EA 92, at the hearing of the suit, the plaintiff did not appear but the defendant did. The plaintiff's suit was dismissed for non attendance. A new suit was filed. The East African Court of Appeal held that the latter suit was *res judicata* and held that a judgement pronounced against a party under the then Rule 178 of the Rules of court (similar to our Order 12 Rule 3) must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence, and accordingly, the matters in issue in the first action must be deemed to have been heard and determined, the dismissal of the earlier action therefore operated as *Resjudicata*.

The provisions of Order 12 Rule 6(2) speak for themselves. The remedy that the appellant herein had was to apply to set aside the order of dismissal.'

16. In present case, the application dated April 1, 2022, which was dismissed for non-attendance had the same prayers with the present one. The applicants herein applied for the same orders under the same grounds.
17. I reiterate the findings in *San Electricals Ltd (supra)* to the effect that, a decision dismissing a matter under Order Order 12 Rule 3 is to be deemed to be a decision on the merits and has the same effect as a dismissal upon evidence. Therefore, the matters in issue in the first action must be deemed to have been heard and determined.
18. The applicant's course of action ought to have been an application to set aside the order of May 11, 2022 and not to file a similar application to the one that had been dismissed.
19. Accordingly, I find merit in the preliminary objection dated May 16, 2022. The application is therefore struck out with costs to the respondents.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 24th day of March, 2023.

A. MABEYA, FCIArb

JUDGE

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