



**Masha v Kenya Pipeline Company Limited (Land Case
E012 of 2023) [2025] KEELC 1342 (KLR) (19 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE E012 OF 2023
SM KIBUNJA, J
MARCH 19, 2025**

BETWEEN

SIDI KARISA MASHA PLAINTIFF

AND

KENYA PIPELINE COMPANY LIMITED DEFENDANT

(Notices of Motion dated 9th February 2025 & 14th February 2025)

RULING

1. The plaintiff moved the court through the notice of motion dated the 9th February 2025 seeking for
“temporary injunction barring the defendant by itself, its servants, agents, proxies, assignees, transferees or directors from carrying out any demolitions, evictions, placing marks or in any other way interfering with the plaintiffs’ houses plot No. MN/VI4182 at Migadini area, Chaani ward in Mombasa County pending the full hearing of this suit.”

The application is based on the ten (10) grounds on its face marked (a) to (j) and supported by the affidavit of Sidi Karisa Masha, the plaintiff, sworn on the 9th February 2025, inter alia deposing that defendant had earmarked the houses for demolition and warned them through meetings that their time there was numbered, and they either relocate or be forcefully evicted; that no arrangements have been made for their relocation or compensation and unless the court issues the order sought, they will suffer prejudice.

2. On its part, the defendant filed the notice of motion dated the 14th February 2025 seeking for inter alia setting aside of the interim order issued on 10th February; striking out of the application dated 9th February 2025 and the suit for being an abuse of the process of the court, and res judicata. The application is based on the twelve (12) grounds marked (1) to (12) on its face and supported by the affidavit of Stanley K. Manduku, Pipeline Wayleave Manager, sworn on the 14th February 2025, in



which he inter alia deposed that the suit and application are incompetent as the plaintiff has not annexed any consent/authorization from the other 55 residents she alleged to represent; that the plaintiff is without locus as she has not shown any lawful/beneficial interest over the suit property; that the suit and application are res judicata as the issue of ownership and occupation of the suit property has been determined in Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, which was abandoned after the court declined to grant a conservatory application vide its ruling of 9th April 2019, and was subsequently dismissed for want of prosecution; that the interim orders issued on 10th February 2025 was obtained through sheer mischief, deceit, concealment and or suppression of material facts from the court by the plaintiff about the existence of Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*; that the suit property is the defendant's safety buffer zone which is required to be clear to separate the public from the hazardous zones and if the interim orders are not vacated the Mombasa County, including the plaintiff, will be exposed to great safety risks; that the plaintiff has been aware that they are required to vacate since 28th November 2018 when they were served with the first notices leading to the filing of Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*; that the clearance of the buffer zones has been going on throughout the country and has involved the stakeholders including the encroachers and politicians; that on 30th January 2025 the defendant held a public sensitization/participation baraza at customs grounds, Chaani, Migadini area which is adjacent to the suit property, to explain why it was necessary for the defendant's wayleave and buffer zone to be cleared, that was attended by Changamwe Deputy County Commissioner, Chiefs, Assistant Chiefs, Village managers, Ambassadors, MCA Chaani, representatives from KPA, EPRA & KPRL, Community Health Promoters, Mbuyuni residents among others; that the marking of the structures on the suit property was done pursuant to the agreement reached during the said public sensitization baraza, following which written notices to vacate were served on the occupants of the affected structures; that the defendant has utilized a lot of resources to actualize the clearance and would be prejudiced if its prayers are not granted.

3. The plaintiff responded to the defendant's application through the replying affidavit of Sidi Karisa Masha, plaintiff, sworn on the 26th February 2025, deposing inter alia that that the application cannot be granted under the provisions of the law it is anchored on and should be dismissed with costs; that the failure to annex the authorization of the other residents when filing the suit and application was due to the urgency and the need to procure the interim order to forestall the demolitions, and the authorization has now been annexed as "SKM-1;" that no application and judgement that would render this suit res judicata has been attached; that they never abandoned the earlier suit, ELC No. 281 of 2018, but it was their then advocate who was not keen in having it prosecuted, and defendant has not availed evidence to proof that it was abandoned; that as that suit was never heard, then the instant suit cannot be res judicata; that the fact that they have lived on the suit property for many years gives them the locus to file this suit; that they were not aware of any meeting with the defendant or being served with notices to vacate; that the status quo should be maintained as the suit is heard and determined.
4. That pursuant to the directions issued on the 24th February 2025, the learned counsel for the defendant filed their submissions dated 5th March 2025 in respect of both applications, while that for the plaintiff filed two sets of submissions dated the 26th February 2025 and 6th March 2025 in support of their application dated 9th February 2025, and in opposition to the defendant's application dated 14th February 2025, respectively, which the court has considered.
5. The following are the issues for the court's determinations in both applications:
 - a. Whether the suit and application filed by the plaintiff is res judicata and or an abuse of court process.



