



**Ndombi v Credit Bank Limited & another (Civil Suit
E023 of 2021) [2022] KEHC 15131 (KLR) (21 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 15131 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E023 OF 2021
SN MUTUKU, J
JUNE 21, 2022**

BETWEEN

PAMELA NAMUSIA NDOMBI APPLICANT

AND

CREDIT BANK LIMITED 1ST RESPONDENT

PHILIPS INTERNATIONAL AUCTIONEERS 2ND RESPONDENT

RULING

1. The Applicant brought this application through a Notice of Motion dated May 12, 2022 under Sections 1A and 3A of the [Civil Procedure Act](#) and Order 2 rule 15 and Order 51 rules 1 and 3 [Civil Procedure Rules](#) seeking orders that:
 - i. That this application be certified urgent and service be dispensed with at first instance.
 - ii. That pending hearing and determination of this Application, this Honourable Court be pleased to grant an interim order restraining the 1st Defendant/Respondent by itself, its servants, workers, its agents, employees or any of them from advertising for public auction or offering for sale by public auction or purporting to sell by public auction the Plaintiff's/Applicant's parcels of land being Titles Number Ngong/Ngong/40723 and Ngong/Ngong/40724 located in Ngong Area within Kajiado County.
 - iii. That pending hearing and determination of this Application, this Honourable Court be pleased to grant an interim order restraining the 2nd Defendant/Respondent by itself, its servants, workers, its agents, employees or any of them from advertising for public auction or offering for sale by public auction or purporting to sell by public auction the Plaintiff's/Applicant's parcels of land being Titles Number Ngong/Ngong/40723 and Ngong/Ngong/40724 located in Ngong Area within Kajiado County.



- iv. That this Honourable Court be pleased to strike out the Notice of Motion and Plaint dated November 24, 2021 drawn, filed and signed by John Omudanga, a person not qualified as an Advocate of the High Court of Kenya.
 - v. That this Honourable Court be pleased to set aside the ruling dated March 15, 2022 and declare it a nullity.
 - vi. That this Honourable Court be pleased to dismiss this suit forthwith.
 - vii. That cost of this Application be awarded to the Applicant.
2. This application was supported by an Affidavit sworn by Pamela Namusia Ndombi on May 12, 2022. The deponent states that she is not a party to this case and had been impersonated; that the pleadings in this matter do not relate to her in any way and facts therein and not her own and that she did not swear any affidavits in this matter and the same is therefore a forgery.
 3. She further deposed that when her properties known as Ngong/Ngong/40723 and Ngong/Ngong/40724 were advertised for public auction by the 2nd Defendant on 2nd December, 2021, William Kuria Josiah, who is the director of Techspa General Supplies Ltd, informed her that he would engage an Advocate to institute a suit for temporary injunction to prevent the sale of her properties and that she knew William Kuria Josiah had hired John Omudanga as his Advocate but that he was a masquerader who had informed her that he practised in the law firm of Kimani Kahete & Co Advocates.
 4. She states that she was not aware of any proceedings in this matter and never attended court nor instructed any advocate or person to do so on her behalf, that she only became aware of this suit when the 2nd Defendant re-advertised her properties or auction on May 19, 2022 and that she went to the Court registry to peruse the file and discovered that an application for temporary injunction had been failed. She stated that she proceeded to call the firm of Kimani Kahete & Co Advocates, the firm on record, to confront the advocate Zakayo Kimani Maina about this matter.
 5. The advocate stated that he was a stranger to the matter and proceeded to file a letter in this court dated May 9, 2022 stating that the suit is a non- starter because John Omudanga is not an advocate and also filed a notice of withdrawal of the Application and suit dated May 9, 2022.
 6. She stated that she reported William Kuria Josiah and John Omudanga at Kasarani Police Station O/ B No 120/90/05/22 and OB No 110/09/05/22 and that she wished the suit to be dismissed to enable her file a new suit with correct facts and to enable her arrest the auctioning of her property.
 7. The Defendants swore a Replying Affidavit dated May 18, 2022 sworn by Wainaina Francis Ngaruiya, the Head of Legal Department of the 1st Defendant. It is the case for the Defendant that the court records show that the suit herein was instituted by the firm of Kimani Kahete & Company Advocates with the Certificate of Urgency for the application dated November 24, 2011 being sworn by one Zakayo Kimani Maina who is in active and licensed practice for the year 2022 as shown in the Search Results annexed as 'WFN'.
 8. It is deposed that no evidence has been tendered to show that the suit was not filed by the said firm; that the applicant cannot under law adduce the letter of May 7, 2022 allegedly drawn by the firm of Kimani Kahete and Company advocates as she is not the maker of the document. Further that the said firm does not afford any comfort to the applicant as the letter does not indicate who signed it; that it is only the said advocate Zakayo Kimani Maina who can claim and adduce evidence that they did not file the suit or draw documents in this matter and the applicant cannot legally do so.



