



**Makau & another v Stecol Corporation (Civil Case E023 of 2023)  
[2025] KEHC 3196 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 3196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E023 OF 2023  
FR OLEL, J  
JANUARY 21, 2025**

**BETWEEN**

**PATRICK M MAKAU ..... 1<sup>ST</sup> PLAINTIFF**

**FLORENCE M MWANGANGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**STECOL CORPORATION ..... DEFENDANT**

**RULING**

**A. Introduction**

1. Before the court for determination are two Notice of Motion applications one dated 13<sup>th</sup> June 2024 filed by the plaintiffs/Applicants seeking to have the Defendant/Respondent furnish security in the sum of Kshs.75,400,213.11/= and the second notice of motion Application dated 25<sup>th</sup> June 2024 filed by the defendant/Respondent seeking to have this suit stuck out with costs.

**I. The Plaintiff’s Notice Of Motion Application Dated 13<sup>th</sup> June 2024.**

2. The plaintiff’s Application dated 13<sup>th</sup> June 2024 was filed pursuant to, provisions of Order 39 Rules 1,2 and 5(1),(2) and (3), Order 40 Rule 2 and 51 Rule 1 of the Civil procedure rules, sections 1A,1B,3,3A and 63(b) of the Civil Procedure Act and seek for the following orders;
  - a. Spent
  - b. That the suit herein be heard and determined urgently as the Plaintiffs/Applicants, members of their family and employees are residing in badly damages premises on their land title number Mavoko Town Block 2/1182 due to serious extensive cracks from explosions of stone blasting in the Respondent’s quarry at Katani on LR. No 12610/4 , the said premises having a high possibility of collapsing yet being the only home and accommodation that the Applicants have.



- c. That Pending the hearing and determination of the suit, the Defendant/Respondent do show cause why within seven (7) days or within such time as the Court may deem fit in the circumstances herein, why it should not furnish security in the sum of Kshs 75,400,213/11 being the costs of construction materials, consultant fees and contractors charges required to complete the construction of a main house for the Applicants pursuant to consent orders and compromise and settlement agreement in Machakos ELC Case no 466 of 2017 , the Respondent having commenced the construction on land title Mavoko Town Block 3/84493 as compensation to the Plaintiffs for the said Plaintiff's damaged main house on land title number Mavoko 3/1182 then abandoning the construction in breach of the said orders and agreement , or such other sum as this Honourable Court deems as sufficient security on the said claim in the suit herein.
  - d. That Until such time as the Respondent appears before the honourbale Court to show cause why it should not furnish such security, this Honourable Court be pleased to attach forthwith the Respondent's rights and interests in the contract between the Respondent and one Endeavours Investments or such other employer on the works that the Respondent executing at the Tatu City construction project, with a value equivalent to the said Khs.75,400,212/71 or such other sum as the Honourable Court deems as sufficient security on the said sum in the suit herein.
  - e. That this Honourable Court do issue such other orders as it may deem fit and just to issue to serve the ends of justice in the circumstances of the suit herein.
  - f. The costs of this Application be borne by the Respondent.
3. The Application is supported by the grounds set out on the face of the said Application and the Supporting Affidavit of the 2<sup>nd</sup> plaintiff, Florence M. Mwangangi, who deposed that by this suit they were claiming a costed sum of Kshs.75,400,213.11/= which they urgently required to expend on construction material, consultants fee, and contractors charges for completion of the construction of their house, which was to be built by the respondent in accordance with the "compromise and settlement agreement" entered into and subsequently adopted as "consent judgment" in MACHAKOS ELC CASE NO.466 OF 2017 ( herein after referred to as " The ELC suit").
  4. The 2<sup>nd</sup> plaintiff deponed that they had constructed their matrimonial home on their parcel of land registered as L.R. No Mavoko town block 3/1182 (hereinafter referred to as "the matrimonial home"), which home comprised of a single-storied main house, staff quarters, stores and perimeter wall among other structures.
  5. That due to powerful explosions emanating from stone blasting activities at the Respondent's quarry situated on Katani Mavoko L.R NO 12610/4,(hereinafter referred to as the "Katani stone quarry site"), the structures and buildings within their "the matrimonial home" had developed serious cracks at critical sections such as the beams, columns, walls, floors, and roof, which ultimately compromised the safety of the said buildings. Various photographs of the structural defects caused on the "matrimonial home", joint reports of structural Engineers, and geological reports were filed to show the extent of structural damage occasioned to the said "Matrimonial home".
  6. To protect their interest and to get compensation for damages caused to their "matrimonial home" by the defendant's unlawful mining activities, they instituted the "ELC Suit" and obtained restraining orders stopping further mining activities within the said "Katani stone quarry site", but during the pendency of the said "ELC suit" a lot of negotiations were held and the parties did eventually enter



