



REPUBLIC OF KENYA



**Bayusuf & 2 others v Diamond Trust Bank & another (Civil Suit
E024 of 2024) [2024] KEHC 12286 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E024 OF 2024
JK NG'ARNG'AR, J
OCTOBER 16, 2024**

BETWEEN

KHUNAIF ANWAR MOHAMED BAYUSUF 1ST PLAINTIFF

SUFYAN ANWAR MOHAMED BAYUSUF 2ND PLAINTIFF

NIHAWAL ANWAR MOHAMED BAYUSUF 3RD PLAINTIFF

AND

DIAMOND TRUST BANK 1ST DEFENDANT

DALALI AUCTIONEERS 2ND DEFENDANT

RULING

1. The Defendants filed a Notice of Motion application dated 7th May 2024 pursuant to Order 2 Rule 15 (1) (b), (c), and (d) of the [Civil Procedure Rules](#), Section 1A, 1B, 3A, 7, and 8 of the [Civil Procedure Act](#) and all other enabling provisions of the law. The Defendant/Applicants seek for orders that this court be pleased to strike out the suit for being an abuse of the court process and being statute barred. The Defendants/Applicants also seek that costs of this application and the suit be borne by the Plaintiffs and the Plaintiffs' advocate jointly and severally.
2. The application is premised on grounds on its face and the Supporting Affidavit of Faith Ndonga sworn on 7th May 2024 that the suit property known as Mombasa/Block X/249 is duly registered in the name of Anwar Mohamed Bayusuf Limited, a limited liability company and not the Plaintiffs. That the Plaintiffs being individuals and not the registered owner of the suit property have no locus standi to institute the present suit before court. That they also have no legal capacity to institute any proceedings on behalf of the estate of Anwar Mohamed Bayusuf (deceased). That the suit also contravenes Section 7 of the [Civil Procedure Act](#) owing to MSA HCCC No. 13 of 2013, [Anwar Mohamed Bayusuf Limited v Diamond Trust Bank Kenya Limited](#) which was dismissed with costs for want of prosecution, and that the suit is entirely an abuse of process.



3. The Plaintiffs in their Replying Affidavit sworn on 20th May 2024 averred that they are all children of the deceased who was the majority shareholder of Anwar Mohamed Bayusuf Limited. That the consent, authority and signature of the deceased were as a company mandate required before authorizing and executing company contracts including execution and registration of an encumbrance on any of the company assets, and that the deceased was the sole signatory to Anwar Mohamed Bayusuf Limited. That the deceased died and was buried on 25th July 2010 leaving behind the Plaintiffs who were barely in primary school and could not comprehend the state of the company's affairs, and that the company was at a standstill. That due to the family wrangles, the Plaintiffs are yet to take out letters of administration but it was agreed that the 1st Plaintiff being the only dependant living in Kenya would take over the affairs of the company pending an amicable distribution of the deceased's assets.
4. The Plaintiffs further stated that they learnt the 1st Defendant had auctioned the yard registered as plot number 194/VI/Mainland North and were in the process of auctioning the suit premise as it had been advertised for sale by the 2nd Respondent on instructions of the 1st Respondent purporting to exercise its statutory power of sale allegedly in regards to a facility of Kshs. 57,000,000 advanced by the 1st Respondent to the company on 3rd August 2011. That this was a surprise as their father died and was buried over a year before the facility was allegedly advanced in personum. That attempts to inquire about the charge and how the property was put up for sale bore no fruits, and that the matter was reported to Makupa Police Station vide OB No. 16/16/04/24.
5. The Plaintiffs averred that upon perusal of the proprietorial documents in the company's possession, they indicated that the 1st Defendant failed to issue a rectification notice to the Plaintiffs under Section 90 (1) of the Land Act which is a mandatory legal requirement. That the 1st Defendant is required to issue a redemption notice as a mandatory requirement under Section 96 (2) of the Land Act. That the imminent sale by auction of the suit premises is in contravention of Rule 15 of the Auctioneer's Rules 1997 as the 2nd Defendant has failed to issue the mandatory 45 days' notice. That no valuer has visited the premises for valuation of the property to ascertain its value and forced sale value in violation of the mandatory requirements of the Land Act.
6. The Plaintiffs stated that the 1st Defendant's deponent does not bear the official capacity to swear or plead in this matter. That the Plaintiffs herein were not aware of MSA HCCC No. 13 of 2013, Anwar Mohamed Bayusuf Limited v Diamond Trust Bank Kenya Limited as the company was on hiatus following the death of the majority shareholder and that the territorial domicile of the other shareholder did not give her authority to institute the suit. That the 1st Defendant is yet to issue this court with the requisite documents it was supplied with during execution of the charge. That the 1st and 2nd Defendants are intermeddling with the deceased's assets including shares in Anwar Mohamed Bayusuf Limited contrary to Section 45 of the Laws of Succession Act. That there are no administrators chosen to administer and cater for the estate of the deceased. That the Defendants intend to deny the Plaintiffs' rights through technicalities which are cured by dint of Article 159 (2) of the Constitution. The Plaintiffs therefore prayed that the Notice of Motion dated 7th May 2024 be dismissed.
7. The application was canvassed by way of written submissions. The Defendants/Applicants filed submissions dated 27th May 2024. On whether the Plaintiffs have locus standi to challenge the 1st Defendant's exercise of its statutory power of sale to enforce security over the suit property, the Defendants relied on the Court of Appeal case in Bank of Africa Kenya Limited & Another v TSS Investments Limited & 2 Others (2024) KECA 410 (KLR) which established the locus standi a party needs to challenge statutory power of sale. The Defendants also cited Section 103 of the Land Act which provides for who ought to make an application for relief against the exercise by the charges of any of the remedies referred to in Section 90 (3).



