



**Kasuku v Osogo & 2 others; Khukheri Holdings Ltd (Intended Defendant)
(Civil Suit 40 of 2014) [2022] KEELC 3121 (KLR) (9 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 40 OF 2014**

OA ANGOTE, J

MAY 9, 2022

BETWEEN

ARMSTRONG FRED KASUKU PLAINTIFF

AND

JAMES CHARLES NAKHWANGA OSOGO 1ST DEFENDANT

MARIA ELIZABETH NAKHUBALI OSOGO 2ND DEFENDANT

RIVERA PROPERTIES KINGS DEVELOPERS LTD 3RD DEFENDANT

AND

KHUKHERI HOLDINGS LTD INTENDED DEFENDANT

RULING

Background

1. Vide a Notice of Motion dated 26th March, 2021 anchored on the provisions of Order 1 Rule 10 (2) and (4) and Order 8 Rule 3 of the [Civil Procedure Rules](#) 2010, the Plaintiff/Applicant seeks the following orders:
 - a. That the Plaintiff be granted leave to enjoin KhuKheri Holdings Limited as the 4th Defendant in this suit.
 - b. That the Plaintiff be granted leave to amend the Re Amended Plaintiff in terms of the annexed Amended Re Amended Plaintiff filed herewith.
 - c. That the costs of the application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of the Plaintiff who deponed that contemporaneously with the filing of the suit, he filed an application for an



interim injunction which was declined on the erroneous basis that his suit was based on a disposition in land without any agreement in writing contrary to Section 3(3) of the Contract Act.

3. It was deponed by the Plaintiff that he filed a Notice of Appeal against the Ruling aforesaid on 12th August, 2014 and applied for copies of the proceedings which have yet to be availed to him; that the 1st and 2nd Defendants were the joint registered owners of the suit property known as L.R 1/390 measuring 1.250 acres and that vide an agreement dated 7th November, 2009, they transferred a portion thereof measuring 0.25 (1/4) acres to him.
4. It is the Plaintiff's case that in breach of the agreement, the 1st Defendant on 6th July, 2011 transferred the suit property to the 3rd Defendant, a company in which the 1st and 2nd Defendants are shareholders and directors; that on 14th August, 2014, while the suit was pending, the 1st and the 2nd Defendants' children incorporated the intended 4th Defendant and that five months after its' incorporation, the intended 4th Defendant was registered as the owner of the apartments.
5. According to the Deponent, the intended 4th Defendant is a cloak of the 1st and 2nd Defendants and the actions aforesaid are attempts by the Defendants to defeat justice and that a judgment entered in his favour cannot be enforced against the 1st and 2nd Defendants because they no longer hold any interests in the said suit property or the apartments erected and constructed thereon because all the apartments are in the names of third parties and the Intended 4th Defendant thus necessitating its joinder.
6. It was deponed by the Plaintiff that the provisions of Sections 50, 51 and 52 of the [Land Registration Act](#) define a prejudicial disposition and grant this court powers to set aside such dispositions; that the law provides for the principle of lifting of the corporate veil in instances of fraud, improper conduct or public policy considerations and that no prejudice will be occasioned by the joinder of the Intended 4th Defendant
7. In response to the application, the 1st and 2nd Defendants filed a Preliminary Objection dated 26th April, 2021 and averred as follows;
 - i. The Application dated 26th March, 2021 is res judicata.
 - ii. The Application dated 26th March, 2021 is a collateral attack on the Rulings delivered herein on the 8th August, 2014 and 26th November, 2018.
 - iii. The Honourable Court cannot sit as an appellate court in respect of its own decisions.
8. The intended 4th Defendant filed Grounds of Opposition to the application and averred as follows:
 - i. The Intended 4th Defendant is not privy to the alleged contracts the subject of these proceedings and thus cannot in law be called to answer for any alleged breach thereunder.
 - ii. The Application is a disguised application for attachment before judgment;
 - iii. The Application is res judicata and offends the principle of issue estoppel pursuant to the Ruling of 26th November, 2018 and 8th August, 2014.
 - iv. The intended 4th Defendant is neither a necessary nor proper party for the purposes of these proceedings.
 - v. The application is an abuse of process, frivolous, vexatious and speculative.