into a binding agreement, termed as “settlement and compromise Agreement”, which agreement was adopted in the said “ELC suit” as a “consent judgment”.

7. Under the terms of the said deed of compromise and settlement, the respondent undertook to build for them a new house similar to their extensively damaged “matrimonial home” on land title number Mavoko Town Block 3/84492, which they owned.
8. Further, under the said compromise, construction of the plaintiff’s new home would be based on pre-approved plans, and costs captured in the bills of quantities and was to be undertaken by a contractor also appointed by the respondent. The construction was assessed, costed, and approved at Kshs.54,400,213.11/=.
9. The respondent’s contractor commenced construction of the new house at the new site but abandoned the site after building the new house foundation because the defendant blatantly failed to pay for the said construction and proceeded to relocate their officers from their known address. It was not until towards the end of 2023, that the plaintiffs managed to trace the defendant at their current location at Tatu City.
10. From the respondent’s past reprehensible conduct of procuring the withdrawal of “The ELC suit”, on its undertaking to construct for the applicants a new house, commencing construction then abandoning the project without notice and disappearing, the applicants were reasonable apprehensive, that the respondent would still abscond, leave, remove their property from the local limits of the court’s jurisdiction or dispose or deal with their properties with intent to avoid the process of the court and to obstruct or delay the execution of any decree that may be eventually passed against them
11. The respondent had further demonstrated contempt of court orders and the judicial process as a whole, and thus it was proper and just under the prevailing circumstances, that they be granted the prayers sought in this motion.

#### **The Defendant/Respondent Response to the Application dated 13.06.2024**

12. The Defendant filed ground of opposition dated 25.06.2024 in opposition to the said Application and objected to the orders being granted on grounds that;
  - a. There were previous proceedings between the same parties, that is, Machakos ELC 466 of 2017; Patrick M. Makau & Another vs The Honourable Attorney General and 3 others on the same subject matter which was settled pursuant to a compromise and settlement agreement dated 07.08. 2020.
  - b. The Plaintiffs have instituted this new suit, instead of seeking execution in Machakos ELC 466 of 2017.
  - c. This present suit is res Judicata, a gross abuse of process and ought to be struck out.
  - d. The court is barred by the provisions of section 6 and 7 of the [Civil Procedure Act](#) from hearing this matter.

#### **(II) The Defendant/applicant Notice Of Motion Application Dated 25<sup>th</sup> June 2024.**

13. Upon being served with the pleadings filed herein, the Defendant/Applicant also deemed it fit to counter the plaintiff’s suit by filing their Notice of motion dated 25.06.2024, pursuant to provisions of Order 2 Rule 15, Order 51 Rule 1 of the civil procedure rules and Section 6 and 7 of the [Civil procedure Act](#), and sort for orders that this suit be struck out with costs.