8. The Defendants submitted that the Plaintiffs do not fall within the scope of persons envisaged to bring any claim of this nature before this court. That the chargor is a limited liability company which has its own separate legal personality and that the property belongs to the chargor and not its shareholders. That the Plaintiffs have admitted not having taken out any letters of administration with respect to the estate of their late father, which is contrary to Section 80 (2) of the Law of Succession Act that until Grant of Letters of Administration Intestate have been obtained by the Plaintiffs, they have no legal capacity to institute the present suit. That the Court of Appeal in Virginia Edith Wamboi Otiemo v Joash Ochieng Ougo & Another (1987) KLR confirmed that an action before obtaining Letters of Administration is incompetent.
9. On whether the issues in contention is res judicata, the Defendants relied on Section 7 of the Civil Procedure Act as well as Section 43 of the Evidence Act. That in MSA HCCC No. 13 of 2013, Anwar Mohamed Bayusuf Limited v Diamond Trust Bank Kenya Limited, similar claims were brought in an attempt to bar the bank from exercising its statutory power of sale and that the suit was dismissed pursuant to a ruling delivered on 6th May 2024. That the Court of Appeal case in Bank of Africa Kenya Limited & Another v TSS Investments Limited & 2 Others (2024) KECA 410 (KLR) identified conditions for res judicata and the Defendants contended that the Plaintiffs cannot claim that they were not aware of any such suit over the same subject matter raising the same issues in contention. The Defendants prayed that the suit be struck out with costs.
10. The Plaintiffs in their submissions dated 22nd July 2024 argued that the issue before this court is not with regards to the personality of the company but the Plaintiff's rights and duties as beneficiaries of the majority shareholder who is now deceased. On whether the Plaintiffs have locus standi to institute this suit, they argued that they approached the court to protect their constitutional and civil rights pursuant to Article 23 and 159 (2) (d) of the Constitution and striking out the suit on trivial technicalities would be draconian.
11. On whether the suit is statute barred as alleged by the Defendants, the Plaintiffs submitted that the Plaintiffs are not aware or privy to any suits instituted before any court on behalf of the company, and if at all there was any, the same was not properly instituted before the said court as there was no representation made by any representatives from the majority shareholder's estate to consent to institution of the said suit. That for the Defendants to prove the claim of res judicata, they need to prove that the elements are well established and affirmed on what issues were really determined in the previous suit, whether they are the same in the subsequent suit and were covered by the decision, and whether the parties are the same or are litigating under the same title and that the previous suit was determined by a court of competent jurisdiction. That the suit before this court does not meet the threshold for res judicata and the Plaintiffs therefore prayed that the Defendants' Notice of Motion application dated 7th May 2024 be dismissed with costs to the Plaintiffs.
12. I have considered Defendants' Notice of Motion application dated 7th May 2024, the Plaintiffs' Replying Affidavit sworn on 20th May 2024 and submissions by the parties. The issues for determination are: -
 - a. Whether there is res judicata
 - b. Whether the Plaintiffs had legal capacity to institute the current suit
 - c. Who should bear costs
13. On the first issue, the Defendants claimed that the suit is res judicata on the basis that the claims filed in the suit herein were similar to those in MSA HCCC No. 13 of 2013, Anwar Mohamed Bayusuf



