



**Singh v Mutua & 2 others (Commercial Case E440 of 2023)
[2024] KEHC 2939 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2939 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E440 OF 2023
MN MWANGI, J
MARCH 15, 2024**

BETWEEN

UBHI RIPTHUMAN SINGH PLAINTIFF

AND

ALFRED MUTUA 1ST DEFENDANT

EMILY CHEBET LOROUPE 2ND DEFENDANT

BRAZILIAN RODIZIO LIMITED 3RD DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 15th January, 2024, brought pursuant to the provisions of Sections 3 & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, and all enabling provisions of the law. The 3rd defendant/applicant seeks the following orders –
 - i. Spent;
 - ii. That pending the hearing and determination of this application interpartes, the Honourable Court be pleased to allow the 3rd defendant to access its Bank Accounts being Bank Account No. XXXXXXXXXX, No. XXXXXXXXXX and No. XXXXXXXXXX at NCBA Bank, Lavington Branch and withdraw a total of Kshs 10,322,134.00 to enable it clear its pending payments/arrears for the month of January 2024;
 - iii. That pending the hearing and determination of the main suit, the 3rd defendant be allowed to access its Bank Accounts being Bank Account No. XXXXXXXXXX, No. XXXXXXXXXX, and No. XXXXXXXXXX at NCBA Bank, Lavington Branch and withdraw a total of Kshs 19,608,982.00 to cater for the whole budget for the month of February, 2024 only;



- iv. That the Honourable Court be pleased to set aside the ex parte orders issued on 15th September, 2023, to allow the 3rd defendant to access its Bank Accounts without any restrictions, being Bank Account No. XXXXXXXXXXXX, No. XXXXXXXXXXXX and No. XXXXXXXXXXXX at NCBA Bank, Lavington Branch;
 - v. That in the alternative to prayer 4 above, the Honourable Court be pleased to direct that the 3rd defendant be and is hereby allowed to access its Bank Accounts being Bank Account No. XXXXXXXXXXXX, No. XXXXXXXXXXXX, and No. XXXXXXXXXXXX at NCBA Bank, Lavington Branch and withdraw a total of Kshs 20,000,000.00 on a monthly basis to meet its statutory deductions, salaries, and other operational costs that it requires every month;
 - vi. That the 3rd defendant/applicant to file a statement of account with the Deputy Registrar of the Honourable Court for all the withdrawals made every month;
 - vii. That the Honourable Court be pleased to issue any other directions that it deems for the interest justice to meet (sic); and
 - viii. Costs of the application be provided for.
2. The instant application is premised on the grounds on the face of it and a supporting affidavit sworn by Kamarow Joel Rionotukei, the 3rd defendant's/applicant's director/shareholder on 15th January, 2024 and a further affidavit sworn by the same deponent on 9th February, 2024. In response thereto, the 1st defendant indicated that it supports the application herein. The 2nd defendant did not file any response.
 3. The plaintiff filed a Notice of Preliminary Objection dated 2nd February 2024 raising the following grounds –
 - i. That the said application is grossly misconceived, gravely misplaced, mischievous, frivolous, scandalous, and vexatious and the same constitutes an abuse of the Court process and as such, it should be dismissed with costs; and
 - ii. That the application dated 15th January, 2024 is res judicata by dint of the ruling delivered by Honourable Mr. Justice Alfred Mabeya on 21st November, 2023 and its resultant orders issued on 22nd November, 2023.
 4. The plaintiff also filed grounds of opposition dated 2nd February, 2024 raising the following grounds: -
 - i. That the application as drawn and filed is fatally and incurably defective, incompetent, bad in law, grossly misconceived, gravely misplaced, totally mischievous, frivolous, scandalous and vexatious, and the same constitutes an abuse of the process of this Honourable Court;
 - ii. That the application is res-judicata in all respects since the issues raised therein were fully and finally determined by the Honourable Mr. Justice Alfred Mabeya in his ruling of 21st November, 2023;
 - iii. That the ruling aforesaid was in respect of the 3rd defendant's application dated 30th October, 2023, seeking similar prayers as those now sought before this Court and riding on similar grounds thereof;
 - iv. That in the ruling, the Honourable Mr. Justice Alfred Mabeya granted the 3rd defendant access to the subject Bank Accounts (No. XXXXXXXXXXXX, No. XXXXXXXXXXXX, and No. XXXXXXXXXXXX) at NCBA Bank Lavington Branch, pending the hearing and determination of the suit;



