



**Kiminda & another v Shivam Pindoriya t/a Harshvi Auto Spares & Hardware Suppliers & 2 others; Otieno & 5 others (Interested Parties) (Environment & Land Case E030 of 2023) [2024] KEELC 13526 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13526 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E030 OF 2023  
CA OCHIENG, J  
DECEMBER 3, 2024**

**BETWEEN**

**PETER MUCHIRI KIMINDA ..... 1<sup>ST</sup> PLAINTIFF**

**PETER MUNGAI KARANJA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SHIVAM PINDORIYA T/A HARSHVI AUTO SPARES & HARDWARE SUPPLIERS ..... 1<sup>ST</sup> DEFENDANT**

**MARACAY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**SHREEJI GROUP LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**EMMANUEL JUMA OTIENO ..... INTERESTED PARTY**

**EDWARD KIMORI ..... INTERESTED PARTY**

**PETER MUNGAI ..... INTERESTED PARTY**

**SAMUEL GIKONYO ..... INTERESTED PARTY**

**HEZEKIA KARIUKI MWANGI ..... INTERESTED PARTY**

**JACKSON KASAMU KAVISU ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination are the Defendants' Notice of Motion Application dated the 17<sup>th</sup> January, 2024 and the Plaintiffs' Notice of Preliminary dated the 19<sup>th</sup> April, 2024.



2. The Defendants' Notice of Motion Application is brought pursuant to Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 2 Rule 15 of the *Civil Procedure Rules*. In the said Application, the Defendants' seek the following Order:-
  - a. Spent
  - b. The Plaint dated 29<sup>th</sup> March, 2023 and filed on 3<sup>rd</sup> April, 2023 be struck out with costs.
  - c. The costs to be borne by the Plaintiffs.
  - d. The Honourable Court be pleased to issue such further or other Orders as may appear to it just and convenient.
3. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Shivam Pindoriya. The Defendants contend that this court is devoid of jurisdiction to handle this suit as it is in breach of the provisions of Section 6 of the *Civil Procedure Act*. Further, that the suit as well as the Application herein is scandalous and constitutes an abuse of the court process. They explain that the Plaintiffs' are aware of the proceedings in MC ELC No. E036 of 2023: *Shreeji Group Limited v Comfort Homes Ltd, Hezekiah Mwangi Kariuki & Jackson Kasamu Kavisu* as they sought joinder in the Lower Court case before moving to file the instant suit. Further, that the Plaintiffs proceeded to file the instant suit, despite the pendency of two previously instituted suits. They aver that the subject matter herein is a dispute revolving around ownership of the two properties being LR No. 20449 and LR No. 20450 respectively. Further, that, to make a determination of the two suit properties as proposed herein, would amount to sub judice. They argue that it would be an exercise in futility to maintain the subject suit and proceed to render another Decree in respect of the Title to and/or ownership of the suit properties, parallel and contradictory to MC ELC No. E036 of 2023: *Shreeji Group Limited v Comfort Homes Ltd, Hezekiah Mwangi Kariuki & Jackson Kasamu Kavisu*.
4. The Plaintiffs opposed the instant Application by filing a Replying Affidavit sworn by Peter Muchiri Kiminda where he deposes that he is well versed with the dispute herein. He insists that the instant Application is premature, ill informed, ill-advised and frivolous. He denies being a party in Mavoko CM ELC No. 035 of 2023 and Mavoko CM ELC No. 036 of 2023 respectively. Further, that they learnt of the Defendants unfounded claim against over LR No. 20449 and LR No. 20450, which is registered in both the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs' respective names, hence they instituted this suit. He argues that the pecuniary value of the suit properties being LR No. 20449 and LR No. 20450, is beyond the jurisdiction of the Magistrates' Court. He highlighted various proceedings in respect to the dispute herein, which have been dealt with, by the different courts. He avers that due to the pronouncement of Hon. R. W Gitau on 7<sup>th</sup> November, 2023, the Defendants herein proceeded to file Misc Application No. 035 of 2023: *Maracay Limited v Comfort Homes Limited & 2 Others* to have MCELC No. E035 of 2023 transferred to this Court, which Application they did not oppose. He contends that the Defendants thereafter moved to Mavoko Magistrate's Court No. 1 under Hon. B Ojoo (SPM) in MCELC No. 036 of 2023, where she held that the said Court had jurisdiction to handle the said dispute. Further, they filed an Application for review before the said court. He reiterates that the Mavoko Chief Magistrate's Court lacks jurisdiction to handle the matter therein.
5. The Plaintiffs' proceeded to file a Notice of Preliminary dated 19<sup>th</sup> April, 2024, which is premised on the following grounds:-
  - a. The Defendants' Application dated 17<sup>th</sup> January, 2024 as filed is incompetent and offends Section 7 of the *Civil Procedure Act*, 2010.