Submissions

9. The Plaintiff, through his counsel, submitted that the dispositions of a number of apartments made on 14th December, 2014 by the 3rd Defendant (where the 1st and 2nd Defendants are shareholders and directors) to the Intended 4th Defendant Khukheri Holdings Limited (whose shareholders and directors are the 1st and 2nd Defendants children) are prejudicial dispositions within the meaning of Sections 50, 51, 52 and 53 of the [Land Registration Act](#) and violates Section 106(3)(a) of the said [Land Registration Act](#).
10. It was submitted that the Defendants' actions further violate the common law doctrine of lis pendens which applies by virtue of Section 3(1) (c) of the [Judicature Act](#); that the doctrine was espoused by the Court of Appeal in [Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another](#) (2015) eKLR and that it is apparent that the apartments were transferred to the intended 4th Defendant during the pendency of the suit whose consequence is that the subject matter has been placed beyond the Plaintiff's execution.
11. In support of their prayer for substitution and addition of parties, counsel urged the court to be guided by the cases of I.G (minor suing through next friend and mother *P.B. O vs James Nyangai Osoro & 2 Others* [2010] eKLR; *Hadson Moffat Kamau vs Makomboki Tea Factory Limited* [2007] eKLR and [Guardian Bank Limited vs Deposit Protection Fund Board the Liquidation of the Euro Bank Limited \(In Liquidation\) & another](#) [2010] eKLR.
12. It was submitted that the Defendants' objections to the application are unmerited; that the application cannot be res judicata as the court has not previously pronounced itself on the question of the intended 4th Defendant's joinder; that the Ruling of 8th August, 2014 related to an application by the Plaintiff against the Defendants for injunction which did not involve the intended 4th Defendant and that the Ruling of 26th November, 2018 related to a plea to enjoin Kings Developers Limited and not Khukheri Holdings Limited. The 1st, 2nd & 3rd Defendants did not file submissions.
13. The Intended 4th Defendant's counsel submitted that the application ought to be dismissed because the Plaintiff has not met the criteria for joinder; that there is no privity of contract between the intended 4th Defendant and the Plaintiff; that it is a fundamental principle of law that it is only a party that is subject of a contract that can be called to answer for it and that a party cannot by the mere fact of its close proximity to a party be held liable under a contract of which it is not.
14. Reliance was placed on the case of [Agricultural Finance Corporation vs Lengeta Limited](#) [1985] eKLR which quoted the case of *Philip Kipchirchir Murgor & 2 others vs Josiah Nyawira Ogina & 2 others* (2020) eKLR.

Analysis and Determination

15. Having analyzed the pleadings and submissions by the parties, the issues that arise for determination are;
 - ii. Whether the present Application is competent?
 - iii. Whether the prayer for joinder is merited?
 - iv. Whether the prayer for amendment is merited?
16. The 1st and the 2nd Defendants filed a Preliminary Objection while the intended 4th Defendant responded to the Motion by filing the Grounds of Opposition respectively. It is common ground



that the only way facts deponed in an affidavit can be disputed or controverted is by filing a Replying Affidavit or cross examination as affirmed by the Court of Appeal in *Daniel Kibet Mutai & 9 others vs Attorney General* [2019] eKLR.

17. Preliminary Objections and Grounds of Opposition only address issues of law. That being the case, the court will proceed on the assumption that the facts raised in the Plaintiff's Supporting Affidavit are uncontested.
18. The Preliminary Objection and Grounds of Opposition are premised on the contention that the application offends the principles of res judicata and issue estoppel. According to the Defendants, the court in its Ruling of 26th November, 2018 dealt with the question of joinder of a proposed Defendant and vide the Ruling of 8th August, 2014, the court held that the Plaintiff did not have any basis of suing the 3rd Defendant in the absence of a written contract.
19. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* which 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”.
20. The Court of Appeal in the case of *The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others*, [2017] eKLR, held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”



21. It is apparent that for the bar of res judicata to be effectively raised, the aforesaid elements must be proved in conjunctive terms.
22. As regards issue estoppel, its' nature was succinctly set out in the judgment of *Diplock LJ (as he then was) in Mills vs Cooper* (1967) 2 All ER 100 at 104, where he stated;

