



REPUBLIC OF KENYA



**Mitaboni Katani Company Limited v Muinde & 5 others (Environment & Land Case 126 of 2019) [2024] KEELC 509 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 509 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 126 OF 2019  
CA OCHIENG, J  
FEBRUARY 7, 2024**

**BETWEEN**

**MITABONI KATANI COMPANY LIMITED ..... PLAINTIFF**

**AND**

**JOSEPH MUTUA MUINDE ..... 1<sup>ST</sup> DEFENDANT**

**DOMINIC MUSEI IKOMBO ..... 2<sup>ND</sup> DEFENDANT**

**GEOFFREY KITHUKA MWANGANGI ..... 3<sup>RD</sup> DEFENDANT**

**HELLENA CHERESEM ..... 4<sup>TH</sup> DEFENDANT**

**THE DISTRICT LAND REGISTRAR, MACHAKOS ..... 5<sup>TH</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Notice of Motion Application dated the 30<sup>th</sup> November, 2022 brought pursuant to Order 2 Rule 15(a), (b), (c) and (d) and Order 51 Rule 1 of the *Civil Procedure Rules* as well as Sections 1A, 1B and 3A of the *Civil Procedure Act*. The Applicants' seek the following Orders:-
  1. The Plaint herein dated 18<sup>th</sup> November, 2019 be struck out and the Plaintiff's suit be dismissed.
  2. The Plaintiff do pay to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants their costs of this Application and those of the main suit.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Joseph Mutua Muinde. The Applicants contend that this Court lacks the jurisdiction to hear and determine this suit as the Plaintiff's allegations of actual or proposed acts or omissions involving fraud, negligence, and breach of duty or breach of trust by the Directors lie solely on the Company's Act and cannot be



determined by the Environment and Land Court. They insist that the Plaintiff does not disclose any or any reasonable cause of action. Further, that it is scandalous, frivolous and/or vexatious. They contend that the Plaintiff is intended to merely prejudice, embarrass or delay the fair trial of the main subject matter in this suit now pending trial at the Court of Appeal. They reiterate that the Plaintiff does not exist and the Plaintiff is otherwise an abuse of the process of the court as the issues raised therein are *res judicata*.

3. The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by one of the Directors called Kalekye Kilonzo where she deposes that the entire application is incompetent, bad in law, ill advised, abuse of the court process and clearly devoid of merit. She contends that the Applicants are not being truthful as they are the sole reason, parties are before court, hence their application should not be entertained. She insists that this court has jurisdiction to properly adjudicate over this matter as the same flows from the [Constitution of Kenya](#) under Article 162(b) which grants it exclusive jurisdiction to determine disputes related to the environment, the use and occupation of, and title to land. Further, that the [Environment and Land Court Act](#) under Section 13(2) grants the Court jurisdiction. She claims the matter before the Court of Appeal has a completely different cause of action and thus the matter before this Honourable Court is not sub judice nor *res judicata*. She argues that the assertions that the Plaintiff was struck off the register of companies and dissolved are unfounded as no evidence has been provided to prove the same, save for an extract of the purported Kenya Gazette Notice which in itself is not certified to prove authenticity of the same. She avers that the Applicants' had no rights to deal with the assets of a struck-out company as they did. Further, that once a company is struck off, as provided by the [Companies Act](#) under Section 905, all its property is vested in or held in trust for the company by the State. She reiterates that the actions of the Applicants' and their assertions that they were trustees of the Plaintiff are illegal and baseless assertions as they clearly contravened the statute. Further, that the Applicants' herein have their hands soiled and thus cannot seek equity as the maxim bars relief for anyone guilty of improper conduct in the matter at hand.
4. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants supported the instant Application, which was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures, pleadings herein and rivaling submissions, the only issue for determination is whether the Plaintiff should be struck off and this suit dismissed with costs to the Defendants.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have sought for the Plaintiff to be struck off and the suit dismissed claiming this Court lacks jurisdiction to handle the matter as the alleged acts complained of involve breach of duty or breach of trust by the Directors. They insist that the Plaintiff does not disclose any reasonable cause of action; is scandalous, frivolous and/or vexatious and intended to merely prejudice, embarrass or delay the fair trial of the pending trial at the Court of Appeal. Further, that the issues raised are *res judicata*. The Plaintiff has opposed the application insisting that this court has jurisdiction to handle the matter and that the dispute before the Court of Appeal is different from this case. It has denied that this suit is *res judicata*.
7. The legal provisions governing the striking out of pleadings is contained in Order 2 Rule 15(1) of the [Civil Procedure Rules](#), 2010 which provides thus:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- (b) it is scandalous, frivolous or vexatious; or



- (c) it may prejudice, embarrass or delay the fair trial of the action;
- or
- (d) it is an abuse of the process of the court.”

8. In the Court of Appeal case of *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 Others* [2005] eKLR it provided the parameters on striking out of pleadings and stated thus:-

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *Dt Dobie & Company (kenya) Ltd. v Muchina* [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

9. While in *Delphis Bank Limited v Caneland Limited* [2014] eKLR, the Court of Appeal while dealing with the issue of striking out of pleadings held that:-

“The leading local case on interpretation of Rule 13 of Order VI of the *Civil Procedure Rules* on which the application striking the defences was based is perhaps *D.T. Dobie & company (Kenya) Ltd v Muchina* which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that;

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”

10. In this instance, the Plaintiff instituted a suit vide a Plaint dated the 18<sup>th</sup> November, 2019 where they sought for the following Orders:-

- a. Declaration that the acquisition of, and subsequent transfers and any other dealings by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants with land parcel No. Mavoko Town Block 2/199 was fraudulent, criminal and dishonest ab initio.
- b. An order of this Honourable Court directing the 5<sup>th</sup> Defendant herein to rectify the register of land parcel No. Mavoko Town Block 2/199 by cancelling the names of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein as the registered proprietors thereof and revert the registration of the said parcels into the name of the Plaintiff.