- b. Whether the plaintiff has the locus standi to file and prosecute this suit.
 - c. Whether the interim order issued on 10th February 2025 was obtained through concealment of material facts’
 - d. Whether the interim order issued on 10th February 2025 should be set aside.
 - e. Who pays the costs?
6. The court has carefully considered the grounds on the two applications, affidavit evidence, submissions by the two learned counsel, superior courts decisions cited thereon, the pleadings and come to the following conclusions:
- a. That the plaintiff commenced this suit through the plaint dated the 9th February 2025, whose heading indicates that she filed it “... on behalf of herself and on behalf of 55 other residents of Migadini area at Chaani”, claiming to be “...the beneficial and or lawful owners of the property known as parcel plot No. MN/V1/4182 at Migadani area, Chaani ward in Mombasa County...”, suit property. They further averred that they have lived on the suit property for a long time, some for over fifty years. The plaintiff had contemporaneously in filing the said plaint, filed the notice of motion under certificate of urgency of even date, seeking for temporary injunction pending the inter parties hearing of the application, and thereafter full hearing of the suit. The court on the 10th February 2025 certified the application urgent and granted order to maintain the obtaining status quo on the use and possession of the suit property pending inter parties hearing of the application.
 - b. The defendant challenged and or responded to the plaintiff’s application through their notice of motion dated the 14th February 2025, that seeks for setting aside the interim order, striking out of the application and suit for being res judicata and an abuse of court process in view of the existence of Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, by the same plaintiffs, and in which the issues of ownership and occupation of the suit property was determined vide the ruling of 9th April 2019. Though the plaintiffs’ response was generally that the said suit was never heard and therefore this suit is not res judicata, it is telling to take judicial notice of the fact that they had not acknowledged the existence of that suit in their plaint dated 9th February 2025. They have also not denied that they were parties in that earlier suit and that the suit property therein was the same suit property in the instant suit and application.
 - c. That further and contrary to the contention of the plaintiffs that no application and judgement in that earlier suit has been attached by the defendant, it is a fact that at paragraphs 3(d) and 4 of the affidavit in support of their application, the defendant attached a copy of the ruling delivered on 9th April 2019 marked “SKM1”, and plaint marked “SKM2” in Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*. The court has perused the said plaint and ruling among other annexures, and it is clear the plaintiffs had through the notice of motion dated 4th December 2018 sought for temporary injunction against the defendant in respect of parcel MN/V1/3794. Among the grounds relied on were that the plaintiffs are residents of plot MN/V1/3794 which borders MN/V1/4182 owned by the defendant. it is apparent the application was heard on merit and in the ruling, the court held among others that:

“9. In this case, there is no dispute that the defendant is the owner of plot No. 4182/V1/MN. The applicants allege that they are residents



of plot No. 3794/V1/MN, which borders the defendant's said plot. The plaintiffs have admitted that they were issued with notice to vacate from the defendant's plot No. 4182/V1/MN. The notice to vacate annexed to the affidavit in support of the motion and marked "RMN2" is in respect of plot No. 4182 and not plot No. 3794/V1/MN. The court has noted the plaintiffs have no claim over plot No. 4182/V1/MN. Their claim is over plot No. 3794/V1/MN. From the evidence on record, I find that the applicants have not established a prima facie case

10. Further in this case, there are 57 named plaintiffs/applicants. The verifying affidavit as well as the affidavits in support of the application has been sworn by Reuben Muki Nzau, the 16th plaintiff/applicant. Whereas he deponed that he had the authority of his co-applicants no such authority had been annexed. Order 1 Rule 13 of the *Civil Procedure Rules* provides
 12. From the evidence on record, I find that the applicants have not established a prima facie case with a probability of success. Secondly, the applicants have not demonstrated that they stand to suffer irreparable harm not compensable in damages. In any case, the notice issued by the defendant relates to plot No. 4182/V1/MN which the plaintiffs do not dispute belongs to the defendant. The notice to vacate has not referred to plot No. 3794/V1/3794/V1/MN in which the applicant are in occupation and in which they allegedly have a court order in force in their favour in HCCC No. 84 of 2002. The balance of convenience, if I had doubt, tilts in favour of the defendant who is the registered owner of plot No. 4182/V1/MN whose rights as proprietor are protected under Article 40 of the *Constitution*.
 13. The upshot is that the notice of motion dated 4th December 2018 is without merit. The same is hereby dismissed with costs to the defendant"
- d. The plaint dated 4th December 2018 has in its heading the names of 57 plaintiffs, including Sidi Karisa Masha, who is the plaintiff herein, as the 39th plaintiff. Even though from the factual materials availed, Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, was not heard to conclusion on merit, there is no doubt the plaintiffs therein, who include the plaintiff herein, had filed an application for temporary injunction order dated 4th December 2018, that was determined through the ruling of 9th April 2019, whose highlights are as set out herein above. The suit property in that earlier suit was MN/V1/3794 that borders MN/V1/4182. The court in its ruling inter alia held that "In this case, there is no dispute that the defendant is the owner of plot No. 4182/V1/MN..... The notice to vacate annexed to the affidavit in support of the motion and marked "RMN2" is in respect of plot No. 4182 and not plot No. 3794/V1/MN. The court has noted the plaintiffs have no claim over plot No. 4182/V1/MN. Their claim is over plot No. 3794/V1/MN. From the evidence on record, I find that the applicants have not established a prima facie case" The plaintiff's response to the defendant's contention that this suit and application are res judicata is that the Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, was not heard to conclusion, and the instant suit should



be heard to its logical conclusion. It is a fact that the ruling of 9th April 2019 has not been challenged or rebutted, and the filing of a fresh suit by the plaintiff herein, and lodging an application for orders similar to those in the application dated 4th December 2018, is not only an abuse of the court process, but amounts to a contravention of section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya, as the issues raised in the instant application are res judicata.

