



REPUBLIC OF KENYA



**Cretum Properties Limited v Safaricom PLC & another (Commercial Case E815 of 2021)
[2025] KEHC 5011 (KLR) (Commercial and Tax) (22 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E815 OF 2021**

MN MWANGI, J

APRIL 22, 2025

BETWEEN

CRETUM PROPERTIES LIMITED PLAINTIFF

AND

SAFARICOM PLC 1ST DEFENDANT

CAROLINE WAIHAKA KIMANI 2ND DEFENDANT

RULING

1. The 1st defendant/applicant filed a Notice of Motion application dated 20th May 2024 pursuant to the provisions of Sections 1A, 1B, 3A, 6 & 63(e) of The *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Articles 50 & 159 of *the Constitution*, 2010, the inherent jurisdiction of this Honorable Court and all other enabling provisions of the law. The 1st defendant seeks an order for stay of proceedings in the suit amongst the parties herein, pending the hearing and determination of Nairobi ELRC Case No. 177 of 2021 - Catherine Waithera Kimani & another v Cretum Properties Limited.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Everlyne Nyambura, the 1st defendant's Senior Manager – M-pesa Business Operations. She averred that the plaintiff claims financial loss arising from a fraud purportedly orchestrated by inter alia, the 2nd defendant. She stated that in Nairobi ELRC Case No. 177 of 2021, the plaintiff's Director by the name Mr. Mungai, swore an affidavit in which he admitted that the claimants in the said suit were former employees of the plaintiff, but accused them of gross misconduct which included participating in a competing company. That Mr. Mungai contended that after being confronted, the said claimants voluntarily resigned from the plaintiff company. Ms



- Nyambura deposed that in the said affidavit, Mr. Mungai asserted that the said claimants misused their positions to perpetrate a theft of Kshs.30,307,618.00 and orchestrated a mass exodus of staff.
3. Ms Nyambura averred that the 2nd defendant's conduct while in the plaintiff's employment is central to both suits, and the issues of alleged financial loss and the role of the 2nd defendant are substantially identical. She claimed that there is a real and present risk of conflicting decisions being issued by Courts of concurrent jurisdiction, considering the contradictory positions taken by the plaintiff in both proceedings. She stated that it is in the interest of justice that the Employment and Labour Relations Court (ELRC) be allowed to determine the employment-related issues first, as they form the foundation of the claims before this Court. She averred that a stay of proceedings would not prejudice any party, as instead, it would promote judicial economy and aid in the just, efficient, and conclusive determination of all issues involved.
 4. In opposition to the instant application, the plaintiff filed a replying affidavit sworn on 3rd June 2024 by Mr. Mburu Mungai Kinyanjui, the plaintiff's Director. He contended that the 2nd defendant was never employed by the 1st defendant, and any fraud involving unauthorized TILL numbers resulted from collusion with the 1st defendant's employees. He noted that the 2nd defendant was joined to this suit at the 1st defendant's request and the plaintiff's pleadings implicate both defendants in the fraud. Mr. Mungai stated that the amended plaint dated 28th March 2022, seeks several reliefs against the defendants herein, including inter alia, Kshs.25,417,368.00 plus interest at CBK rates, loss of business resources, a public apology in a national Newspaper and damages for breach of contract.
 5. Mr. Mungai averred that ELRC Case No. 177 of 2021 is unrelated to this suit, as it involves employment issues like unfair termination, unpaid dues, and pension contributions. He stated that the plaintiff's claim in this suit involves the 2nd defendant, formerly its Finance Officer, fraudulently creating a parallel merchant settlement account linked to her personal details, with possible help from the 1st defendant's staff. He asserted that the instant application is res judicata, as a similar application was orally made and dismissed on 29th January 2024. He accused the 1st defendant of delaying these proceedings by failing to comply with pre-trial directions since 2021.
 6. In a rejoinder, the 1st defendant filed a further affidavit sworn on 1st August 2024 by Ms Everlyne Nyambura, the 1st defendant's Senior Manager – M-pesa Business Operations. She stated that the plaintiff's claim of fraud involving the 2nd defendant is closely linked to issues in the ELRC case, contrary to the plaintiff's assertions. She contended that the amended plaint in this suit alleges theft by the 2nd defendant during the course of her employment and that she resigned in a huff, but in the employment case, she claims that her contract of employment was terminated through constructive dismissal. Ms Nyambura averred that both Courts may be required to determine whether the 2nd defendant stole funds from the plaintiff company, thus risking conflicting judgments.
 7. The plaintiff filed a further affidavit sworn on 25th September 2024 by Mr. Mburu Mungai, the plaintiff's Director. He contended that the 2nd defendant while employed by the plaintiff colluded with the 1st defendant's staff in February 2016 to create a fraudulent TILL number used to divert company funds to her personal phone number. He noted that the 2nd defendant remained employed with the plaintiff until her voluntary resignation in October 2019. He stated that the filing of the employment suit in February 2021 by the 2nd defendant was an afterthought to derail the fraud case. Mr. Mungai contended that in this case, the 1st defendant is accused of negligence in approving the fraudulent TILL number and failing to cooperate with investigations by the DCI and the CBK. He asserted that in any event, the 2nd defendant's claim of constructive dismissal was dismissed by the Employment Court in a Ruling delivered on 11th March 2021.



