



Shah (As the personal representative of the Estate of Kantibhai M Patel) v Attorney General & another; Prime Bank Limited (Interested Party) (Environment & Land Case 428 of 2007) [2023] KEELC 18053 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18053 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 428 OF 2007**

**JO MBOYA, J
MAY 31, 2023**

BETWEEN

PRITIBALA MILAN SHAH (AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF KANTIBHAI M PATEL) PLAINTIFF

AND

THE ATTORNEY GENERAL DEFENDANT

AND

VALLEY VIEW ENTERPRISES LIMITED RESPONDENT

AND

PRIME BANK LIMITED INTERESTED PARTY

RULING

Background and Introduction

1. Vide Notice of Motion Application dated the 7th March 2023, the Plaintiff/Applicant herein has approached the Honorable court seeking for the following Reliefs;
 - i.(Spent).
 - ii. That the Statement of Defense, and all the Pleadings and/or Documents filed the Interested Party be struck out; and
 - iii. That the cost of and incidental to this Application be borne by the Interested Party.



2. The instant Application is premised on various albeit numerous grounds, totaling 21 in number. Further, the Application is said to be supported by the affidavit of (sic) one Paul Gicheru, but which affidavit has neither been exhibited nor attached to the instant Application, either as alleged or at all.
3. Notably, the Plaintiff/Applicant has instead attached and annexed affidavit of one Pritibhala Milan Shah sworn on the 7th March 2023; but which supporting affidavit have no nexus or affinity to the subject application, insofar as the same has not been alluded to in the body of the Application.
4. Be that as it may, upon being served with the instant Application, the Interested Party, whose pleadings are the basis of the current Application, filed Grounds of opposition dated the 16th May 2023; and in respect of which same has contended, inter-alia that the instant application constitutes and amounts to an abuse of the Due process of the Honourable Court.
5. For good measure, the subject matter was listed for hearing on the 16th May 2023, when counsel for the Plaintiff/Applicant raised and brought to the attention of the Honourable court that same has filed an Application dated the 7th March 2023, which was pending hearing and determination.
6. Confronted with the situation raised by Learned counsel for the Applicant, the court ordered and directed that the pending application be canvassed and disposed of beforehand.
7. Consequently and in this regard, the Application dated the 7th March 2023, was thereafter canvassed and ventilated vide oral submissions.

Submissions By The Parties

a. Applicant's Submissions:

8. Learned counsel for the Applicant adopted and relied on the Grounds contained at the foot of the Application and further reiterated on the contents of the supporting affidavit, which was filed alongside the Application.
9. Additionally, Learned counsel for the Applicant raised, highlighted and canvassed three (3) Issues for due consideration by the Honourable court. Firstly, Learned counsel for the Applicant submitted that the Interested Party herein has since proceeded to and filed a Statement of Defense, wherein same has purported that the suit Property was duly and lawfully charged to and in favor of the Interested party.
10. Furthermore, Learned counsel has contended that insofar as the Interested Party sought for and obtained Leave to be joined and was indeed joined as an Interested Party, same cannot now purport to file a Statement of Defense in respect of the subject matter. In any event, Learned counsel has submitted that a Statement of Defense can only be filed by and on behalf of a Principal Party and not otherwise.
11. Secondly, Learned counsel for the Applicant has submitted that the issues that are being raised and canvassed at the foot of the current application, are separate and distinct from the issues that were ventilated by and on behalf of the Plaintiff herein on the 20th February 2023. Consequently, Learned counsel has submitted that the current application is therefore not barred and/or prohibited by the doctrine of Res-judicata or otherwise.
12. Thirdly, Learned counsel has submitted that the orders that were made by the Honourable court on the 23rd November 2022, were not made by consent of the Parties. In this respect, Learned counsel has submitted that the Plaintiff/Applicant herein opposed the joinder of the Interested Party and the filing of pleadings by and on behalf of the said Interested party.