9. Further arguments are that no evidence has been adduced to confirm the allegation that the suit was filed by an unlicensed person; that no evidence has been adduced to show the role one John Omuganda allegedly had in this matter and in any event, his name does not appear anywhere on the court's record and that the applicant has not tendered any proof of impersonation or forgery as alleged.
10. It is the Defendants' argument that all the signatures in the suit have been attested to by advocates/commissioners of oath and no issue has been raised on the attestation of the signatures, that the applicant's claim that she made a criminal report over the issue has not been supported by proof; that the Applicant claims that facts in this suit do not reflect the proper position yet she does not indicate how the facts in the suit differ from the proper position.
11. It is the Defendants' claim that this is a well-orchestrated scheme by the Plaintiff having failed to stop the sale of the property and it is clear that she has tried everything to do so; that if indeed a notice of withdrawal of the suit has been filed by the firm of Kimani Kahete & Company advocates, then this application is functus officio as the suit does not exist anymore.

Oral Submissions

12. The matter proceeded to hearing where the parties argued orally in Court. The Applicant through her counsel argued that the Applicant was not aware of the matter herein; that the suit was instituted by the borrower and the purported advocate; that she only became aware of the suit when her property was re-advertised; that the firm on record has now applied for Notice of withdrawal of the suit dated May 9, 2022 as they stated that they did not institute the suit; that the purported advocate Mr John Omudanga was not an advocate but a process server not qualified to act as an Advocate and these proceedings are legally defective and cannot be cured by any pleadings or coming on record of any other Advocate.
13. Counsel for the Defendants argued that application raises 3 major issues. The first one being filing of pleadings by an unqualified person. They reiterated the contents paragraph 3 of their Replying Affidavit and submitted that the firm of Kimani Kahete and Company Advocates instituted the suit herein and the certificate of urgency dated November 24, 2021 was sworn by Zakayo Kimani Maina who is active and licensed to practice for the year 2022.
14. They submitted that there is no evidence to show that John Omudanga filed any pleadings; that no evidence has been adduced to show in what capacity the alleged imposter acted; that only the firm of Kimani Kahete and Company Advocates can come and claim that they have not filed the pleadings and that the letter attached bears no signature to show who authored it and cited *Mugo Mungai & 4 others v Official Receiver & Provincial Liquidator (Capital Finance Limited and Pioneer) & 2 others [2019] eKLR* to the effect that the maker of a document must be identifiable and that for the said letter to be admissible in court the author must be known and must produce it in court.
15. On the second issue that the Applicant claims that she was not aware of the pleadings and the signatures were forged, it is argued that these are serious allegations that have to be proved; that there was no evidence tendered to prove the same; that the signatures have to be attested to before an advocate and none of the advocates has come to court to state as such; that the Applicant bears the burden of proving that the signatures were forged.
16. The third issue concerns the withdrawal of the Notice of withdrawal dated May 9, 2022. The Respondents argued that this action renders the application herein functus officio as the suit does not exist. On that point they relied on the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (interested party) [2021] eKLR*.