8. The application herein was canvassed by way of written submissions. The 1st defendant's submissions were filed by the law firm of Majanja Luseno & Company Advocates on 30th August 2024 & 14th November 2024, while the plaintiff's submissions were filed on 27th September 2024 by the law firm of H.T & Associates Advocates. On 19th November 2024, Mr. Mayogi, learned Counsel for the 2nd defendant indicated that the 2nd defendant would not participate in the instant application.
9. Mr. Mwangi, learned Counsel for the 1st defendant referred to the provisions of Section 12 of the Employment & Labour Relations Court Act and submitted that the ELRC is the appropriate forum to address the common issues in this case and ELRC Case No. 177 of 2021. He contended that the plaintiff had not shown what prejudice it would suffer if the instant application was allowed. He argued that if this Court was to hear and decide on matters related to the 2nd defendant's employment, it would be overstepping its jurisdiction and effectively acting as an ELRC, a forum the parties have already agreed to submit to.
10. Counsel referred to Section 6 of the *Civil Procedure Act* and the case of David Ndi & others v Attorney General & others [2021] KEHC 9746, and stated that the employment case was the first to be filed in February 2021, while this matter was filed later in September 2021, hence the ELRC ought to be allowed to determine the common issues spoken of. Mr. Mwangi asserted that it is in the interest of justice and efficient use of judicial time to grant the orders sought, so as to prevent the risk of two concurrent Courts making conflicting decisions on similar issues.
11. Mr. Thimba, learned Counsel for the plaintiff submitted that the instant application is unmaintainable, as this case and ELRC Case No. 177 of 2021 are unrelated. He argued that this suit involves a fraud claim against the defendants, while the employment case is in respect to the 2nd defendant's claim for wrongful termination. Counsel contended that the 1st defendant is merely attempting to delay these proceedings, as no connection exists between the two suits, which are in the Commercial and Tax Division and the ELRC. Mr. Thimba emphasized of the need for timely adjudication of the suit, amongst the parties herein, which has been delayed due to the 1st defendant's actions. He relied on the decisions in Kenya Wildlife Service v James Mutembei [2019] eKLR and Re Global Tours & Travels Limited, Nairobi HC Winding up Cause No. 43 of 2000, and argued that the two suits have different issues and seek different prayers, showing no nexus, thus the instant application should not be allowed.
12. In a rejoinder, Mr. Mwangi submitted that the plaintiff appointed the 2nd defendant as an agent for the Lipa na Mpesa account in 2016. He stated that the plaintiff claims that the 2nd defendant in collusion with 1st defendant's employees, fraudulently registered a parallel account and diverted company funds, which was discovered in 2019 after the 2nd defendant left the company. He pointed out that the 2nd defendant in her defence stated that she was acting under the plaintiff's Director's instructions and that the funds that were lost were approved for personal expenses. Mr. Mwangi noted that the 2nd defendant filed a wrongful termination claim against the plaintiff for constructive dismissal being ELRC Case No. 177 of 2021.
13. He submitted that in the response to the said suit, the plaintiff accused the 2nd defendant of theft, asserting that the dismissal coincided with the discovery of the fraudulent activities. Mr. Mwangi relied on the case of Ethics & Anti-Corruption Commission v Charles Nderitu Maitai & 13 others [2021] eKLR, and argued that the issues in both cases are interconnected. He submitted that staying the current proceedings is warranted, as the outcome of the employment suit will affect the suit amongst the parties herein.



