



Hassan v Mahadi Container Depot Limited & 2 others (Civil Suit E015 of 2024 & Civil Case E016 & E018 of 2024 (Consolidated)) [2025] KEHC 12125 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 12125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E015 OF 2024 & CIVIL CASE E016 & E018 OF 2024 (CONSOLIDATED)**

F WANGARI, J

APRIL 3, 2025

BETWEEN

KHALIF YUSUF HASSAN PLAINTIFF

AND

MAHADI CONTAINER DEPOT LIMITED 1ST DEFENDANT

MAHADI ENERGY LIMITED 2ND DEFENDANT

PREMIER BANK KENYA 3RD DEFENDANT

RULING

1. The 3rd Defendant filed a Notice of Motion Application dated 13/11/2024 brought under the provisions of Order 2 Rules 15 and Order 51 Rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the [Civil Procedure Act](#), the Defendant/ Applicant sought the following reliefs:
 - a. That the 3rd Defendant be struck off the initial proceedings.
 - b. That the foregoing orders applies mutatis mutandis to Mombasa HCCC No. E016 of 2024: Mohamed Abdi Gacamey v Mahadi Container Depot Limited & 2 others as well as Mombasa HCCC No. E018 of 2024: Abdillahi Mohamed Gabow & Another v Mahadi Container Depot Limited & 2 others.
 - c. That this Honourable Court be pleased to make any further or other order in the interest of justice.
 - d. That the costs of this application and the suit be borne by the Plaintiff.
2. The grounds in support of the application were that there was no privity of contract between the Plaintiff and the 3rd Defendant where the 3rd Defendant was a secured financier in a loan advanced to the 2nd Defendant. The said loan was secured by the 2nd Defendant's properties known as L.R Number



MN/VI/2428 and L.R Number MN/VI/4689. The 3rd Defendant therefore has priority and first interest as regards the suit properties.

3. The Plaintiff therefore lacks cause of action against the 3rd Defendant, hence the suit against the 3rd Defendant should be struck off. The application was supported by an Affidavit of David N. Njoroge, an Advocate of the High Court practicing in the firm of Advocates which has the conduct of this suit on behalf of the 3rd Defendant and which contents are similar to the grounds of the application.
4. The Plaintiff in Mombasa HCCC No. E016 of 2024 filed a Replying Affidavit dated 12/02/2025. He sought to have the Supporting Affidavit sworn by David N. Njoroge be struck off from the records as the issue of striking out the suit is a contested fact.
5. Further, even though he admits that there was no privity of contract between him and the 3rd Defendant, the 3rd Defendant was a necessary party in the proceedings for reasons that if the suit properties were to be sold by the 3rd Defendant, then it had the obligation of releasing the surplus to the Plaintiff. He prayed that the application be dismissed with costs.
6. On behalf of the 1st and 2nd Defendant, a Replying Affidavit dated 12/02/2025 was sworn by Ibrahim Hussein Mahadi, the Managing Director. I shall deal with this application herein below.
7. The court directed that the application be canvassed by way of written submissions. Only the 3rd Defendant complied by filing its submissions dated 30/12/2024. It is important to note that the Respondents had not filed their Replying Affidavits despite service, and directions for filing of submissions were given before they filed their Replying Affidavits. As at the time of writing this ruling, the written submissions by the Respondents had not been filed.

Analysis and Determination

8. I have carefully considered the application, the responses by the Respondents, submissions by the 3rd Defendant, the authorities cited as well as the law and I discern the following issues for determination: -
 - a. Whether the application has merits
 - b. What is the order as to costs?
9. Before going to the merits of the application, as stated herein above, I shall first look into the Replying Affidavit sworn by the Managing Director of the 1st and 2nd Defendant companies. First, it is drawn and filed by the firm of Advocates, Gachiri Kariuki & Company Advocates. It is only discerned from paragraph 1 of the Replying Affidavit that the affidavit is for the 1st and 2nd Defendant.
10. It is not indicated who the firm of advocates is acting for. From the court records, the said Replying Affidavit was uploaded by the firm of Mutisya Mwanzia & Odeng Advocates, who are on record for the 2nd Defendant. The counsel for the 1st Defendant is deemed to be the firm of Professor Albert Muma & Company Advocates, as the Notice for Change of Advocates was only in respect to the 2nd Defendant.
11. Based on the above, the question arising is who the firm of Gachiri Kariuki & Company Advocates is representing. I find that the affidavit in question was filed by a firm of Advocates not properly on record. The said Affidavit is a stranger to the proceedings and therefore struck out from the records.
12. In respect to whether the 3rd Defendant should be struck out from the proceedings, I make reference to the ruling of this court dated 19/07/2024, and more specifically to paragraph 38 and 39 of the ruling, whose contents are well within the knowledge of the parties as the ruling forms part of these proceedings. It is deemed that this application arose from the findings of the court in the said ruling.



13. The Plaintiff cannot be found to state that though there was no privity of contract between the parties, its interests in the suit properties concerns the 3rd Defendant, hence it should be part of the suit. Without reiterating the contents of the Ruling dated 19/07/2024, it was clearly stated that the Plaintiff's remedy lies against the 1st and 2nd Defendant and not the 3rd Defendant.
14. I do concur with the submissions by the 3rd Defendant and its reliance in the case of Peter Njenga Kamau t/a Penar Interconsumer Products v Ecolab INC & anther (Civil Suit E462 of 2020), in support of the fact that the 3rd Defendant was not a necessary party to the proceedings.
15. The 3rd Defendant having not been privy to the loan agreement between the Plaintiffs in the 3 suits on one part, and the 1st and 2nd Defendants on the other part, and on the other hand, the Plaintiffs not being privy to the loan agreement between the 1st and 2nd Defendant on one part, and the 3rd Defendant on the other part, I find that the claim by the Plaintiffs against the 3rd Defendant is unfounded.
16. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. The Plaintiffs in filing the respective suits were only pursuing their interests but the wrong party in respect to the 3rd Defendant. Considering that unlike the 3rd Defendant, they were unsecured creditors, I need not punish them by condemning them to pay costs. Each party should bear its own costs.
17. Having found the application merited, the following orders flow therefrom:
 - a. The application dated 13th November, 2024 has merits and it is hereby allowed as prayed
 - b. Each party to bear own costs.Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF APRIL, 2025.

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F. WANGARI

JUDGE

In the presence of:

N/A by the Plaintiff

N/A by the 1st and 2nd Defendants

Mumu Advocate h/b for Njoroge Advocate for the 3rd Defendant

M/S Salwa, Court Assistant