Determination

17. Simply put, the Applicant's claim is that she knows nothing about the pleadings before this court because she never instructed anyone to bring this matter to court on her behalf and that one John Omudanga, an impostor, is the one who filed these pleadings without her consent and knowledge. She claims that she only came to know about this matter after her property was re-advertised for sale.
18. All these allegations have been denied by the Respondent who have stated that the Applicant has not brought any proof of the allegations she is making.
19. The contents of the Notice of Motion, Supporting Affidavit, the Replying Affidavit and oral submissions in court are clear on the case each party presented to this court and I need not repeat them in my determination given that I have already summarized them above.
20. Among the prayers sought in this Notice of Motion are the prayer to strike out the Notice of Motion and Plaint dated November 24, 2021 drawn, filed and signed by John Omudanga, a person not qualified as an Advocate of the High Court of Kenya; to set aside the ruling dated March 15, 2022 and declare it a nullity and to dismiss this suit forthwith.
21. The Plaint dated November 24, 2021 and the Notice of Motion of the same date are drawn and filed by the firm of M/s Kimani Kahete & Co Advocates. The Notice of Motion has been canvassed and a ruling delivered on March 15, 2022. The Certificate of Urgency on that Notice of Motion is sworn by Mr Zakayo Kiani Maina. There is nothing on record from this person to show that indeed it was not him who swore this affidavit but an impostor. There are two other pending applications drawn and filed by the same firm of advocates: the Notice of Motion dated March 25, 2022 and another dated April 13, 2022. In all these pleadings, the name of John Omudanga does not appear anywhere.
22. On February 15, 2022, one Mango appeared in court and informed the court that he was holding brief for Mr Kimani for the Applicant. Again, on February 17, 2022, one Philip Otieno attended court and informed the court that he was holding brief for Mr Kimani for the Applicant. He prosecuted the Application on behalf of Mr Kimani. He also attended court on March 15, 2022 when ruling was delivered dismissing the Notice of Motion dated November 24, 2021. In all these court appearances none of these people told the court that they were holding brief for Mr John Omudanga.
23. The Applicant claims that she is a stranger to these pleadings and proceedings but mentions nothing about the facts of this case in respect to the loan facility and the default in repayments which gave rise to the events leading to these pleadings. The claims she is making arose after the Notice of Motion dated November 24, 2021 was dismissed.
24. Neither Mr Kimani or any advocate from his firm has appeared in court to provide the much-needed information that they did not indeed draw and file the pleadings in this matter. What could have been easier than to have Mr Kimani attend court to inform the court what the Applicant is now telling the court?
25. The Notice of Withdrawal of the entire suit ought to have been filed by Mr Kimani. He is the right person to file it and also attend court to inform the court the reasons behind the claims being made by the Applicant.
26. I doubt that the Applicant knows the implications of the claims she is making. These are serious issues with criminal elements. The name of the firm of M/s Kimani Kahete & Co Advocates is at the centre of all this. It is a matter that requires serious thought and evidence to prove these serious allegations.



The OB extract in respect to the reports allegedly made to the police were not attached. This court is being asked to believe the word of the Applicant without evidence to back her up.

27. The law under sections 107 and 109 of the *Evidence Act* are clear that the burden of proof is on the party that alleges. Allegations of fraud are serious ones and the law expects strict proof. In *Kinyanjui Kamau v George Kamau [2015] eKLR*, the court expressed itself as follows:

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

28. I agree with counsel for the Respondent that the maker of the letter dated May 7, 2022 is the right person to produce it. The law under section 35(1) of the *Evidence Act* is clear on that aspect, when it states that:

In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

- (a) if the maker of the statement either—
- (i) had personal knowledge of the matters dealt with by the statement; or (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters;
- (b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

29. I agree with the counsel for the Respondent that the effect of withdrawing a suit renders the matter functus officio as the suit does not exist anymore, as stated in the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (interested party) [2021] eKLR*. Further, the court in *Smt Raisa Sultana Begam & others v Abdul Qadir & others AIR (1966 ALL 318)*, the court held that:

“Either it is done or not done; there is nothing like its being incompletely or ineffectively. The consequence of an act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only Plaintiff and withdraws the whole of the suit, the suit comes to an



end and nothing remains pending before the Court; if he is only one of several Plaintiffs, he ceases to be a party and the suit of only the other Plaintiffs continues. If he withdraws only a part of the suit that part goes out of jurisdiction of the court and it is left with only the other part. This is the natural consequence of the act; a further consequence imposed by Sub-rule (3) is that he cannot institute any fresh suit in respect of the subject matter. He becomes subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the Court. The bar on his instituting a fresh suit would be meaningless if he were permitted to revoke the withdrawal and get himself restored to the status of a Plaintiff in respect of the withdrawn suit. There is no provision allowing revocation of the withdrawal

30. My careful consideration of this matter leads me to the conclusion that the Applicant is abusing the process of this court. She has made allegations without providing proof of the same. It is a dangerous way of making pleadings. She needs good counsel on the legal process to adopt in order to seek justice.
31. The Applicant has failed to persuade this court on the issues she is raising. Her application has no basis whatsoever given that she has failed to prove the same. Consequently, the Notice of Motion dated May 12, 2022 is hereby dismissed in its entirety with costs to the Respondent.
32. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 21ST JUNE 2022.

S N MUTUKU

JUDGE