13. In the premises, Learned counsel has submitted that it is therefore erroneous and misleading for the Interested Party to contend that the orders of 23rd November 2022 were made by consent.
14. Finally, Learned counsel for the Plaintiff/Applicant has submitted that it is trite and established position of the law that an Interested party can neither raise nor canvass an issue that is separate and distinct from the issues raised by the Principal Parties. Consequently, Learned counsel for the Applicant has contended that the issue of the suit property being charged to and in favor of the Interested Party, is a separate and distinct issue that cannot be canvassed in the instant matter.
15. Based on the foregoing submissions, Learned counsel for the Applicant has thus implored the Honourable court to find and hold that the Statement of Defense, pleadings and documents which have since been filed by the Interested Party ought to be struck out and expunged from the record of the Honourable court.

b. 1st Respondent's Submissions:

16. Learned Principal Litigation Counsel, Mr. Allan Kamau, raised, highlighted and amplified two (2) issues for due consideration and determination by the Honourable court.
17. Firstly, Learned counsel submitted that the Application by and on behalf of the Interested Party came up for hearing on the 23rd November 2022, whereupon the advocates for the Parties signaled their position as pertains to the said application. In this regard, Learned counsel added that the advocate for the Applicant indeed conceded the joinder of the Interested Party into the proceedings.
18. Furthermore, Learned counsel has contended that the application by and at the instance of the interested party also contained a limb wherein the interested party sought to file appropriate pleadings, documents and witness statements, as may be necessary to facilitate her participation in the subject proceedings.
19. In the premises, Learned counsel pointed out that insofar as the Plaintiff/Applicant had conceded and thus consented to the joinder of the Interested Party and the filing of pleadings by same, the Plaintiff/Applicant herein cannot now be heard to challenge the propriety of the pleadings filed.
20. In summary, it was the submissions of the Learned Principal Litigation counsel that the orders that were made on the 23rd November 2022; were made by consent of the Parties and therefore such orders are binding on the Plaintiff and thus same cannot be set aside and/or be vacated in the manner sought by the Plaintiff/Applicant.
21. In support of the foregoing submissions, Learned Counsel cited and relied on, inter-alia, the case *Brook Bond Liebig (Tanzania) Ltd versus Mallya (1975)EA* and *Flora N Wasike versus Desterio Wamboko (1988)eKLR*, respectively.
22. Secondly, Learned counsel for the 1st Defendant/Respondent also submitted that the current Application by and on behalf of the Plaintiff/Applicant is Res-judicata, insofar as a similar Application had been raised and canvassed before the Honourable court.
23. In particular, Learned counsel invited the attention of the court to the proceedings of the 20th February 2023, when counsel for the Applicant raised and canvassed an informal application seeking to strike out the Statement of Defense, the List of Documents and the Witness Statement filed by and on behalf of the Interested Party.



24. It was the further submissions of the Counsel that the said Application was indeed heard and disposed of by the court on the said date. For clarity, counsel pointed out that the Application to strike out and expunge the pleadings by the interested party was indeed dismissed.
25. In view of the foregoing, the Learned Principal Litigation counsel therefore invited the court to dismiss the Application dated the 7th March 2023, which in any event, was termed to be an abuse of the Due process of the court.

c. 2nd Respondent's Submissions:

26. Learned counsel for the 2nd Defendant/Respondent associated herself with the submissions of the Principal Litigation Counsel and reiterated that the application dated 7th March 2023 was indeed Res-judicata.
27. Furthermore, Learned counsel for the 2nd Respondent also submitted that having raised similar issues on the 20th February 2023, the current application by and on behalf of the Plaintiff/Applicant therefore constitutes and amounts to an abuse of the Due process of the Honourable court.
28. In a nutshell, Learned counsel for the 2nd Respondent contended that the subject application ought to be dismissed.

d. Interested Party's Submissions:

29. On behalf of the Interested Party, Learned counsel Mr. Mutua adopted adopted and relied on the grounds of opposition dated the 16th May 2023; and therefore highlighted two (2) issues for due consideration by the court.
30. First and foremost, Learned counsel for the Interested party submitted that the current application is contrary to and in contravention of the express term of the orders of the court that were issues on the 23rd November 2022 and on the 20th February 2023, respectively.
31. In particular, Learned Counsel submitted that as long as the said orders remain undisturbed, the Plaintiff/Applicant herein who was party and privy to the said orders, cannot be heard to seek to strike out the pleadings filed by the Interested party.
32. Secondly, Learned counsel for the Interested Party has also submitted that the current application replicates and resembles the informal application which was argued and canvassed by the Plaintiff/Applicant on the 20th February 2020. In this regard, Learned counsel has thus contended that the application is therefore prohibited by the doctrine of Res-judicata.
33. As a result of the foregoing, Learned counsel for the Interested Party has therefore invited the Honourable court to find and hold that the impugned Application is not only misconceived, but bad in law and thus Legally untenable.

Issues for Determination

34. Having reviewed the Application dated the 7th March 2023; and the Grounds of Opposition filed by the Interested Party and upon considering the oral submissions made by Counsel for the respective Parties, the following issues do arise and are worthy of determination;
 - i. Whether the instant Application is competent and Legally tenable in the absence of the requisite Supporting Affidavit to anchor same.