14. The said Application was supported by the grounds advanced on the face of the said Application and the supporting affidavit sworn by the defendant's director, Wang Xiaoxiao dated 24<sup>th</sup> June 2024, where he deponed that there were previous proceedings in the "ELC Suit" between the same parties herein and the said matter was settled pursuant to a "compromise and settlement agreement dated 7<sup>th</sup> August 2020".
15. The plaintiffs ought to have sought execution in the said "ELC Suit" instead of filing a new suit and to that extent, the current proceedings were a gross abuse of the court process and ought to be struck out. It was also to be noted that they had also filed an application seeking to set aside the consent dated 7<sup>th</sup> August 2020, which application was yet to be determined.
16. It was the defendant's further contention that no evidence had been placed before the court by the plaintiff to support their allegation that their "matrimonial home" was about to collapse and/or that the defendants were about to close shop and relocate outside the country. To the contrary, they had their offices situated at Tatu city and were executing two (2) contracts assigned to them by Kenya Rural Roads Authority to upgrade roads within Nandi county over the next couple of years. They were thus capable of settling any judgment that may be passed against them.
17. The Defendant/Applicant therefore urged the court to grant the prayers sought by striking out this suit.

#### **The Plaintiff's Response to the Application dated 25.06.2024**

18. The plaintiffs did oppose this Application and filed their Replying affidavit sworn by the 2<sup>nd</sup> plaintiff dated 16<sup>th</sup> July 2024. She deponed that they would rely on all of the previous pleadings filed, including the plaint, witness statement, list of documents and averments made in support of their Application dated 13.06.2024 all of which clearly set out their cause of action.
19. Without doubt, the said pleadings showed that the defendant/Applicant's cause of action did not have merit as it was founded on sheer mischief and deliberate misrepresentations of fact with the sole aim of frustrating or defeating the ends of justice.
20. The suit filed raised several triable issues as they had sought liquidated damages arising from the defendant/applicant's breach of the "compromise and settlement agreement" and in addition had also sought for general damages connected to and incidental to the said breach. Those were issues, which this court had jurisdiction to hear and determine and not issues for the Environment and Land court.
21. The 2<sup>nd</sup> plaintiff further averred that they were justified in seeking to have the defendant provide security for the reason that by its past conduct, they had demonstrated disregard and flagrant breach of the "consent Order" emanating from the "Elc suit" and without doubt had showed that the defendant was inclined towards avoiding liability lawfully accruing against it. That was reason enough for the court to order for the provision of security.
22. Further if indeed the defendant/applicant had been awarded such big construction contracts within the Republic of Kenya as it alleged, then public good, moral fairness, and good sense demanded that they should obey court orders already issued and respect the rights of the citizen, who were the taxpayers funding the said infrastructure projects undertaken.
23. The plaintiffs thus averred that it would only be fair and just in the unique circumstances of this case to have the defendant's application be dismissed with costs.



## C. Parties Submissions

### Plaintiff submission

24. The plaintiff's counsel submitted that it was not in dispute that the defendant had failed to honour its obligation under the compromise and settlement deed signed by the parties on 07.08.2020 to settle the "ELC suit". Under the said settlement deed, the defendant had undertaken to construct the plaintiff's new house to compensate for damages occasioned to their "matrimonial home" which had been extensively damaged by the respondent's quarrying activities.
25. The defendant contractor abandoned the site after carrying out 10% of the construction works and as a result, the plaintiffs suffered further losses, which were particularized in this suit totaling Kshs.75,400,213.11/= as claimed.
26. This suit sought to recover sums initially agreed upon under the said "settlement and compromise agreement", but more importantly they also sought to recover extra expenses incurred as a result of the defendant's failure to hold his end of the bargain. These were new issues, that could not be handled by the Environment and Land Court, given the scope of the said court's jurisdiction as anchored under Article 165(2),(b) of *the Constitution* as read together with Section 13 of the *Environment and Land Court Act*.
27. Reliance was also placed in the case of *Kinuthia Vrs Kanyi & Another Neutral citation; (2024) KEELC 1625, Eklr, & Hydro Water Well (k) Limited Vs Nelson Mukara Ssechere & 2 others [2021]e KLR* where the Environment and land court declined the invitation to hear a matter arising from breach of contractual obligations and the second citation also discussed the need to give evidence to prove loss suffered arising from breach of contract.
28. These new issues pleaded in the suit also ousted the applicability of the provisions of Section 34 of the *Civil Procedure Act*, as the extent of damages suffered as a result of the breach and quantum of damages awardable to the plaintiffs were new matters, which had not been litigated upon previously in the "ELC Suit". The said provision of law was therefore inapplicable under the circumstance.
29. Arising from the above submissions, it was clear that the suit as filed had a clear cause of action and raised triable issues. Consequently, the pleadings filed ought not be struck out as requested for by the defendant.
30. Further courts had held that the power to strike out pleadings was draconian in nature and required that such powers be exercised sparingly, with extreme caution, and only in the clearest of cases. The present suit did not fall in the said category of cases. Reliance was placed on *Jubilee Insurance Company Limited Vrs Grace Anyona Mbinda (2016) eklr*, *Blue Shield Insurance Ltd Vrs Joseph Mboya Oguttu (2009) eklr* & *Crescent Construction CO Ltd Vrs Delphis Bank Ltd (2007) eKlr*, where the aforementioned legal position was discussed with approval.
31. On whether the defendant should provide security for liquidated damages claimed pending determination of the suit, the plaintiffs submitted that there was no doubt that without any justification, the defendant had flagrantly breached the "compromise and settlement agreement", which was subsequently adopted as a "consent order" in the "ELC Suit", and unilaterally abandoned the construction site to the plaintiff's detriment.
32. Even though the defendant had argued that it has several multi-billion construction contracts it was currently undertaking, its previous conduct disentitled it from being granted a benefit of doubt,