- e. That I have perused the complaints in this suit and Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, and I am left wondering whether firstly, the plaintiffs in both suits really know on which specific parcel of land their structures are situated. Is it on MN/V1/3794 as alleged in Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, or on MN/V1/4182 as alleged in the instant suit, or their structures have moved from one plot to the other? Secondly, whether the plaintiffs herein had forgotten the existence of their previous litigation(s) including Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, when averring at paragraph 23 of their complaint herein that “The plaintiffs aver that there is no other suit pending between the plaintiffs and the defendants over the same subject matter” while at paragraph 9 of their replying affidavit to the defendant’s application they deposed inter alia that “.....the defendant has not provided any proof to show that our suit was abandoned,” leaving it open for one to conclude that they believed their suit was still alive or pending in court. If that was so, then this suit should be sub judice and a contravention of section 6 of the [Civil Procedure Act](#) Chapter 21 of Laws of Kenya.
- f. That it is evident that just like it was in Mombasa ELC No. 281 of 2018, *Ishmael Mangi Katana & 56 Others v Kenya Pipeline Company Limited*, where no authority to plead for the other plaintiffs/applicants had been filed, no authority to plead on behalf of the other 55 residents was filed with the complaint and notice of motion dated 9th February 2025, which is in contravention of Order 1 Rule 13 of [Civil Procedure Rules](#). The defendant raised that objection through its application dated the 14th February 2025 and the plaintiff has tried to cure that through paragraph 5 of their replying affidavit by annexure “SKM1” which consists of three documents with twenty five (25), twenty seven (27) and nine (9) names respectively, all totalling sixty one (61) people. Though the three lists carrying those people are not dated, they accompany the letter of authority dated 20th February 2025 by the plaintiff’s advocates, which clearly confirms the suit and application herein dated 9th February 2025 that predated the letter of authority were indeed filed without the requisite authority required of a representative suit. That while I agree with the decisions cited by the learned counsel for the plaintiff, to the effect generally that failure to annex the authority in representative suits may not necessarily be sufficient ground to strike out the suit, it however shows lack of candidness, and absence of full disclosure or concealment on the part of the plaintiff/applicant, when seeking and obtaining orders certifying the application as urgent, and interim ex parte orders. That concealment would be a strong or reasonable basis upon which to consider vacating or setting aside the interim ex parte orders obtained thereof on 10th February 2025.
- g. The plaintiff also submitted that the defendant application is hinged on the wrong law and should be struck out and relied on the Court of Appeal decision in the case of [Mariga & 2 Others v Mariga & Another](#) (Civil Application E026 of 2023) [2024] KECA 470 (KLR) (26



April 2024) (Ruling), in which an application had been brought under wrong provisions of the law and it was held thus:

- “ 17. In this regard, the application is liable to be struck out having been hinged on the wrong provisions of the law.
- 18. In the result, I find the application before me is fatally defective and incompetent. The application is therefore struck out with no order as to costs.”

The defendant application has in its heading cited Order 1 Rule 10(2), (4) Rule 14 & 25 of the Civil Procedure Rules, which provides for substitution and addition of parties and procedure of moving the court orally or through chamber summons. Indeed those provisions of the Civil Procedure Rules have nothing to do with applications for setting aside or vacating interim orders issued, or striking out the suit and or the application. The application should be struck out with costs.

- h. The foregoing determinations are sufficient for the court to dispose of the two applications without going to the other issues, including whether the plaintiff has met the threshold for temporary injunction order to be issued at this stage.
 - i. That under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where the court for good cause orders otherwise. Having found no merit in the plaintiff’s application dated the 9th February 2025, the defendant is awarded costs.
7. Flowing from the above determinations, the court finds and orders as follows:
- a. That the Plaintiff’s application dated the 9th February 2025, is without merit and is dismissed with costs.
 - b. That the defendant’s application dated 14th February 2025, is without merit and is hereby struck out with costs.
 - c. That the interim ex parte status quo order granted on 10th February 2025 and extended on 24th February 2025, is hereby vacated.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF MARCH 2025.

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S. M. KIBUNJA, J.

ELC MOMBASA.

In the Presence of:

Plaintiffs : Mr. Edwin Yose

Defendant : Mr. Odongo

Shitemi– Court Assistant.

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S. M. KIBUNJA, J.

ELC MOMBASA.