- ii. Whether the orders of 23rd November 2022 were made by Consent of the Parties and if so; whether the current Application seeks to contradict the said orders which have neither been reviewed nor set aside.
- iii. Whether the current Application is barred by the doctrine of Res-Judicata in terms of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

Analysis and Determination

Issue Number 1

Whether the instant Application is competent and Legally tenable in the absence of the requisite Supporting Affidavit to anchor same.

35. It is common ground that the subject Application, is one such application that requires to be supported by and/or anchored on a supporting affidavit. For clarity, it is the supporting affidavit that would provide the factual/evidential anchorage of the application.
36. In any event, there is no gainsaying that the Plaintiff/Applicant herein and her legal counsel appreciated and acknowledged that the current application required to be supported by an affidavit. Consequently and in this regard, the Application was (sic) purported to be anchored on the affidavit of one, Paul Gicheru.
37. Looking at the instant Application, one would have expected the Supporting affidavit attached and/or annexed to the Application, would be the one alluded to and/or enumerated in the body of the Application and not otherwise.
38. Notwithstanding the foregoing, it is worthy to note that instead of annexing and or exhibiting the affidavit of Paul Gicheru, which has been identified and disclosed in the body of the Application, Learned counsel for the Applicant has nevertheless attached and exhibited the affidavit of Pritibhala Milan Shah, which has not been alluded to in the body of the application.
39. Notably, whenever an affidavit is sought to be relied on; it is imperative, nay mandatory for the details of the affidavit to be spoken to and underlined in the body of the Application and thereafter the affidavit shall be annexed to the application, in the usual manner of practice.
40. However, in respect of the instant matter, the Plaintiff/Applicant has alluded to the supporting affidavit of Paul Gicheru and which affidavit has neither been annexed nor attached to the Application. To the contrary, what has been attached/annexed to the Application is the affidavit of Pritibhala Milan Shah, which has not been alluded to and which in any event, is at variance with the Application.
41. It is my humble position that the current Application is neither supported nor premised on any factual basis or otherwise. In any event, the affidavit which has been attached is contrary to and at variance with the Application.
42. Owing to the foregoing, and given that the Plaintiff/Applicant had intended to rely on a supporting affidavit, which has not been annexed, there is no gainsaying that the instant Application has been made in vacuum and is therefore Legally untenable.
43. Before departing from this point, it is important to recall and underscore that whereas there are instances where the law allows and provides for applications to be made without being supported by an affidavit, the instant situation does not fit within the purview of such applications that can be canvassed



without the requisite supporting affidavit. Instructively, where the law does not require a supporting affidavit, the Statute and the Rules of Procedure have been explicit.

44. For good measure, the instances where a supporting affidavit is not necessary, includes inter-alia where one invokes the provisions of Order 2 Rule 15(1) (a) of the Civil Procedure Rules or; in respect of Substantive Notice of Motion envisaged under the provisions of Order 53 of the Civil Procedure Rules, 2010.
45. In a nutshell, it is my humble albeit considered view that the subject application, which is inherently contradictory, is not only premature and misconceived; but is fatally defective and incompetent. In this regard, the entire Application courts striking out.

Issue Number 2

Whether the orders of 23rd November 2022 were made by Consent of the Parties and if so; whether the current Application seeks to contradict the said orders which have neither been reviewed nor set aside.

46. On the 31st October 2022, the Interested Party herein filed/lodged a Chamber Summons Application wherein same sought, inter-alia, to be joined into the instant proceedings as an Interested Party and similarly, to be allowed to file (sic) desired pleadings, witness statements and Bundle of Documents, to facilitate her participation in the instant matter.
47. First forward, the Application filed by and on behalf of the Interested Party came up for Hearing on the 23rd November 2022, and whereupon same was conceded to and/or consented upon by the advocates for the Parties.
48. For good measure, the Plaintiff/Applicant herein was represented by Learned counsel Mr. Edmond Wesonga who submitted as hereunder;

