



**Mwangi v Kibugu & another (Environment and Land Case  
303 of 2018) [2025] KEELC 5175 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5175 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE 303 OF 2018**

**A OMBWAYO, J  
JULY 10, 2025**

**BETWEEN**

**SIMON MUIGAI MWANGI ..... PLAINTIFF**

**AND**

**SOLOMON MURIITHI KIBUGU ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KIBUGU KIONI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Brief Facts**

1. This is a ruling in respect the application dated 22nd April, 2025 filed by the Plaintiff/Applicant which sought the following orders: -
  - a. Spent.
  - b. That the Plaintiff be and is hereby granted leave to amend his Plaint herein by adding a 3rd Defendant.
  - c. That Abdinasir Haji t/a Topline Traders Limited be joined as a 3rd Defendant.
  - d. Spent.
  - e. That upon joining the 3rd Defendant, the Defendants jointly and severally be restrained either by themselves, servants or agents from dealing with the suit property known as Nakuru/ Municipality/Block 8/6 in a manner that may alienate the suit property or in a manner that may interfere with the Plaintiff's full enjoyment of the suit property pending the hearing and determination of the suit.
  - f. That costs of this application be provided for.



2. The Application was based on grounds set out and supported by the Affidavit of Simon Muigai Mwangi the Applicant sworn on 22nd April, 2025. He stated that he purchased ½ acre out of the suit property Nakuru/Municipality/Block 8/6 from the Defendants jointly. He further stated that he obtained all the necessary statutory requirements including approval from NEMA and proceeded to invest on the said property.
3. He stated that the Defendants have since interfered with his business operations and even blocked him from accessing the suit premises. He further stated that the Defendants have recently introduced Abdinasir Haji t/a Topline Traders Limited into the suit property. He stated that the Defendants have further infringed on his right to the suit property by production of a report from the County Government of Nakuru that the location of the suit property is not to be sub divided into less than 1-acre land. He added that this has since given the Plaintiff's case a different dimension hence the need to seek leave to amend the Plaintiff.
4. In conclusion he urged the court that it would be in the interest of justice that the application be allowed.

### Response

5. The proposed 3rd Defendant filed its grounds of opposition dated 22nd May, 2025 on the following grounds:
  1. That the party to be enjoined as a 3rd Defendant has not been identified. Abdinasir Haji and Topline Traders Limited are different persons. The said parties are different entities, Abdinasir Haji cannot therefore trade as Topline Traders Limited which is a juristic person capable of trading in its name.
  2. That we are guided by the holding in the matter of Ukwala Supermarket v Jaideep Shah & another [2022] eKLR, where the court stated as follows:

A Company is a judicial person. The law expressly permits the incorporation of a business for the very purpose of enabling its shareholders and directors to escape personal liability. In *Salomon v Salomon & Co (1897) AC 22* where Lord Macnaghten affirmed the separation between the corporation and its members in the following eternal words:

The company is at law a different person altogether from its subscribers...and, though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members, liable, in any shape or form, except to the extent and in the manner provided by the act.
  3. That a company operates as a separate entity and should handle all its matters as legal entity.
  4. That if the court was to allow joinder of the proposed Defendant, the court would end up generating a judgment or order that will be incapable of being enforced for the reason that the same would be directed at defendants who were not recognized in the pleadings and did not did not have capacity to sue or to be sued.



5. That it is trite law that for a court to have jurisdiction over a matter, proper parties must be identified.
6. That we are guided by the holding In Apex Finance International Limited and Another v Kenya Anti-Corruption Commission NKU HC JR No. 64 of 2011 [2012] eKLR, the court cited a decision of the Supreme Court of Nigeria, Goodwill and Trust Investment Ltd and Another v. Witt and Bush Ltd Nigerian SC 266/2005 which captured the fundamental nature of the issue of capacity. The court observed that:

“It is trite law that to be competent and have jurisdiction over a matter, proper parties must be identified before the action can succeed, the parties to it must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the court the court lacks jurisdiction to hear the suit, and, “where the court purports to exercise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”
7. That further, the application for leave to amend the plaint is contrary to order 8 rule 3 (5) of the Civil Procedure Rules which states that an amendment should not be substantive to raise a new cause of action. The amendment seeks orders for amendment of the certificate of title and compensation for loss which will change the character of the initial suit.
8. That there exists no factual or legal nexus between the cause of action pleaded in the original Plaint and the Proposed 3rd Defendant.
9. Order 8 Rule 5 of the Civil Procedure Rules on amendment of pleadings provides:

An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
10. In “Kassam – Versus - Bank of Baroda (Kenya) Limited (2002) 1 KLR 294. The court reiterated the tenents for granting leave to amend a plaint and held as thus:-
  - a. The party applying is not acting mala fides;
  - b. The amendment will not cause some injury to the other side which cannot be compensated by costs;
  - c. The amendment is not a device to abuse the court process;
  - d. The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
  - e. And that the amendment will not alter the character of the suit.
11. That the proposed amendment seeks to substantially change the nature of the suit by introducing new reliefs and issues unrelated to the original claim, contrary to Order 8 Rules 3 and 5 of the Civil Procedure Rules.



12. That the amendment and joinder are made late in the proceedings and without good cause. The same will occasion prejudice, hardship, and procedural disadvantage to the Proposed Defendant, which cannot be remedied by costs, the same is mala fides.
  13. That the omission of the Proposed Defendant in the original Plaintiff was not due to a bona fide mistake but is a belated and strategic move intended to expand the scope of the suit contrary to the rules of fair trial. The joinder is proposed nine years after filing of the suit.
  14. That the application offends the doctrine of privity of contract since there is no contractual obligation as between the proposed third Defendant and the Plaintiff. The Plaintiff is estopped from suing the proposed Defendant under a contract it was not privy to.
  15. In *Kenya Women Finance Trust v Bernard Oyugi Jaoko & 2 others* [2018] eKLR, the Court of Appeal deliberated on the doctrine of privity of contract at length and in *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another* (supra) the Court rendered itself that:
 

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract.

Accordingly a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, Lord Haldane, LC rendered the principles thus: “My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”
  16. That the Application is an abuse of the court process given that the Plaintiff had filed a similar Application which was dismissed vide the ruling dated 28th March, 2025. The application therefore, undermines the overriding objective of the *Civil Procedure Act* under Sections 1A and 1B, which obligate parties to assist the court in the just, expeditious, proportionate and affordable resolution of disputes.
  17. That the Application is fatally defective, incompetent, bad in law and an abuse of the Court process as the Plaintiff intends to waste court’s time on matters that are legally unattainable.
6. The 1st Defendant also filed a Replying Affidavit sworn on 22nd May, 2025 where he averred that the application was an abuse of the court process, and should be dismissed with costs. He further averred that number three (3) of the application could not be granted as the Applicant seeks to have an alien entity joined as a party to the suit. He added that the Plaintiff sought to join Abdinasir Haji T/a Topline Traders Limited as the Third Defendant, but the mode of citation was fundamentally flawed. He averred that the joining was improperly cited and offended the principle of legal personality. He further averred that the proposed 3rd Defendant was a non-existent legal entity and could not be validly joined.
  7. He averred that the Plaintiff, despite having legal representation, previously sought a similar joinder under incorrect provisions of law, which was dismissed on 28th March 2025. He added that the current attempt sought to reintroduce the same party under a different guise, without correcting fundamental legal defects. He also averred that the Plaintiff did not seek any relief against the proposed 3rd Defendant in the original claim and that there was no established nexus warranting the joinder of the said party. He averred that the Plaintiff is now seeking to substantially amend the Plaintiff to introduce new causes of action and a new party, amounting to a complete re-characterization of the suit.



8. He also averred that the impugned report dated 12th August 2014 by the Nakuru Municipal Council, relied upon as the basis for amendment and joinder, was in the Plaintiff's possession from the inception of the suit. He averred that the Plaintiff has failed to provide a reasonable explanation for the delay in bringing this application and thus this application would amount to opening new litigation based on stale facts, which the Plaintiff has always been aware of, but failed to act on. He averred that the Plaintiff's application was devoid of merit and ought to be dismissed with costs