because despite having the capacity to undertake and fulfill its obligation as agreed, they had willingly chosen to spit on the plaintiff's face, so to speak.

33. The foregoing therefore raised serious doubts on the defendant's assertions that it had no intention of relocating its business from the court's jurisdiction and it was therefore in the interest of justice to grant the orders sought and the defendant be directed to provide security.
34. The plaintiffs finally submitted that they had placed before the court sufficient evidence to show the grave danger they faced as a family as their "matrimonial home" was structurally weak and could collapse at any time. The photographs attached as exhibits fully showed the extent of structural damage, which had been occasioned by the defendant's negligence and since they did not have any other home, it was in the interest of justice to have this suit heard and determined on merit within the shortest time possible to alleviate the suffering they were undergoing.

### **Respondents Submissions**

35. The defendant's counsel identified three issues for determination, namely;
  - a. Whether the suit should be struck out.
  - b. Whether the defendant should be ordered to provide security, and
  - c. Whether the suit should be given an early hearing date.
36. As to whether the suit should be struck out, the Respondent relied on the cases of South Nyanza Sugar Co Limited vs Alfred Sagwa Mdeizi t/a Pave Auctioneers [2010] e KRL, Kennedy Ooko Jacob t/a SSebo Intel Co Auctioneers vs John Abich Ochanda [2021] e KLR, Satya Bhamu Gandhi vs Director of Public Prosecutions & 3 others [2018] e klr, Kamunye and others vs the Pioneer General Assurance Society Limited [1971] EA 263 & Benjoh Amalgamated Limited vs Kenya Commercial Bank Limited [2006] e KLR and submitted that the Plaintiffs should have instituted execution proceedings in "the ELC Suit" rather than filing a separate suit to enforce the consent.
37. The defendant also pointed out that this instant suit was res-judicata given that it was based on the same cause of action and raised the same issues which were determined in the "ELC Suit".
38. As regards the security for the judgment, it was submitted that no evidence had been provided to show that the Defendant was about to dispose of their property or to remove it from the jurisdiction of this court. Further, no basis had been laid to support the inference that the defendant would not be able to satisfy a judgment issued against them. Reliance was placed on the cases of Rift Valley Railways (Kenya) Limited vs Siewa Furniture and Interior Designers Limited and another [2019] e KLR and Kuria Kanyoko t/a Amigis Bar and Restaurant vs Francis Kinuthis Nderu & Others (1988) 2KAR 126.
39. In addition, it was further submitted that the Plaintiffs had not furnished evidence of imminent collapse of the "matrimonial home" nor had they faced any challenge in pursuit of having this suit heard in the normal manner. Reliance was placed in the case of Josephine Ndenyi vs Vishak Builders Limited [2015] e KLR, where Aburili J emphasized that it was important that pretrial requirements be complied with before a suit is set down for hearing.
40. The defendant thus urged this court to strike out this suit for contravening the mandatory provisions of Section 34 of the *Civil Procedure Act*, and for being Res judicata in light of the previous proceedings of the "ELC Suit", which were determined by the "consent judgment" endorsed on 25<sup>th</sup> November 2020.