- v. That the ruling aforesaid and its resultant orders issued on 22nd November, 2023 is in full force and effect since it has not been set aside and no review and/or appeal has been preferred against the same; and
 - vi. That in the circumstances, the filing of the application herein is an utter abuse of the Court process and the same should therefore be dismissed with costs to the plaintiff.
5. The application herein was canvassed by way of oral submission. Mr. Wafula, learned Counsel for the 3rd defendant submitted that the 3rd defendant cannot conduct its business, cannot pay statutory deductions, suppliers, and its employees since it has no access to any funds. In addition, KRA and the 3rd defendant's suppliers have issued it with demand letters. Counsel further submitted that the monies being held in the frozen accounts belong to the 3rd defendant company and not its directors, thus the 3rd defendant should be allowed to access the said monies. It was stated by Counsel that this suit is primarily between the plaintiff and the 1st defendant, and the 3rd defendant was not a party to the agreement for the sale of shares between the plaintiff and the 1st defendant.
 6. Mr. Wafula asserted that the application herein is not *res judicata* as it seeks different orders from those that were sought in the application dated 30th October, 2023, and that Judge Mabeya in his ruling dated 21st November, 2023 allowed the 3rd defendant to access the frozen accounts for only three months, being November 2023, December 2023 and January 2024, but the main suit could not be completed within three months. Counsel contended that the doctrine of *res judicata* cannot arise where there is a continuous cause of action as is the case herein.
 7. Ms. Kyania, learned Counsel for the 1st defendant submitted that the dispute herein is purely between the plaintiff and the 1st defendant since the agreement for the sale of shares dated 6th October, 2022 is between them. She indicated that for the said reason, the terms of the said agreement should not be imposed on the 3rd defendant as privity of contract only applies to parties to a contract. Counsel urged this Court to allow the instant application so as not to prevent the 3rd defendant from ceasing its operations.
 8. In opposing the application, Mr. Nyachoti, learned Counsel for the plaintiff submitted that the issues raised in the application herein have already been determined with finality by Judge Mabeya in a ruling delivered on 21st November, 2023. He expressed the view that if the 2nd & 3rd defendants are dissatisfied with the orders emanating therefrom, they should lodge an appeal or file an application for review against the said ruling. He contended that determining this application will amount to this Court sitting on appeal against the ruling delivered on 21st November, 2023 by Judge Mabeya.

Analysis and Determination.

9. I have considered the application herein, the grounds on the face of it and the two affidavits filed in support thereof. I have also considered the grounds of opposition and the Notice of Preliminary Objection filed by the plaintiff, as well as the oral submissions made by Counsel for the parties. The issues that arise for determination are -
 - i. Whether the application herein is *res judicata*; and
 - ii. Whether the orders of 15th September, 2023 should be varied.
10. The 3rd defendant in its supporting affidavit deposed that it will not be able to continue with its business operations and functions for part of the month of January 2024, and that from the month of February 2024, going forward, if it is not allowed to access its bank account Nos. XXXXXXXXXX,



XXXXXXXXXX and XXXXXXXXXXXX at NCBA Bank, Lavington Branch and withdraw funds to meet its expenses, which include operational costs, salaries, requisite statutory deductions, rent, utilities as well as the business premises insurance; then it cannot manage and operate its business functions including meeting its expenses and statutory requirements.

11. It averred that there are currently ex parte orders issued on 15th September, 2023 by the Court, restraining the defendants from withdrawing, transferring, disposing of and/or dealing whatsoever with money held in the said bank accounts.
12. The 3rd defendant deposed that for the month of January 2024, it urgently requires to access and withdraw funds in the aforementioned accounts to clear pending bills for the month of January 2024, totaling Kshs10,322,134.00. That for the month of February 2024, it will require Kshs19,608,982.00 to meet its expenses, and in the subsequent months it will require approximately Kshs 13,000,000/- monthly to meet its business operational costs and expenses.
13. The 3rd defendant averred that it has been sued by one of its suppliers at the Milimani Small Claims Court in Milimani SCCCOM No. E090 of 2024: Seton Internationa Limited V Brazilian Rodizio LTD. It also stated that rent for the business premises was increased with effect from January 2024.
14. The 3rd defendant posited that the Court has been cognizant of the fact that it needs to continue with its business operations and meet its various expenses thus it has constantly reviewed and adjusted the ex parte orders issued on 15th September, 2023, to enable the 3rd defendant pay for its expenses. It contended that it has become untenable for it to continuously make formal applications before the Court so as to be allowed to access the bank accounts for a certain period of time only, hence it is not only prudent but also in the interest of justice for the ex parte orders issued on 15th September, 2023 to be vacated to allow it to access the subject accounts pending the hearing and determination of the main suit.
15. The 3rd defendant averred that the application herein is not res judicata by virtue of the ruling delivered on 21st November, 2023, since the facts and issues in the application dated 30th October, 2023 that was the subject of the said ruling were substantially different from the instant application, the prayers sought herein are substantially different from those that were sought in the application dated 30th October, 2023, and the instant application is for subsequent payments from the month of January 2024 onwards.
16. The 3rd defendant averred that in the ruling delivered on 21st November, 2023, the Court granted it access to the subject bank accounts for 3 months only, being the months of November 2023, December 2023 and January 2024, within which time the dispute herein would have been heard and determined. It contended that a number of factors changed and the dispute herein could not be heard and determined fully in 3 months as directed by Judge Mabeya. In addition, KRA has issued agency notices to the 3rd defendant for overdue Tax.