Analysis And Determination.

14. I have considered the application filed herein, the grounds on the face of it, and the affidavits filed in support thereof, the replying affidavit by the plaintiff as well as the further affidavits filed by both the plaintiff and the 1st defendant. I have also considered the written submissions filed by Counsel for the parties. The issues that arise for determination are –
- i. Whether the instant application is res judicata; and
 - ii. Whether these proceedings should be stayed pending the hearing and determination of ELRC Case No. 177 of 2021.

Whether the instant application is res judicata.

15. The doctrine of res judicata is provided for under the provisions of Section 7 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya which states 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 Supreme Court of Kenya in the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others [2021] KESC 39 (KLR), addressed itself on the doctrine of res judicata and 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 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;
 - ii) sameness of the title/claim;
 - (iv) concurrence of jurisdiction; and
 - (v) finality of the previous decision. (Emphasis added).
17. The plaintiff herein contends that the instant application is res judicata, as a similar application was orally made and dismissed on 29th January 2024. On perusal of the Court record, I note that on 29th January 2024, Mr. Muchiri who was appearing for the 1st defendant brought to the attention of this Court the existence of ELRC Case No. 177 of 2021. Thereafter, Mr. Korir who was appearing for the plaintiff submitted that there is no relationship between this suit and the said employment case. He further stated that the employment case has never proceeded and this Court cannot wait for its determination before it can proceed. This Court then noted that there is no order for stay of



proceedings in this case so that it can await the hearing and determination of ELRC Case No. 177 of 2021. Therefore, there is nothing stopping this case from proceeding to hearing.

18. From the above observation made by this Court, it is evident that no application similar to the instant one has ever been made by any of the parties herein either formally or orally before this Court.
19. It is therefore my finding that the instant application is not res judicata, thus the plaintiff's plea on the said issue cannot be sustained.

Whether these proceedings should be stayed pending the hearing and determination of ELRC Case No. 177 of 2021.

20. This Court has the requisite jurisdiction to issue an order for stay of proceedings. In determining the application herein, this Court's discretion can only be exercised in the 1st defendant's favour subject to it establishing the principles laid down by the Court in *Re Global Tours & Travel Ltd* (supra), where it was held as follows-

As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice...the sole question is whether it is in the interest of justice to order for stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting or not granting the order. And, in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously. (Emphasis added).

21. The 1st defendant seeks an order for stay of proceedings in the suit before this Court pending the hearing and determination of ELRC Case No. 177 of 2021 on grounds that the 2nd defendant's conduct while in the plaintiff's employment is central to both suits and that the issues of alleged financial loss and the role of the 2nd defendant are substantially identical. The 1st defendant claims that there is a real risk of conflicting decisions being made by Courts of concurrent jurisdiction, considering the contradictory positions taken by the plaintiff in both proceedings. The 1st defendant argued that the foundation of the dispute before this Court are employment related issues, thus it is in the interest of justice that the ELRC be allowed to determine the said issues first.
22. The plaintiff on the other hand contends that the disputes in the two suits are unrelated since ELRC Case No. 177 of 2021 involves employment issues like unfair termination, unpaid dues, and pension contributions, whereas this suit concerns the 2nd defendant who is the plaintiff's former Finance Officer, who is accused of fraudulently creating a parallel merchant settlement account linked to her personal details, with help from the 1st defendant's staff.
23. At paragraph 27 of this Court's Ruling delivered on 29th September 2023, I noted that the plaintiff's case against the defendants in this suit is that the 2nd defendant colluded with employees of the 1st defendant and registered a parallel alien Merchant Settlement Account Number 985750 and fraudulently diverted monies paid by the plaintiff's customers to the 2nd defendant without a resolution by the plaintiff's Board, thus causing the plaintiff massive loss.