“I am not opposed to the Application. In the premises, same can be allowed. However I am seeking for costs of the Application”
49. Premised and based on the position taken by inter-alia, Learned counsel for the Plaintiff/Applicant, the Honourable court proceeded to and granted orders whereupon the Chamber Summons Application dated 31st October 2022 was allowed. For coherence, the Honourable court thereafter directed that the Interested Party shall be at liberty to file the requisite Pleadings, Witness Statements and Bundle of Documents, if any and same were to be filed and served within 14 days from the date of the order.
50. Furthermore, the court thereafter granted liberty to the Plaintiff and the Defendants to file rejoinder Pleadings, Further Documents and additional Witness Statement, if any, within 14 days from the date of service by the Interested Party.
51. My understanding of the proceedings taken on the 23rd November 2022 and the consequential orders arising therefrom is to the effect that same were made by consent of and in the presence of the advocates for the Parties.
52. Consequently and in the premises, the question that does arise is whether the Plaintiff/Applicant herein can now be heard to contend that the interested party ought not to have filed the statement of defense, the bundle of documents and the witness statement and by extension to seek to strike same out the Pleadings and Bundle of Documents filed; albeit without having the said orders set aside and/or reviewed in the first instance.



53. In addition, there also arises the question as to whether the court can strike out and/or expunge the named pleadings and documents filed by the Interested Party, during the lifetime of the explicit and express orders which were granted in the presence of the advocate of the respective Parties.
54. To start with, it is trite, established and hackneyed law that an order of the court made in the presence of the Parties and of the party's advocates is binding on the Parties and thus has contractual effect, in alike manner as if same was by consent.
55. Furthermore and in any event, where a Party signals that same is not opposed to the application, like it transpired in the instant matter, the bottom line is that Party is stating that he/she is consenting to the Application in question.
56. In the premises and insofar as Learned counsel for the Applicant consented to the application dated the 31st October 2022, there is no doubt, that the resultant orders were therefore consensual and have contractual effects of the Plaintiff/Applicant. In this regard, neither the Plaintiff/Applicant nor the Legal counsel, can run away from the consequence of the consent order.
57. Nevertheless, if the Plaintiff/Applicant and by extension the Legal counsel, are keen to disassociate themselves with terms and tenor of the consent orders, then it behooves the Plaintiff/Applicant to establish, demonstrate and satisfy the requisite ingredients that would warrant impeachment/ rescission of a consent and not otherwise.
58. In this respect, it is instructive to restate and reiterate the succinct decision in the case of Brook Bond Liebig (T) Ltd versus Mallya (1975)EA, where the Court of Appeal for Eastern Africa stated and held thus;

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

59. In addition, the circumstances where a consent order or better still, an order made with the concurrence of the Parties can be set aside or vacated was also canvassed and elaborated upon in the case of Flora N Wasike versus Desterio Wamboko (1988)eKLR, where the Court of Appeal stated and observed as hereunder;

“It seems that the position is exactly the same in East Africa. It was set out by Windham J, as he then was, and approved by the Court of Appeal for East Africa, in Hirani v Kassam (1952) 19 EACA 131, at 134, as follows:

“The mode of paying the debt, then, is part of the consent judgment. That being so, the court cannot interfere with it except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. No such ground is alleged here. The position is clearly set out in Setton on Judgments and Orders (7th edn), vol 1, P 124, as follows:

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”



60. It is important to point out that even though Learned counsel for the Plaintiff/Applicant endeavored to submit that the orders made on the 23rd November 2022; were not made by consent of the Parties, I beg to point out that the submissions rendered by and on behalf of the Plaintiff amounted to splitting hairs, if not semantics. Clearly, when counsel says that he is not opposed to the Application, the grammatical implication denotes that he is conceding.
61. Furthermore, my understanding of one not being in opposition; is to the effect that same is consenting to the Application. Consequently, irrespective of whatever semantics that one applies, I come to the conclusion that the orders of 23rd November 2022. were made by Consent of the Parties and thus can only be varied subject to proof of the established conditions, as outlined in the decision cited above.
62. Lastly, insofar as the orders made on the 23rd November 2022 remain in force, the current Application, which seeks to strike out and expunge the Pleadings and Documents filed by the Interested Party shall remain bad in law and an abuse of the due process of the court.