- b. The Defendants' Notice of Motion dated 17<sup>th</sup> January, 2024 is frivolous, vexatious and an abuse of the Court Process. It is brought in bad faith and should be dismissed with costs.
6. The instant Application and Notice of Preliminary Objection were canvassed by way of written submissions.

### **Analysis and Determination**

7. Upon consideration of the instant Notice of Motion Application and Notice of Preliminary Objection, including the respective Affidavits and rivaling submissions, the only issue for determination is whether the Plaintiffs' suit as against the Defendants' should be struck off.
8. The Defendants' claim this suit is sub judice by dint of MC ELC No. E036 of 2023: Shreeji Group Limited v Comfort Homes Ltd, Hezekiah Mwangi Kariuki & Jackson Kasamu Kavisu and should hence be struck off.
9. The legal provisions governing striking out of pleadings is contained in Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 which stipulates that:-

“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.”

10. The Court of Appeal in *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 Others* [2005] eKLR provided 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.”



11. While in the case of *Delphis Bank Limited v Caneland Limited* [2014] eKLR, the Court of Appeal while dealing with the issue of striking out 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.”

12. In this instance, I note the fulcrum of the dispute herein revolves around proprietary interest in land being LR No. 20449 and LR No. 20450 respectively. Both the Plaintiffs and Defendants have filed suits in different courts seeking proprietary interest over the two parcels of land being LR No. 20449 and LR No. 20450. The Plaintiffs insist that the Mavoko CM’s Court does not have pecuniary jurisdiction to deal with the disputes herein, which fact is opposed by the Defendants. I note in one suit being MCELC No. E035 of 2023, where the Magistrate’s court downed its tools citing lack of jurisdiction, the suit land is LR No. 20449 while in another suit being MCELC No. E 036 of 2023, the suit land is LR No. 20450 but a different Magistrate’s court insisted that it had jurisdiction to handle it.
13. Be that as it may, noting that this is a Superior Court to the Chief Magistrate’s Court and is clothed with jurisdiction to handle all land matters by dint of Section 13 of the *Environment and Land Court Act*, I opine that since the deponent Peter Muchiri Kiminda who is one of the registered proprietors of the suit properties was not a party in the two aforementioned suits, filed in Mavoko and with the instant suit touching on both parcels of land, it would be unjust to strike it out, as this will deny him the right to be heard as enshrined in Article 50 of the *Constitution*.
14. Further, it is my considered view that all parties who claim proprietary interest on the suit lands should have been made parties to the suit but since the Defendants have not denied that they failed to join Peter Muchiri Kiminda in the two suits filed in Mavoko, I find that this would defeat the claim of sub judice at his instance. I opine that all the matters revolving around the two suit properties including the parties herein, should all be dealt with in this court and not separated.
15. In the case of *Omoke v Kenyatta & 83 others* (Petition 11 (E015) of 2021) [2021] KESC 27 (KLR) (Civ) (9 November 2021) (Ruling), the Supreme Court while dealing with consolidation of several suits filed over the same subject, observed as following:-

“Consolidation of suits or appeals will be ordered where there are common questions of either law or fact in two or more suits or appeals and where it is desirable that all the related matters be disposed of at the same time.”

16. Even though no party sought for consolidation of the three related suits, in my view, consolidating all the suits would be the best remedy as there are common questions of law and fact in all of them and this will culminate in achieving the overriding objective of this court and meet the ends of justice. In the foregoing, while exercising the inherent jurisdiction of this court, and associating myself with the decisions cited, I will decline to strike out the Plaint dated 29<sup>th</sup> March, 2023 and filed on 3<sup>rd</sup> April, 2023



as sought by the Defendants but direct that Machakos ELC 030 of 2023, Machakos ELC 4 of 2024 and Mavoko MCELC No. 036 of 2023 should be consolidated and heard together, before this Court.

17. In the foregoing, I find the Notice of Motion Application dated the 17<sup>th</sup> January, 2024 unmerited and will dismiss it, but allow the Notice of Preliminary Objection dated the 19<sup>th</sup> April, 2024.

18. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 3<sup>RD</sup> DAY OF DECEMBER, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Ms. Rotich holding brief for Orlando for Plaintiffs

Nasimiyu for Defendants

No appearance for Interested Parties

Court Assistant - Simon

