



**Rukwaro (Suing as the Legal Representative of the Estate of Rukwaro
Gichuru Kianduma - Deceased) v Gichohi & 2 others (Civil Suit
E6 of 2021) [2023] KEHC 21402 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL SUIT E6 OF 2021**

**M MUYA, J
JULY 27, 2023**

BETWEEN

**PETER NDUNGU RUKWARO (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF RUKWARO GICHURU KIANDUMA -
DECEASED) PLAINTIFF**

AND

HEZEKIAH WANGOMBE GICHOHI 1ST DEFENDANT

HEZY JOHN LIMITED 2ND DEFENDANT

UMOJA SERVICE STATION LIMITED 3RD DEFENDANT

RULING

1. The Notice of Motion application dated March 9, 2021 seeks the following orders:-
 - i. That the honourable Court be pleased to strike out the plaint filed herein for being an abuse of the court process.
 - ii. That in the alternative, this court be pleased to stay further proceedings in this suit pending the implementation of the mediation settlement agreement dated March 14, 2019 entered into in Nyeri High Court Civil Suit No 13 of 2016. Hezekia Wangombe Gichohi, Hezy John Limited, Allimex Limited Hill Investors Limited and Caroline W Kamau Abuor Vs David Muthoga Anthony Wagura Ikiki, Peter Gichohi Gitau and Umoja Service Station limited.

The application is supported by the affidavit of Hezekiah Wangombe Gichohi sworn on March 10, 2021.



2. The application is opposed, Vide the affidavit of Peter Ndungu Rukwaro Sworn on November 10, 2022 whose grounds are:-
 - i. The application lacks merit and fails to demonstrate why the plaint should be struck out or why the proceedings ought to be stayed.
 - ii. That he is not a party in the mediation agreement dated March 14, 2019 in Nyeri HCC No 13 of 2016
 - iii. That he is not in violation of the Court Orders issued in Nyahururu CMs Court in succession cause No E74 of 2020 on the limited grant issued for filing suit against the two entities.
 - iv. The issue of Res Judicata does not arise as he was not party in Nyeri HCC NO 13 of 2016 as his claim is for alleged illegal and fraudulent transfer of the plaintiff's late fathers alleged shares in the 3rd Defendant.
 - v. That the application is brought in bad faith and meant to prejudice his rights as the alleged rightful owners of the said shares in question.

Defendants/Applicants case

3. The 1st and 2nd Defendants are shareholders in the 3rd Defendant which is a limited liability company. The Plaintiff/Respondent's father had in the same vein acquired shares in the 3rd Defendant. When he passed on the Respondent made an application before the Chief Magistrate in Nyahururu in succession case No E74 of 2020.
4. It is the Applicants contention that in the above mentioned succession cause the Respondent was allowed to sue only two entities for the recovery of his later father shares held by the 3rd Defendant and allegedly illegally and fraudulently transferred to 1st and 2nd Defendants. Further that the grant issued to the Respondent was a limited one.
5. The applicants main contention is that there was a mediation agreement in Nyeri HCCC No 13 of 2016 whose terms among others were that an audit be conducted on the 3rd Defendant's shares to establish what each of the company member owns and parties to ask the court to elect a date for them on when the audit was to be conducted. That this order covered all the shareholders including the plaintiff/Respondents father shares.
6. The applicants contention is the that the intention of the plaintiff is to lift the veil of incorporation by suing the 1st Defendant/applicant in his capacity as one of the former directors and chairman of the 2nd and 3rd defendant respectively on allegations of fraud committed while as the director of the 2nd Defendant.
7. Reliance is placed in the case of *Kalaba Enterprises Limited –versus- Shamsbudin Hussein varvani and another (2014) e KLR* Which following the Celebrated case of *Salomon & co Ltd – Versus- Salomon(1897) AC 22 HC* observed that a company is different person altogether from its subscribers and directors. Although it is a fiction of law, it still is as important for all purposes and intents in any proceedings where a company is involved needless to say that separate legal personality of a company can never be departed from, except in instances where the statute, or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities and that development has been informed by



the realization by the courts that over time promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of Justice or in public interest to identify and punish the persons who misuse the medium of corporate personality.'

8. It is the contention by the applicants that the plaintiff has been aware of the proceedings touching on the distribution of shares in the 3rd Defendant in Nyeri Hcc No 13 of 2016.
9. That the issues he is seeking to be addressed by the court are the same to be decided by an auditor appointed by an order of the court.
10. Further that the suit before the court is fatally defective and is for striking out, it is an abuse of the court process because the plaintiff is an alleged member of the 3rd Defendant whose shares are being audited by an auditor appointed by the court in Nyeri Hcc No 13 of 2016.

It is the Applicants case that the suit is barred by the doctrine of Res Judicata.

11. Reliance is placed in the case of *John Florence Maritime Services Limited and another -vs- Cabinet Secretary for Transport and Infrastructure and 3 others (2015) eKLR* where it was held:-

' The Doctrine of Res Judicata has two main dimensions. Cause of action Res Judicata and issue of Res Judicata. Res Judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings. The latter having been between the same parties, or their privies and having involved the same subject matter. Cause of action Res Judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings.