“The doctrine of issue estoppel in civil proceedings is of fairly recent and sporadic development, though none the worse for that...This doctrine, so far as it affects civil proceedings, may be stated thus: a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or of the legal consequences of facts, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction in such previous civil proceedings to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings has since become available to him”.
23. The rationale for the doctrine of issue estoppel was affirmed by the Court of Appeal in *Royal Media Services Limited & 2 Others vs Attorney General & 8 others* [2014] eKLR who placed reliance on the case of *Hunter vs Chief Constable of the West Mid Land Police and Others* [1981] 3WLR900 wherein Lord Diplock had this to say inter alia:

“It would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.”
24. The court further placed reliance on the case of *Trade Bank Limited vs LZ Engineering Construction Limited* [2000] IEA 266 stating that;

“As per the decision in Trade Bank Limited versus LZ Engineering Construction Limited (Supra) issue estoppel, applies to matters ruled upon by a Court of law and on issues of fact.”
25. The court has considered the Rulings of 8th August, 2014 and 26th November, 2018. The Ruling of 8th August, 2014 was in respect of an application seeking injunctive orders against the Defendants. The court declined to issue the injunctive orders having found that the Plaintiff had not established a prima facie case.
26. The Ruling of 26th November, 2018 addressed several applications including prayers seeking to dismiss the suit, which prayers were rejected. Relevant to this application was the Plaintiffs' application for joinder of King Developers Limited. In declining the said joinder, the court held;

“In the instance case, the proposed Defendant had its share of the Apartments in the Joint venture which venture has been completed. The Plaintiff is not seeking any relief against the proposed Defendant. The 1st and 2nd Defendants were given their share of the Apartments. If the Plaintiff will succeed in his claim, he will go for the six apartments he is claiming from the 1st and 2nd Defendants share. He will not go for the share of the proposed Defendant.”
27. As regards res judicata, the court is not convinced that the matter is res judicata. The Ruling of 8th August, 2014 was with respect to an application for injunction while the Ruling of 26th November,



2018 addressed among others an application for joinder of Kings Developers Limited, a different entity from Khukheri Holdings whom the Plaintiff is seeking to join in these proceedings.

28. As to the question of issue estoppel, the court found King Developers Limited were not a necessary party. In the present application, the Plaintiff's case is that the 1st and 2nd Defendants against whom they claim a portion of the suit property no longer hold any interest therein, the same having been transferred to the Intended 4th Defendant during the pendency of the suit and in so doing, have removed the suit property from the ambit of this Court. In view of the different circumstances, the court is not convinced that the matter offends the principle of issue estoppel.
29. The issue of joinder of parties is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

30. Order 10 (4) of the Civil Procedure Rules states as follows:

“Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

31. The Court of Appeal in *Pravin Bowry vs John Ward and Another* [2015] eKLR considered the principles to be considered in an application for joinder of parties to a suit. In so doing, the court placed reliance on the Ugandan case of *Deported Asians Custodian Board vs Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”



32. The Court of Appeal also referred to its earlier decision in *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR on the interpretation of Order 1 of the Rules where it had observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.

...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

33. The Plaintiff lays claim on a portion of the suit property being originally L.R 1/390 (L.R No 1/357). It is the Plaintiff's case that vide an agreement entered into between himself on the one hand and the 1st and 2nd Defendants on the other hand, it was agreed that in consideration of the amounts paid to National Bank by the Plaintiff on account of the obligations owed to it by the 1st and 2nd Defendants, ¼ acre portion of the suit property would be excised and transferred to him.
34. According to the Plaintiff, the Defendants breached the agreement and entered into a joint venture agreement with Kings Developers Limited and that the 1st and 2nd Defendants further transferred the property to the 3rd Defendant, which transfer is disputed hence their presence in the suit.
35. The Plaintiff is seeking inter-alia for a mandatory injunction directing the 3rd Defendant to execute in his favour instruments of transfer or conveyance in respect of five apartments and 0.4 share to be held in common in one other apartment erected being L.R No 1/390 Nairobi.
36. The Plaintiff contends that the proposed 4th Defendant is an entity created by the 1st and 2nd Defendants' children whose sole intent is to move the suit property outside the ambit of the court; that the intended 4th Defendant is for all intents and purposes a cloak for the fraudulent actions of the 1st and 2nd Defendants' and that there is need to among others, pierce its veil of incorporation and investigate the transfer to it of the apartments which the Plaintiff asserts ought to have been registered in the 1st and 2nd Defendants names.
37. The intended 4th Defendant has not controverted the Plaintiff's factual averments and more particularly that during the pendency of the suit, the Intended 4th Defendant whose directorship and shareholding consists of the 1st and 2nd Defendants children, was registered as a proprietor of some apartments which ought to have been registered in the 1st and 2nd Defendants' names.
38. Black's Law Dictionary, 9th edition, defines lis pendens as the jurisdiction, power or control acquired by a court over property while a legal action is pending.