### C. Determination

41. I have perused both Notice of Motion applications on record, the responses thereto, and the respective submissions on record and I find that the issues for determination are;
- a. Whether the suit should be stuck out.
  - b. Whether the Defendant should be ordered to provide security.
  - c. Whether the Plaintiff should be given an early hearing date.
  - d. Who should bear the costs of the Application filed?

#### Whether the suit should be stuck out

42. The power to strike out pleadings is provided for under Order 2 Rule 15 of the Civil Procedure Rules in the following terms;
1. At any stage of the proceedings the court may order to be stuck out or amended any pleading on the ground that;
    - a. It discloses no reasonable cause of action or defence; or
    - 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 otherwise an abuse of the process of the court;
43. The defendant urged this court to strike out this suit on two grounds, namely; that there were previous proceedings between the plaintiffs and the defendant in “the ELC Suit”, which proceedings were settled pursuant to a “compromise and settlement agreement dated 7<sup>th</sup> August 2020”, and subsequently adopted in court as a “consent judgment” on 11.11. 2020 and decree issued dated 25.11.2020.
44. It was also the defendant’s further contention that the plaintiffs were expressly barred by provisions of Section 34 of the *Civil Procedure Act*, from filing a new suit to enforce the decree issued in the “ELC Suit”. Such execution proceedings could only take place in the former suit. The proceedings herein to that extent were a gross abuse of the process of the court and ought to be stuck out.
45. On the first issue, I refer to the Black’s law Dictionary 10<sup>th</sup> Edition defines “res judicata” as
- “An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
46. The Supreme Court in the case of John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR enumerated on this principle at length and stated as follows;
- “The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties;



and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

55. It emerges that, contrary to the respondent's argument that this principle is not to stand as a technicality limiting the scope for substantial justice, the relevance of res judicata is not affected by the substantial-justice principle of article 159 of *the Constitution*, intended to override technicalities of procedure. Res judicata entails more than procedural technicality, and lies on the plane of a substantive legal concept.
56. The learned authors of Mulla, Code of Civil Procedure, 18th Ed 2012 have observed that the principle of res judicata, as a judicial device on the finality of court decisions, is subject only to the special scenarios of fraud, mistake or lack of jurisdiction (p 293):The principle of finality or res judicata is a matter of public policy and is one of the pillars on which a judicial system is founded. Once a Judgment becomes conclusive, the matters in issue covered thereby cannot be reopened unless fraud or mistake or lack of jurisdiction is cited to challenge it directly at a later stage. The principle is rooted to the rationale that issues decided may not be reopened and has little to do with the merit of the decision.”
57. The essence of the res judicata doctrine is further explicated by Wigram, V-C in *Henderson v Henderson* (1843) 67 ER 313, as follows:
- where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].
58. 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 Githae & 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.

59. That courts have to be vigilant against the drafting of pleadings in such manner as to obviate the res judicata principle was judicially remarked in *ET v Attorney-General & another*, (2012) eKLR, thus:

The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others*, (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J, in the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face-lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

59. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action.(See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others Civil Appeal 110 of 2011* (2013) eKLR)

47. While it is indeed true that the plaintiff had sued the defendant in the “ELC suit”, and the cause of action herein is related to the outcome of the said suit, it is my finding that what has been raised for determination herein is a new cause of action, which is completely distinct from the prayers pleaded in the former suit.