### **Submissions**

9. Counsel for the Applicant filed her submissions dated 18th June, 2025 where she identified three issues for determination. The first issue was whether the Defendants breached the Sale Agreement. She submits in the affirmative and argues that the breach stemmed from their failure to effect the subdivision and transfer of a 0.5-acre portion of Nakuru Municipality Block 8/6, which the Plaintiff purchased for Kshs. 12.5 million with the intention of establishing a petrol service station. She relied on the case of *National Bank of Kenya Ltd V Wafula Civil Appeal E044 of 2021 [2024] KEHC 1187 (KLR)*. The second issue was whether the Plaintiff was entitled to a refund of Kshs. 17,531,564. It was counsel's submission that the Plaintiff was entitled to a refund of Kshs. 17,531,564. She submits that the amount represented the financial loss suffered due to the Defendants' breach and non-disclosure. She submits that the said expenses were incurred with the Defendants' knowledge and partly under Clause D of the Sale Agreement, and the Defendants' refusal to refund them constituted a breach of contract. She cited the case of *Dormakaba Limited V Architectural Supplies Kenya Limited [2021] KEHC 210*.
10. The final issue was whether the Plaintiff qualified for an injunctive relief. She submits in the affirmative relied on the case of *Giella v Caseman Brown EA 358*. She submits that Plaintiff contends that a prima facie case existed since the agreement and its breach were undisputed. She further submits that there was a real risk of irreparable harm if the Defendants dispose of the suit land. She submits that the balance of convenience favored the Plaintiff, who has invested a substantial amount of Kshs. 17,531,564 in the property.
11. Counsel for the proposed 3rd Defendant filed his submissions dated 10th June, 2025 where he identified three issues for determination. Whether the proposed third Defendant should be joined to the proceedings. It was counsel's submission that Abdinasir Haji and Topline Traders Limited are different entities, and a company is a juristic person capable of being sued in its own name, making the identification unclear. She relied on the case of *Apex Finance International Limited and Another V Kenya Anti-Corruption Commission NKU HC JR No. 64 of 2011 [2012] eKLR* and *Nova Holdings Limited V Waithera & 5 Others (ELC Case 83 of 2022) [2023] KEELC 22571 (KLR)*. He further submits that the original plaint, filed almost nine years ago, raised no cause of action against the proposed third defendant, and joining them now would cause prejudice.
12. The second issue was whether the Plaintiff should be granted leave to amend the Plaint. It was counsel's submission that the proposed amendment sought to substantially change the nature of the suit by introducing new reliefs and issues contrary to Order 8 Rules 3 and 5 of the Civil Procedure Rules. He submits that the draft amended plaint sought for a declaration of ownership, whereas the initial plaint sought a refund for developments and purchase price from the 1st and 2nd Defendants, representing a completely different cause of action. He relied on the case of *Kassam V Bank of Baroda (Kenya) Limited (2002) 1KLR 294*.
13. On the final issue, whether the Application is an abuse of the court process, he submits that the instant application was an abuse of the court process since the Plaintiff had filed a similar application which was dismissed on 28th March, 2025. He argues that entertaining such a repeated application undermines



the overriding objective of the *Civil Procedure Act*, which mandates parties to assist the court in the just, expeditious, proportionate, and affordable resolution of disputes. He cited the case of *Ongera V Shah & Another* (ELC Msc Application E130 of 2023) [2023]

### **Analysis and Determination**

14. This court has considered the application, grounds of opposition, replying affidavit and submissions and is of the view that the main issue for determination is whether the application is res judicata.
15. Section 7 of the *Civil Procedure Act* Cap 21 provides that:

“No court shall try any suit or issue in which the matter directly and 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 a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
16. It is worthwhile to note that a person shall not commence more than one action in respect of the same or a substantially similar cause of action and the court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.
17. In the case of *Uhuru Highway Development Ltd V Central Bank of Kenya, Exchange Bank Ltd* (in voluntary liquidation) and *Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be resuscitated by another Application.
18. The Court of Appeal further stated that:

“That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for.”
19. It is not in dispute, that there exists an order in by this court dated 28th March, 2025 emanating from the Applicant’s application dated 13th November, 2024. In the said application, the issue of joinder of the proposed 3rd Defendant and a temporary injunction against it was heard and determined by this court wherein the matters were directly and substantially in issue as those in the instant application.
20. The Applicant by bringing an application after application on the same issue at different times one after another is hell bent not only to defeat the course of justice but also an abuse of the court process which this court shall not condone. The upshot of the foregoing is that the instant application is res judicata and the same is dismissed with costs to the Defendants/Respondents. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA. NAKURU**

**ENVIRONMENT AND LAND COURT**



DATE: 2025-07-10 11:55:35