24. Further, I noted at paragraph 29 of the said Ruling that -

A perusal of the plaintiff's amended plaint reveals that other than the allegation of collusion with the 2nd defendant, it also claims that the 1st defendant is in breach of its fiduciary and/or contractual duty of care to the plaintiff. The plaintiff averred that the 1st defendant failed to exercise due diligence in requiring mandatory Board resolutions before effecting changes with respect to the plaintiff's Lipa na Mpesa Till Number 155536 and Merchant Store Number 1555077 which changes are the sole cause of the losses suffered by the plaintiff.

25. From the pleadings filed by the parties herein, the 2nd defendant's claim against the plaintiff in ELRC Case No. 177 of 2021 is on unfair termination. In the said suit, 2nd defendant claims that her contract of employment was terminated by way of constructive dismissal through the appointment of new Directors by the plaintiff, who filled the 2nd defendant's position thereby rendering her redundant. In response thereto, the plaintiff contends that the 2nd defendant voluntarily resigned from the plaintiff company after a conflict of interest was discovered as she was engaging in similar and competitive business through another registered company where she was a Director/Shareholder and never disclosed the same to the plaintiff.

26. It is also clear from the annexures attached to the affidavit in support of the instant application that by the time the 2nd defendant left the plaintiff company, the issue of missing funds had not arisen. This is because it was only after the alleged resignation of the 2nd defendant from the plaintiff company that the plaintiff commenced reconciliation of its customer's payments made through the Lipa na Mpesa platform with the bank statements, which reconciliation allegedly revealed glaring anomalies and discrepancies that did not match the payments that were being made by the plaintiff's various clients through the official registered TILL number and the merchant store numbers, and the amounts remitted to the bank account.

27. From the foregoing, it is my considered view that the main issue for determination before the ELRC is whether the 2nd defendant voluntarily resigned from the plaintiff company or whether she was constructively dismissed, whereas the main issues for determination in this Court are whether the 2nd defendant colluded with employees of the 1st defendant and registered a parallel alien Merchant Settlement Account Number 985750 and fraudulently diverted monies paid by the plaintiff's customers to the 2nd defendant; and whether 1st defendant breached its fiduciary and/or contractual duty of care to the plaintiff.

28. In as much as the issue of theft of funds will come up at the hearing of both suits, unlike this Court, the ELRC is not burdened with determining whether or not the 2nd defendant stole or led to the loss of the alleged funds leading to the termination of her contract of employment with the plaintiff. Additionally, even if the ELRC was to determine the aforesaid issue, its finding will have no bearing on this case, in which the main dispute between the plaintiff and the 2nd defendant is collusion between the latter and the 1st defendant's employees, leading to loss of the plaintiff's funds.

29. In the case of *Kikambala Housing Estate Limited v Akash Devani & 10 others* [2020] eKLR, the Court in declining an application similar the instant one held that-

An order for stay of proceedings should not be granted as of course merely because it has been sought. The court must appreciate the constitutional dictate for the expeditious disposal of the case and only stay proceedings in very compelling cases. This is what I get from the author of *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, on the threshold for stay of proceedings;



“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

30. In the result, I am not persuaded that there is a real risk of conflicting decisions being made by Courts of concurrent jurisdiction in the event that the instant application is not allowed. It is therefore my finding that the 1st defendant has not made out a case to warrant being granted the orders sought in the instant application.
31. The upshot is that the application dated 20th May 2024 is bereft of merits. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF APRIL 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Musau h/b for Mr. Luseno for the 1st defendant/applicant

Messrs Thimba and Nthatu Ntogo for the plaintiff/respondent

No appearance for the 2nd defendant

Ms B. Wokabi – Court Assistant.