48. The court has perused the decree issued in the “ELC Suit” dated 25.11.2020 (marked as WX-1) in the defendant’s application. It was recorded therein as follows;

- i. That pursuant to a compromise and settlement agreement entered into between the plaintiffs and the 4<sup>th</sup> defendant herein on 07.08.2020 it is hereby consented to by and between the plaintiffs and the 4<sup>th</sup> defendant that the plaintiff’s claim herein against the 4<sup>th</sup> defendant be and is hereby marked as compromised in terms of the said compromise and settlement agreement.



- ii) That the suit against the 1<sup>st</sup> to 3<sup>rd</sup> defendants be marked as withdrawn with no orders as to costs.
- iii) That this suit is marked as settled.
49. In the “ELC Suit”, the plaintiffs had sued the defendant and sought permanent orders of injunction restraining the Hon Attorney General/Ministry of Mining and NEMA from issuing blasting material, and mining licenses to the defendant. They also sought to injunct/restrain all stone quarry activities undertaken by the defendant at their “Katani stone quarry site”, until all measures had been put in place to ensure statutory compliance and also to avoid further damage to the plaintiff’s premises. Those issues do not arise herein.
50. The plaintiff also prayed for special damages for expenses incurred in repairing her “matrimonial home” and the cost of building a new home. She further prayed for aggravated damages. The former suit was part heard and after lengthy negotiations, a deed of “compromise and settlement” was recorded on 07.08.2020, and later endorsed by the court as a consent order on 11.08.2020. The decree arising therefrom was extracted on 25.11.2020.
51. The defendant failed to honour his obligations under the said “consent order”, which in common law is known to have a “contractual effect”. The plaintiffs have in law the undeniable right to enforce the said contract, given that they have suffered further losses, which are particularized in the plaint herein. Secondly the compromise and settlement” and “consent order” unfortunately did not provide for an “execution clause”, which could be enforced in the event of failure by the defendant to comply. That regrettably put the plaintiffs in a fix and they cannot be faulted for perusing this cause of action, to enforce what had been mutually agreed upon, but not implemented due to the “outright intransigence” of the defendant.
52. It is therefore my finding that this suit is not Res judicata.
53. The other issue that comes up is whether the plaintiffs are barred from executing the consent by filing a different suit. Section 34(1) of the [Civil Procedure Act](#), provides as follows;
- “Questions to be determined by court executing decree”
1. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and related to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit
54. As noted above, the compromise and settlement” and “consent order” endorsed in the “ELC Suit” unfortunately did not provide for an “execution clause”. All the said consent judgment did was to compromise the suit as agreed between the parties and have the same withdrawn. (see annexure WX-1, being the decree issued pursuant to the consent judgment). So, pray, how is the plaintiff to enforce the same? Section 34 of the [Civil Procedure Act](#), therefore does not come into play as the decree is merely “declaratory in nature and non-executable as extracted”.
55. It is, therefore, my finding that the plaintiffs were within their right to file this suit to enforce the said agreement and also seek further damages arising from breach of the said “compromise and settlement agreement dated 07.08.2020”. This cause of action therefore does not offend the provisions of Section 34 of the [Civil Procedure Act](#), raises trial issues, and thus cannot be struck out.



### **Whether the Defendant should be ordered to provide security.**

56. Order 39 of the Civil Procedure Rules provides for “Arrest and attachment before judgment”. Specifically, Order 39 Rule 1 of the [Civil Procedure Act](#) provides for;

Where the defendant may be called upon to furnish security for appearance

Where at any stage of a suit, other than a suit of the nature referred to in paragraph’s (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise;

- a. That the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that maybe passed against him-
  - i. Has absconded or left the local limits of the jurisdiction of the court; or
  - ii. Is about to abscond or leave the local limits of the jurisdiction of the court; or
  - iii. has disposed of or removed from the local limits of the jurisdiction of the court property or any part thereof; or
- b. That the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit

The court may issue a warrant of arrest against the defendant and bring him before the court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff’s claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court.

Security (Order 39. Rule 2)

2.