Whether the application herein is *res judicata*.

17. The doctrine of *res judicata* is provided for under Section 7 of the [Civil Procedure Act](#), 2010, which states as follows: -

“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.”

18. The Court in the case of *Abok James Odera v John Patrick Machira* Civil Application No. Nai. 49 of 2001 laid down the principles to be established by a party which seeks to rely on a plea of res judicata. These are-
- i. a previous suit in which the matter was in issue;
 - ii. the parties were the same or litigating under the same title;
 - iii. a competent court heard the matter in issue; and
 - iv. the issue had been raised once again in a fresh suit.
19. It is not disputed that an almost similar application dated 30th October, 2023 was previously filed by the 3rd defendant. I however note that in the said application, the 3rd defendant did not seek an order to set aside the exparte orders issued on 15th September, 2023. I also note that this application has been precipitated by the fact that in the ruling delivered on 21st November, 2023, the learned Judge only ordered payments for three months, being November 2023, December, 2023 and January 2024, within which time the dispute between the parties herein should have been determined. The learned Judge went further to fix three days for hearing of the suit in a bid to expedite its determination.
20. It is evident from the record that the hearing of this matter is yet to kick off. In addition, there are two pending applications. In one, the plaintiff is seeking leave to amend the plaint and in the other, it is seeking an order to the effect that the 1st defendant’s current Advocates on record should be restrained and/or barred from representing the 1st defendant. On 14th December, 2023, this Court set fresh hearing dates for the main suit, which is now scheduled for hearing on 9th and 16th of May, 2024. In view of the foregoing factors, it is inescapable to conclude that the dispute herein could not be determined within three months as anticipated by Judge Mabeya in his ruling delivered on 21st November, 2023.
21. In the cases of *Mburu Kinyua v Gachini Tuti* [1978] KLR 69; [1976-80] 1 KLR 790 and *Churanji Lal & Co v Bhaijee* [1932] 14 KLR 28 authoritatively cited by the Court in *Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR, the Court stated thus-
- “However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine.”
22. The ruling delivered on 21st November, 2023 allowed payments for the months of November 2023, December 2023 and January 2024 on the understanding that funds in the subject accounts belong to the 3rd defendant and not to its directors and/or shareholders, thus the 3rd defendant must be left to run, notwithstanding the infighting by its shareholders and/or directors. The 3rd defendant contended that this application is seeking payment for the subsequent months in view of the fact that the suit herein could not, and has not been determined within three months as anticipated by Judge Mabeya in his ruling dated 21st November, 2023.
23. Given the said circumstances, I am of the considered view that the aforementioned events amount to fresh happenings, thus the defence of res judicata as provided for under Section 7 of the *Civil Procedure Act* is not applicable to this case. The Notice of Preliminary Objection is therefore without merits and is dismissed with costs to the 3rd defendant.



Whether the orders of 15th September, 2023 should be varied.