- c. In the alternative to prayer (b) in the foregoing, an Order of this Honourable Court directing the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants jointly and severally to pay the full consideration for land parcel No Mavoko Town Block 2/199 to the Plaintiff at prevailing market rates.
  - d. Any other further or such orders as this Honourable Court may deem fit, just and expedient to grant.
  - e. Interests on (c) above at prevailing court rates until payment in full.
  - f. Costs and interest of this suit.
11. While in Machakos ELC No. 112 of 2009 *Peter Mutua Muinde & Dominic Musei Ikombo (suing as trustees and on behalf of Mitaboni Katani Co. Ltd) v Geoffrey Kithuka Mwangangi & Hellena Cheserem* the Plaintiffs therein vide a Plaint dated the 20<sup>th</sup> April, 2009, where they had sought for the following Orders:-
- a. An order directing the Land Registrar Machakos to rectify the register in respect of title Mavoko Town Block 2/199 by reinstating the Plaintiffs as registered proprietors thereof as trustees of Mitaboni Katani Company Limited.
  - b. An order compelling the Defendants to avail the title deed in respect of title Mavoko Town Block 2/199 to the Land Registrar Machakos for cancellation failing which the Land Registrar be at liberty to effect the rectification notwithstanding that the title deed will not have been availed to him.
  - c. General damages for breach of contract and interest thereon at court rates.
  - d. Costs of this suit and interest on the decretal amount at court rates.
12. The Defendants therein filed a Counter-claim dated 2<sup>nd</sup> June, 2009 where they sought the following Orders:
- a. Judgement be entered for the Defendants on the Counter-claim.
  - b. General damages for breach of contract.
  - c. The Plaintiffs be compelled to point out the beacons over Mavoko Town Block 2/199.
  - d. The Plaintiffs be compelled to issue vacant possession over Mavoko Town Block 2/199.
  - e. Costs of the suit.
  - f. Interests on (b) above at Court rates until payment in full from date of filing suit.
13. The trial Court after hearing the matter entered Judgment in favour of the Defendants on 2<sup>nd</sup> March, 2018 as per the Counter-claim. The Plaintiffs therein being aggrieved, filed an Appeal being Nairobi Civil Appeal No. 58 of 2019 which was dismissed on 7<sup>th</sup> August, 2020.
14. I note the fulcrum of the dispute herein and in the previous suit revolved around the suit land being Mavoko Town Block 2/199. Further, that the previous suit as well as the subsequent Appeal in respect to the suit land were heard and determined on merit. The Plaintiffs have now filed this suit seeking to litigate over the same suit land claiming the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not have capacity to file the previous suit, or deal with suit land.



15. On *res judicata*, Section 7 of the [Civil Procedure Act](#), stipulates 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. The [Civil Procedure Act](#) provides explanations with respect to the application of the *res judicata* rule. Explanations 1-6 states thus:-

“Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

17. In the case of [Stephen Wanganga Njoroge v Stanley Ngugi Njoroge & Another](#) (2017) eKLR which referred to [Uhuru Highway Development Ltd v Central Bank & Others](#), CA No. 36 of 1996 where the Court of Appeal stated that:-

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.” Emphasis mine

18. Further, the Supreme Court of Kenya in the case of [John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others](#) (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), held that:-

“Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Gitbae & 2 others, (2010) eKLR, under five distinct heads:

(i) the matter in issue is identical in both suits;



- (ii) the parties in the suit are the same;
- (iii) sameness of the title/claim;
- (iv) concurrence of jurisdiction; and
- (v) finality of the previous decision.” Emphasis mine

19. On perusal of all the pleadings including the respective documents, insofar as the Plaintiff herein has sued the Plaintiffs in the previous suit as 1<sup>st</sup> and 2<sup>nd</sup> Defendants, I note in both suits, the Claimant was Mitaboni Katani Company Limited. It is also evident that the current 3<sup>rd</sup> and 4<sup>th</sup> Defendants were Defendants in the previous suit. I note the Plaintiff herein has simply clothed the claim in fresh apparel but if dissected the dispute remains one and the same. It is trite that litigation must come to an end. Based on the facts before me while relying on the legal provisions I have cited above, as well as associating myself with the decisions quoted on *res judicata*, and applying them to the circumstances at hand, I find that the fulcrum of the dispute herein and the previous suit was the same. Further, the parties were the same, litigated under same title, and the previous suit was heard as well as determined on merit. In the foregoing, I find that this suit is hence *res judicata*.

20. In the foregoing, I find that the Plaintiff herein does not disclose any reasonable cause of action. Further, that it is scandalous, frivolous and vexatious and amounts to an abuse of the court process since the issues raised herein had been heard as well as determined in the previous suit which was litigated upto the Court of Appeal.

21. In the circumstance, I find the Notice of Motion Application dated the 30<sup>th</sup> November, 2022 merited and will allow it.

22. I proceed to strike out the Plaintiff and dismiss this suit with costs to the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