- (1) Where the defendant fails to show such cause the court shall order him either to deposit in court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to rule 1.
2. Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

Order 39 Rule 5;

Where the defendant may be called upon to furnish security for the production of property

5(i) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him;

- a. Is about to dispose of the whole or any part of his property
- b. Is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court.



The court may direct the defendant, within a time fixed by it, either to furnish security, in such terms as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.

57. The plaintiff depones and it is not denied by the defendant that they did not uphold their side of the bargain in fulfilling its obligation under the “compromise and settlement agreement dated 07.08.2020”. The defendant on the other hand did aver that the plaintiffs were not entitled to the orders sought as they were not about to relocate from the country and had only moved their office to a more spacious location at Tatu City.
58. They had bagged several lucrative contracts with Kenya Rural Roads Authority worth “billions of shillings” within Nandi county, which projects were ongoing and would take several years to complete. The orders sought were thus misplaced and ought not to be granted as they had a presence within the jurisdiction of the court and it was not proved that they wanted to dispose of their properties.
59. The learned Author Mulla in his treatise on the Indian Code (15<sup>th</sup> Ed) page 1502 inter alia of order 38 rule 5 deposes:

“the object of this rule is to prevent the decree that may be passed from being rendered infructuous... The order is not unconditional one directing attachment of property, but one calling upon the defendant to furnish security. Where the defendant offers to give security, the court should go into the question of its sufficiency before issuing a final order of attachment.”

60. This issue was discussed in the case of *International Air Transport Association & Another Vrs Akarim Agencies Company & 2 others* (2014) eKLR where GIKONYO J stated:-

“Order 39 rule 1 and 5 of the CPR is about giving security for appearance or satisfaction of a decree which may be passed against the Respondent. The Respondent may be called upon to show-cause why he should not give security for satisfaction of the decree which may be passed against him. Rule 1 is more draconian and may result into the arrest of the Respondent....Rule 5 on the other hand is milder and deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the court .....both of these rules share two common things, namely: 1) both serve the purpose of preventing the Respondent from doing any act that will obstruct or delay execution of the decree that may be issued against the Respondent; and 2) the standard of proof is that set out in the case of *Giella V Cassman* i.e. establish prima facie case of the conditions set out in the particular rule.”

61. Further the English Court of Appeal, in the case of *Mareva Compania Naviera SA v International Bulk Carrier SA (The Mareva)* (1975) 2 Lloyd Rep 509, explained the reason why the court will require a party to deposit the funds claimed in an action before the hearing and determination of the dispute on its merit (famously known as Mareva injunction). Lord Denning MR who spoke on behalf of the court stated the rationale as follows;

“In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets



so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.”

62. From the foregoing, the relief sought is intended to prevent the defendant or would-be judgment debtor from dissipating his assets or from leaving the jurisdiction of the court which will result in defeating, obstructing, or delaying the execution of the decree. This remedy is sought based on the equitable maxim that equity does not act in vain.
63. The power to order a party to deposit security, however, has to be exercised with great caution as was stated in the case of *Eswari Electricals (PVT) Limited v Empower Installation Limited & another* [2017] eKLR where the court had this to say:-

