



**Said v Juja Coffee Exporters Limited & another (Environment & Land  
Case 68 of 2022) [2025] KEELC 4893 (KLR) (2 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 4893 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 68 OF 2022**

**SM KIBUNJA, J**

**JULY 2, 2025**

**BETWEEN**

**ISHA TAHER SHEIKH SAID ..... PLAINTIFF**

**AND**

**JUJA COFFEE EXPORTERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**BANK OF AFRICA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**CHAMBER SUMMONS DATED 29TH OCTOBER 2024 & NOTICE OF MOTION DATED 19TH  
DECEMBER 2024**

1. The plaintiff filed the chamber summons dated 29th October 2024, seeking for:
  - a. This Honourable Court be pleased to grant leave to substitute Fatma Tahir Sheikh Said as a witness instead of Isha Taher Sheikh Said, the Plaintiff.
  - b. The witness statement of Isha Taher Sheikh Said dated 29<sup>th</sup> October 2024 be admitted in evidence without calling her to testify; and or alternatively
  - c. The said Isha Taher Sheikh Said do give evidence on the basis of affidavit evidence.
  - d. Costs of this application be provided for.

The facts being that the plaintiff is seriously indisposed with throat cancer and her speech is affected, and thus unfit to testify. That she was reportedly, admitted at the time of making the said application. In support of the application, a medical report marked MW1 was attached, as well as a power of attorney marked MW3. but the court has noted that there is no indication of whether it was registered or not as it does not have a P.A number. However, this being a court of record, the court found the P.A number 22197 from an attachment in the plaintiff's



application dated 28<sup>th</sup> March 2023 which was already been dealt with. The witness statements of both the Plaintiff and Fatma Taher Sheikh Said were also attached and marked MW2 and MW4 respectively.

2. In reply, the 2<sup>nd</sup> defendant filed a replying affidavit sworn on 19th December 2024 by Victor Keittany, a senior recoveries officer with the 2nd defendant. He stated that the application is incurably defective and incompetent for reason that it offends the provisions of section 33 (a-h) and 35 of the [Evidence Act](#). Further that the application is res judicata on the basis that this court's ruling of 1st March 2023 already described this suit as res judicata as it had already been litigated in Mombasa HCC 57 of 2016, Juja Coffee Exporters Limited & 3 Others versus Bank of Africa Kenya Limited & Another. He stated that the above-mentioned suit was dismissed on 17th June 2023, but asked the court to allow the suit to go for full hearing and the court to admit the statement of the plaintiff as evidence without calling her as a witness or substituting her with Fatma Taher Sheikh Said.
3. The 2<sup>nd</sup> defendant filed the notice of motion dated 19<sup>th</sup> December 2024, seeking for the following orders:
  - a. The Plaintiff's suit be struck out with costs to the 2<sup>nd</sup> defendant.
  - b. Pending the hearing and determination of Mombasa Civil Appeal No. E185 of 2024, Bank of Africa Kenya Limited versus Juja Coffee Exporters limited & 7 Others, an order be issued staying any further proceedings in this case.
  - c. This Honourable Court do issue any other orders it may deem just, fit and expedient in the interest of justice.
  - d. That costs of this application be borne by the Plaintiff.
4. In reply the plaintiff filed grounds of opposition dated 20th March 2025, inter alia stating that this court through its ruling of 1<sup>st</sup> March 2023 has already determined that the issues raised by the 2<sup>nd</sup> defendant that matter proceed to trial and hence the 2<sup>nd</sup> defendant's application is an indirect prayer for review of the same ruling. Further that this court and the parties have been ready to proceed to hearing as illustrated by the hearing dates of 29th May 2024, 16th July 2024 and 4th November 2024, and the application therefore lacks merit and should be dismissed with costs.
5. From the record, the 1<sup>st</sup> defendant has not participated in these proceedings. The learned counsel for the plaintiff and 2<sup>nd</sup> defendant filed their submissions dated 20th March 2025 and 26th March 2025 respectively, which the court has considered.
6. The main issues arising from the applications for the court's determinations are as follows:
  - a. Whether or not any of the applications are res judicata or sub judice.
  - b. Whether or not both applications have merit
  - c. What orders should issue.
  - d. Who bears the costs?
7. The court has carefully considered the grounds on each of the applications, grounds of opposition, affidavit evidence, submissions by the learned counsel and come to the following determinations:
  - a. The law on res judicata and sub judice is codified in sections 7 and 6 respectively, of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya. The plaintiff's application mainly seeks that the plaintiff be excused from attending court on account of being seriously indisposed, and that