Issue Number 3

Whether the current Application is barred by the doctrine of Res-judicata in terms of Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

63. Other than the fact that the orders of 23rd November 2022; were made by Consent of the respective advocates, it is also important to note that the Interested Party failed and or neglected to file the resultant pleadings, documents and witness statements; within the circumscribed timelines.
64. Arising from the failure to file the requisite pleadings, documents and witness statements within the prescribed timeline, counsel for the Plaintiff/Applicant thereafter raised and canvassed an application wherein same sought to strike out and expunge the pleadings and the incidental documents that were filed on behalf of the Interested Party.
65. Instructively, at the point when the Plaintiff/Applicant sought to strike out the said pleadings, same was aware that the Interested Party had filed a Statement of Defense together with the impugned documents.
66. Having been aware of the filing of the Statement of Defense and the incidental documents, it behooved the Plaintiff/Applicant to raise and mount a globalized application seeking to strike out the pleadings, if at all at one go. In this regard, it is not open for a Plaintiff/Applicant to litigate and raise issues by instalments.
67. Consequently and in my humble view, the contentions being raised by the Plaintiff/Applicant as to whether or not an Interested Party can file a Statement of Defense, ought to have been canvassed vide the application which was argued and disposed of on the 20th February 2023.
68. Having not addressed the question now being raised at the foot of the current application, it is deemed that the issue beforehand stood abandoned and cannot now be ventilated and canvassed either in the manner alluded to by the Plaintiff/Applicant or at all.
69. For good measure, the current Application by the Plaintiff/Applicant is caught up and prohibited by the provisions of Order 3 Rule 4(2) of the Civil Procedure Rules, 2010, which essentially, prohibits Litigation by installments and/or in piecemeal.
70. For ease of reference, the provision (supra) are reproduced as hereunder;
 4. Suit to include the whole claim [Order 3, rule 4.]



- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.
 - (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished.
 - (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.
71. On the other hand, it is also imperative to state and underscore that the issues that are now being raised at the foot of the Application resembles and replicates the issues that were adverted to at the foot of the Application that was ventilated and canvassed on the 20th February 2023. In this regard, there is no gainsaying that the current application is also prohibited by doctrine of Res-judicata.
72. Notably, the doctrine of Res-judicata as highlighted and amplified by Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, bars and prohibits re-agitation of same/similar issues, as the ones that had hitherto been canvassed before the court.
73. Furthermore, there is also an aspect of the doctrine of Res-judicata which relates to and addresses issues that ought to have been made part of the attack or defense, in the previous proceedings (read application), but were not canvassed. Instructively, this aspect of Res-judicata is adequately referred to as constrictive res-judicata. See Section 7(4) of The *Civil Procedure Act*, Chapter 21 Laws of Kenya.
74. In any event, the import, tenor and scope of the Doctrine of Res-judicata was succinctly highlighted in the case of Kenya Commercial Bank (K) Ltd versus Benjoh Amalgamated Ltd (2017)eKLR, where the court of appeal stated and held as hereunder;
- “To our mind, there is no better case in which the Court ought to invoke the doctrine of constructive res judicata than in the present appeals. Constructive res judicata is broader and encompasses all the issues in a dispute which, a party employing due diligence ought to have raised for consideration. To allow Benjoh to relitigate, re-agitate and re-canvass any issues, no matter how crafted or the legal ingenuity and sophistry employed and in spite of the plethora of cases already conclusively determined by competent courts on the question of accounts, would be tantamount to throwing mud on the doctrine of res judicata and allow a travesty of justice to be committed to a party. The specific issue the respondent raises of rendering true and proper accounts to a customer’s accounts, has been or could have been raised before the High Court in the previous suits”.
75. Without belaboring the point, it is evident and apparent that the issues now being espoused and canvassed at the foot of the current Application resembles what was hitherto argued before the Honourable court and was disposed of vide ruling/orders of the court made on the 20th February 2023.
76. In view of the foregoing, the Plaintiff/Applicant cannot evade the implication and application of the doctrine of res-judicata, whatsoever.

Final Disposition

77. Before proclaiming and/or making the Final orders, it is not lost on the Honourable court that the Plaintiff/Applicant herein seems grossly obsessed with the nature of documents filed by the Interested party and not the contents thereof.



78. Nevertheless, it is instructive to point out that it is immaterial the nature and type of pleading filed by an Interested Party save that an Interested Party cannot raise or canvass a separate and distinct issue, which is at variance with the pleadings of the Principal/Primary parties.
79. Be that as it may, I have come to the conclusion that the Application dated the 7th March 2023; is not only misconceived and bad in law; but same also constitutes an abuse of the Due process of the Honourable Court.
80. Consequently and in a nutshell, the Application be and is hereby Dismissed with costs to the Defendants/Respondents and the Interested Party.
81. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Mr. Edmond Wesonga for the Plaintiff/Applicant

Mr. Allan Kamau principal litigation counsel for the 1st Defendant/Respondent

Ms. Purity Makori h/b for Mr. Kelvin Mogeni for the 2nd Defendant/Respondent.

Mr. Mutua for the Interested Party