“In conclusion, we stress that the power to order a party to furnish security is to be exercised with great caution because at the time it is exercised the dispute has not been determined one way or another on merit. See *Nduhiu Gitahi & ano. v Hannah Wambui Warugongo* [1988] 2 KAR 100 and *Corporate Insurance Company Limited v Emmy Cheptoo* High Court Civil Appeal No. 124 of 2014.
64. From the averments made herein and responses filed, the plaintiff has proved that the defendant deliberately failed to carry out civil works agreed upon, to construct for the plaintiffs a new home after admitting that their activities at the “Katani stone quarry” had caused significant structural damage to the plaintiff’s “matrimonial home”, yet they ( the defendant) confirm by their pleadings that they are financially liquid and are handling public contracts worth “billions of shillings”.
65. The defendant’s conduct to say the least is despicable and must be frowned upon. Their action no doubt leads to only one logical conclusion, which is; that they contemptuously ignored to implement the “compromise and settlement agreement”, with the intent of, “ to delay or to avoid any process of the court by obstructing or delaying the execution the decree passed” and under the obtaining circumstances affords a reasonable probability that they will continue to obstruct, defeat and/or delay execution of the decree passed herein.
66. From the forgoing there is no doubt that a prima facie case has been established by the applicants under Order 39, Rule 1(b), of the Civil Procedure Rules. The defendant, past conduct proves that they do not honour court processes and are deliberately intent on obstructing and/or delaying the execution of any decree that may be passed against it.
67. Order 39, Rule 5 of the civil procedure rules, allows the court, “to direct the defendant within a time to be fixed by it, either to furnish security, in such terms as may be specified in the order, or to produce and place at the disposal of the court, the said property or value of the same”.
68. Under the “compromise and settlement agreement dated 07.08.2020” executed by both parties and adopted in court on 11.11.2020 as a “consent judgment”, the defendant had irrevocably committed to indemnify the plaintiffs and build for them a new “matrimonial home” at a cost of Kshs 53, 686,354.32/= based on valuation undertaken by their own appointed Architect and quantity surveyor.
69. The plaintiffs claim this sum and other expenses incurred and/or to be incurred to build a new home and the said costing totals to Kshs 84,016,213.11/=.
70. Given that part of this claim is yet to be proved, it will be just and equitable to direct the defendant to provide security for the undisputed sum and provide adequate interest thereon as security for the decree, which may be issued hereinafter. This order is made conscientiously while considering the



circumstances of this particular case, to ensure observance of due process of Law, to do justice between the parties, and to secure a fair trial between them.

71. The plaintiff has thus proved that they have a prima facie case for the defendant to provide security before judgment to ensure they do not once again obstruct the course of justice and/or avoid the court process as they have been shown to do. The defendant will furnish security in the sum of Kshs 65,000,000/=.

**B. Whether the plaintiff's suit should be heard and determined expeditiously.**

72. The plaintiffs by their pleadings showed the state of structural disrepair, whereupon she resided. The parties herein have filed most of their pleading but pre-trial has not been undertaken as provided for under Order 11 of the Civil Procedure Rules. The court does not operate in a vacuum and considers the current state of affairs as pertains to the plaintiff's "matrimonial home" to be a health hazard for their family. That calls for urgent court intervention.
73. It is my finding that the plaintiff's request to have this matter disposed of expeditiously has merit and will not prejudice the defendant, whose initial inaction exacerbated matters, leading to the filing of this suit.

**C. Disposition**

74. For the foregoing reasons, I find and order as follows
- a. That the plaintiff's Application dated 13<sup>th</sup> June 2024 has merit and the same allowed on the following terms
    - i. The defendant will deposit the said sum of Kshs.65,000,000/= as security, in a joint interest-earning account to be opened at a reputable commercial bank under the joint names law firms appearing for the parties herein.
    - ii. In the alternative, the defendant will furnish the court with a specific irrevocable bank guarantee of Kshs.65,000,000/=, pegged exclusively to this suit and which guarantee shall be valid for the entire period of this suit.
    - iii. The said sum be deposited and/or guaranteed to be provided within the next 30 days from the date hereof.
    - iv. Both parties are granted 30 days from the date hereof to exchange further trial documents, and witness statements, and the same is to be physically filed ,bound, and paginated for easy of reference during trial.
    - v. The suit herein will be heard priority basis.
    - vi. Costs for this Application is awarded to the Plaintiff
  - b. The Defendant's Application dated 25<sup>th</sup> June 2024 lacks merit and the same is dismissed with costs to the plaintiff.
75. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 21<sup>ST</sup> DAY OF JANUARY, 2025.**

**FRANCIS RAYOLA OLEL**



**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 21<sup>ST</sup> DAY OF JANUARY, 2025.**

In the presence of:

No appearance for Plaintiff/Applicant

No appearance for Defendant/Respondent

I.Jabo Court Assistant