In such a case, the bar is absolute unless fraud or collusion is alleged. Issue Res Judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.'

12. Reliance is placed in the court of appeal case in *IEBC versus Maina Kiai and 5 others (2017) e KLR* where it was held:- Thus, for the bar of Res Judicata to be effectively raised and upheld on account of a former suit the following elements must be satisfied as they are rendered not in distinctive but conjunctive terms.
 - a. The suit or issue was directly and subsequently in issue in the former suit.
 - b. The former suit was between the same parties or parties under whom they or any of them claim
 - c. Those parties were litigating under the same title
 - d. The issue was heard and finally determined in the former suit.
 - e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.



Plaintiff/Respondents case

13. The Plaintiff intimates that the institution of succession case was to obtain locus standi to enable him pursue the interest of the deceased Estate. That there is no other suit between the plaintiff and the Defendants concerning the same subject matter and the doctrine of Res Judicata does not apply.
14. The plaintiff raises the issues for determination thus:-
 1. Whether the plaintiff/Respondent had the right to institute the suit herein.
 2. Whether the suit is Res Judicata and or an abuse of the court process.
15. It is the Contention of the Respondent that the parties in the Nyeri HCCC No 13 of 2016 were, Hezekia Wangombe Gichohi, Hezy John Limited, Allimex Limited, Hill investors Limited, Caroline W. Kamau Abuor Versus David Muthoga, Anthony Wagura Ikiki, Peter Gichobu Gitau and Umoja service Station Limited. That the remedies sought and the subject matter was different.
16. The Plaintiff places reliance in the celebrated case of IEBC –Versus- Maina Kiai & 5 Others (2007) e KLR Supra Plaintiff also relies on Section 7 of *Civil Procedure Act* which provides:- 'No Court shall try any suit or issue in which the matter directly or 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 court competent to try such subsequent suit in which such issue has been subsequently raised and has been heard and finally dismissed by the court.'
17. That the application to trike out the plaint is premature. whether the plaintiff is bound by the mediation settlement dated March 14, 2019 and which was adopted as a Judgment by Mshila Judge on April 10, 2019 by consent? It is Plaintiff's contention that the Parties were different. The cause of action was different. The Plaintiff was not a Party to that suit and hence could not be bound by that consent Judgment.

Analysis and determination

Issues

1. Whether the plaintiff's suit is Res Judicata and an abuse of court process.

18. The Applicant's contention is that the plaintiff is seeking unlawfully to lift the veil of incorporation by suing the 1st Defendant in his capacity as one of the former directors and former chairman of the 2nd and 3rd Defendants on allegations of fraud committed while in his capacity as the Director of the 2nd Defendant.
19. The applicant rely in the case of Kolaba Enterprises Limited – Versus- Shamshudin Hussein Varvam and Anther (2014) e KLR Supra. The applicants have quoted a passage and indeed underlined it thus

'...Needless to say that separate legal personality of a company can never be departed from except in instances where the statute or the Law provide for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities...'
20. The applicants concede that the plaintiff suit is based on fraud as against and in particular the 1st defendant in his capacity as one of the former directors and former chairman of 2nd and 3rd Defendant. By reason of the foregoing the plaintiff is properly placed to lift the corporate veil if need by dint of the allegations of fraud.



21. On the issue of Res Judicata the applicants have relied in the case of IEBC –Versus- Maina Kiai and 5 others (2017) eKLR where the court of appeal rendered itself thus:- for the bar of Res Judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied; as they are rendered not in distinctive but conjunctive terms:

- (a) The suit or issue was directly and subsequently in issue in the former suit
- (b) The form suit was between the same Parties or Parties under whom they or any of them claim.
- (c) Those Parties were litigating under the same title
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

22. It is Patently clear, that the Plaintiff/Respondent in Civil Case No E06 of 2020 was not a Party in Nyeri Hcc No 13 of 2016. The Parties therein were Hezekiah Wangombe Gichohi Hezy John Limited Allimax Limited, Hii investors Limited and Caroline.

W Kamau Abuor Versus David Muthoga, Anthony Wagura Ikiki Peter Gichohi Gitau and Umoja Service Station Limited.

The name of the Plaintiff clearly does not feature anywhere and therefore not a Party in HCCC No 13 of 2016 Nyeri.

The applicant's contention is that he was aware of the proceedings therein and the Plaintiffs claim should have been enjoined. Its trite law that he who alleges a fact must prove it.

The applicants have not shown and or indicated sufficiently to the court how and when the Plaintiff became aware of the proceedings in Nyeri HCC No 13 of 2016.

23. A mediated settlement was entered as a Judgment of the court by Mshila Judge on April 10, 2019. The Plaintiff was not a Party to the suit hence he cannot be said to be bound by that consent Judgment.

The instant suit is based on fraud whose particulars have been pleaded. This cause of action is different from that found in Nyeri Hccc No 13 of 2016.

Hence the doctrine of Res Judicata is not applicable.

24. I find that this application has no merit and it's dismissed with costs to the Plaintiff/Respondent

RULING READ AND DELIVERED IN OPEN COURT AT NYERI THIS 27TH DAY OF JULY, 2023.

HON. JUSTICE M. MU YA

JUDGE