39. Lis pendens is a common law principle that was enacted into statute by Section 52 of the Indian Transfer of Property Act (ITPA) – now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in *Bellamy vs Sabine* [1857] 1 De J 566 held as follows:

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendente lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgement or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

40. The essence of the doctrine of lis pendens is that it prohibits a party to a suit from transferring or altering the status of the suit premises, while the suit is pending. In the present case, it has been demonstrated that certain apartments have been transferred to the Intended 4th Defendant during the pendency of the suit.

41. In the circumstances, it is apparent that notwithstanding the lack of contractual relationship between the Plaintiff and the intended 4th Defendant, the orders sought herein might affect the proprietorship of the suit property which is currently registered in the name of the intended 4th Defendant.

42. The Plaintiff has also alleged fraud in the manner the suit property was sold to the Intended 4th Defendant and asserts that the same constitutes a prejudicial disposition. The intended 4th Defendant ought to respond to the said allegations to enable the court to effectually and completely adjudicate upon the dispute. In the circumstances, the court is convinced that the intended 4th Defendant is a necessary party herein.

43. The general power of the court to allow parties to amend pleadings is drawn from Section 100 of the *Civil Procedure Act* which provides as follows;

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

44. Order 8 Rule 3(1), (2) and (5) of the Civil Procedure Rules provide as follows:

“(3) (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(3) (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

“(3) (5) 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.”

45. Whereas Order 8 Rule 5(1) provides as follows:

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

46. The principles upon which a court acts in an application to amend pleadings were set out by the Court of Appeal in *Central Kenya Limited vs Trust Bank limited* (2000) eKLR which referred to commentaries on the Indian Civil Procedure Code by Chittaley and Rao where the learned authors stated as follows with regards to the rule to amendment of pleadings;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state: A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

47. More recently, the Court of Appeal in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] eKLR affirmed that the law applicable to amendment of pleadings is as stated in Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition and captured by the Court of Appeal in *Joseph Ochieng & 2 Others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

48. It is apparent that the courts' discretion to amend pleadings at any stage of the proceedings is wide and unfettered except that it should be exercised judicially and upon the defined principles so as to bring out the real issues in controversy between the parties, and on such terms as to costs as may be just.

49. In the present case, the Plaintiff is seeking to re-amend the Plaint to include the Intended 4th Defendant and its claims against it. The nature of its claim, save for the addition of the intended 4th Defendant, has not changed. Having found that the intended 4th Defendant is a necessary party in these proceedings, it follows that the amendment is necessary to reflect this position.



50. For those reasons, the court finds that the Plaintiff's application dated 26th March, 2021 is merited and the same is allowed in the following terms:

- i. The Plaintiff be and is hereby granted leave to join Khukheri Holdings Limited as the 4th Defendant in this suit.
- ii. The Plaintiff be and is hereby granted leave to amend the Re- Amended Plaint in terms of the annexed Amended Re-Amended Plaint within 14 days and serve the same on the Defendants.
- iii. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF MAY, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Amollo for the Plaintiff/Applicant

Mr. Anzala for 3rd Defendant

Mr. Anzala for Mureithi for Intended 4th Defendant

Ms Inimah for Luseno for 1st and 2nd Defendant

Court Assistant – June Nafula