one Fatma Taher Sheikh Said be allowed to be substituted a witness only. The 2nd defendant claimed in the replying affidavit by one Victor Keittany that the application and suit was res judicata. This is a point of law, and the court has to address it first. In the ruling of 1<sup>st</sup> March 2023, on plaintiff's application for injunction dated 23<sup>rd</sup> June 2022 and that of the 2<sup>nd</sup> defendant for recusal of Naikuni J, dated 26<sup>th</sup> July 2022, the court inter alia held that:

“J. .... The plaintiff has not established the existence of any special circumstances that would allow the parties to re-litigate the issues that may well have been in the previously filed suit before the High Court. the plaintiff has been in occupation of the suit property since 1998, and must have been aware and involved in the filing and prosecution of the other litigations and appeals thereof as particularized above. The plaintiff therefore ought to have sought protection of her spousal rights by litigating in HCCC No. 57 of 2016, probably by seeking leave of court to be joined as a plaintiff therein, and front her cause of action for example, (against) the Bank over her claim and what I would now consider the estate of her deceased husband.

K. In conclusion, I find the application dated 23<sup>rd</sup> June 2022, is res judicata as the issues therein have been determined previously by a court of competent jurisdiction to the appeal level, as between the same parties and or through whom they claim...”

Indeed, though the court did not state so, this suit was subjudice HCCC No. 57 of 2016, that was then pending. The 2<sup>nd</sup> defendant has disclosed through their application that HCCC No. 57 of 2016 that was pending when the ruling of 1<sup>st</sup> March 2023 above was delivered was subsequently dismissed on 17<sup>th</sup> June 2023. That effectively means the issues herein are res judicata HCCC No. 57 of 2016, and without much ado, this suit is for striking out.

- b. Upon the dismissal of HCCC No. 57 of 2016, another suit over the suit property among others, being ELC No. E049 of 2023 was filed with an injunction application, which was granted. An appeal No. E185 of 2024 was filed before the Court of Appeal that was reportedly pending when the applications subject matter of this ruling were filed. The 2<sup>nd</sup> defendant in addition to seeking for the suit herein to be struck out for being res judicata also prays for proceedings to be stayed to await determination of Mombasa Civil Appeal No. E185 of 2024. Having found merit in the striking out prayer, I do not find any need to pronounce myself on the stay of proceedings prayer and the plaintiff's chamber summons as they all fall by the way.
  - c. As the 2<sup>nd</sup> defendant has succeeded in their application, then in terms of section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya that provides that costs follow the event unless where ordered otherwise on good reasons, the plaintiff will pay their costs.
8. From the foregoing determinations on the two applications, the court finds and orders as follows:
- a. The 2<sup>nd</sup> defendant's application dated 19th December 2024 for striking out the suit for being res judicata has merit.
  - b. The plaintiff's suit commenced through the plaint dated 23<sup>rd</sup> June 2022, is hereby struck out with costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 2ND DAY OF JULY 2025.**

**S. M. KIBUNJA, J.**



**ELC MOMBASA.**

In The Presence Of:

Plaintiff : Mr. Waziri

Defendants : Mr Wawire For 2<sup>Nd</sup> Defendant

Shitemi-court Assistant.