24. None of the parties herein filed a replying affidavit to controvert the averments contained in the 3rd defendant's supporting and further affidavits in support of the application herein. Instead, the plaintiff filed grounds of opposition and a Notice of Preliminary Objection. In the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR cited by the Court of Appeal in the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR, the Court held as follows-
- “As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath.”
25. Further, in the case of *Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited* [2010] eKLR, the Court held thus on the failure to file a replying affidavit to an application -
- “The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus, what was deposed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant”.
26. This Court finds that in the absence of a replying affidavit rebutting the 3rd defendant's averments contained in its supporting and further affidavits, this Court is left with no option but to take the said averments as true. The 3rd defendant contends that it will not be able to continue with its business operations and functions for part of the month of January 2024, and that from the month of February 2024, going forward, if it is not allowed to access the subject bank accounts and withdraw funds to meet its expenses which include, business operational costs, salaries, requisite statutory deductions, rent, utilities as well as the business premises insurance.
27. Annexed to its affidavit are pleadings for Milimani SCCCOM NO. E090 of 2024 where the 3rd defendant has been sued by one of its suppliers, a notice from its landlord notifying it that rent was reviewed upwards from the month of January 2024, and demand letters and invoices from its suppliers for payment of goods supplied to it. Further, the 3rd defendant asserted that KRA has issued it with agency notices for overdue Tax. From the foregoing, I am persuaded that the 3rd defendant needs a constant supply of money to be able to run its business operations, as well as to fulfill its obligations towards its staff, suppliers, landlord and the Kenya Revenue Authority.
28. The Court in its ruling dated 21st November, 2023 varied the orders issued on 15th September, 2023 for three months with the hope that the dispute herein will have been heard and determined within the said period. As explained earlier, that could not be achieved due to other cases that had already been confirmed earlier for hearing by this Court. As such, fresh hearing dates were given for the month of May 2024.
29. I agree with the Counsel for the 3rd defendant that it is untenable for the 3rd defendant to continuously make formal applications before the Court to be allowed to access the bank accounts specified in this



ruling for a certain period of time only. As was stated by Judge Mabeya, the funds in the subject accounts belong to the 3rd defendant, and not its directors and/or shareholders. Therefore, the 3rd defendant must be left to run despite the infighting by its shareholders and/or directors. The 3rd defendant averred that from the end of the month of February 2024 going forward, it will require approximately Kshs13,000,000/- every month to meet its business operational costs and expenses.

30. Although in the application herein the applicant has prayed to be allowed to be withdrawing Kshs20,000,000/- on a monthly basis to meet its financial obligations, that prayer is at variance with the averment in paragraph 7 of the supporting affidavit sworn on 15th January, 2024, where Kamarow Joel Rionotukei deposed that from the month of February going forward, the 3rd defendant will require approximately Kshs13,000,000/- every month to meet its business operational costs and expenses. Asking for Kshs20,000,000/- in the substantive prayer and Kshs13,000,000/- in the supporting affidavit is double speak. This Court is guided by the averment in the supporting affidavit. Secondly, this Court cannot allow the withdrawal of such a large amount of money as Kshs20,000,000/- on a monthly basis without justification. It is common knowledge that some of the expenses outlined in paragraph 7 of the said affidavit such as payment for licences are annual paid annually, and not monthly. Once expensed, they will not be due for payment until the year 2025.
31. In the end, I am satisfied that the defendant has made out a case to warrant this Court to make an order varying the exparte orders issued on 15th September, 2023.
32. The upshot is that the application dated 15th January, 2024 is merited. I make the following orders -
 - i. That the 3rd defendant is hereby allowed to access its Bank Account Nos. XXXXXXXXXXX, XXXXXXXXXXX and XXXXXXXXXXX at NCBA Bank, Lavington Branch to withdraw a total of Kshs10,322,134.00 to enable it clear its pending payments/arrears for the month of January 2024;
 - ii. That the 3rd defendant is hereby allowed to access its Bank Account Nos. XXXXXXXXXXX, XXXXXXXXXXX and XXXXXXXXXXX at NCBA Bank, Lavington Branch to withdraw a total of Kshs19,608,982.00 to cater for the budget for the month of February 2024;
 - iii. That the 3rd defendant is hereby allowed to access its Bank Account Nos. XXXXXXXXXXX, XXXXXXXXXXX and XXXXXXXXXXX at NCBA Bank, Lavington Branch to withdraw a total of Kshs 13,000,000/- on a monthly basis to meet its statutory deductions, salaries, and other operational costs that it requires every month pending the hearing and determination of this suit;
 - iv. That the 3rd defendant is hereby ordered to file monthly statements of accounts of its income and expenditure with the Deputy Registrar of this Honourable Court to account for all its earnings credited into and all the withdrawals made from Bank Account Nos. XXXXXXXXXXX, XXXXXXXXXXX and XXXXXXXXXXX at NCBA Bank, Lavington Branch, and any other bank accounts it may be operating or it will be operating, pending the hearing and determination of this suit; and
 - v. Costs of the application are awarded to the 3rd defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MARCH 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI



JUDGE

In the presence of:

Mr. Wafula for the 3rd defendant/applicant

Ms Kyania holding brief for Dr. Musau for the 1st defendant

Ms Mayega h/b for Mr. Nyachoti for for the plaintiff

Ms B. Wokabi – Court Assistant.