Limited v Diamond Trust Bank Kenya Limited in an attempt to bar the bank from exercising its statutory power of sale. That the said suit was dismissed for want of prosecution on 6th May 2024 but the Plaintiffs under the guise of a new suit and through legal craft are also seeking to circumvent the principle of *res judicata* contrary to Section 7 of the Civil Procedure Act and which should not be permitted.

14. This court has perused evidence on record and established the existence of MSA HCCC No. 13 of 2013, Anwar Mohamed Bayusuf Limited v Diamond Trust Bank Kenya Limited. It is noted that parties filed several applications therein and rulings were issued to that effect, including one delivered on 4th April 2024 which directed the matter to proceed for hearing on 6th May 2024 and that the suit be heard on a priority basis and concluded by 31st December 2024. However, on 6th May 2024, the suit was dismissed for want of prosecution.
15. The Supreme Court in Petition 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others (2014) eKLR expressed itself on the doctrine of *res judicata* as follows: -

“The concept of *res judicata* operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings ... This is a long-standing common law doctrine for bringing finality to the process of litigation; for avoiding multiplicities of proceedings; and for the protection of the integrity of the administration of justice? all in the cause of fairness in the settlement of disputes.

This concept is incorporated in Section 7 of the Civil Procedure Act (Cap. 21, Laws of Kenya) which prohibits a Court from trying any issue which has been substantially in issue in an earlier suit. It thus provides:-

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 in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others (2021) eKLR held: -

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. 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”

17. Contrary to the position of the Plaintiffs, this court finds that the issues in the two suits are directly and substantially the same. Both suits are seeking a permanent injunction against the sale of Mombasa/



Block x/246 and a declaration that the intended sale is illegal. However, issues in both suits have not been heard and determined with finality. There are no judgments in place as while the previous suit was dismissed for want of prosecution in its preliminary stages, parties are yet to comply with Order 11 of the *Civil Procedure Rules* in the instant suit. It is on this basis that this court finds the issue of res judicata does not apply in all the four corners of this matter.

18. On the second issue, it is not in dispute that Mombasa/Block x/249 was registered under Anwar Mohamed Bayusuf Limited. It is also not in dispute that Anwar Mohamed Mohamed Bayusuf (deceased), the majority shareholder with 999 shares, and Noor Ali Jeizan, the minority shareholder with 1 share, were parents of the Plaintiffs who now become beneficiaries of the estate of the deceased. What is in dispute is whether the Plaintiffs had legal capacity to institute the current suit.
19. The Defendants on the one hand maintained that the Plaintiffs had no legal capacity to institute the suit on the basis that the suit property is in the name of a separate legal entity, that the Plaintiffs being dependants of the estate of the deceased does not entitle them to file the present suit on behalf of the estate of the deceased, and that the Plaintiffs do not fall within the scope of persons envisaged under Section 103 of the *Land Act* to bring any claim of this nature before this court. The Plaintiffs on the other hand, in their Replying Affidavit, admitted that indeed they are yet to take out letters of administration and that there are no administrators chosen to administer the estate of the deceased.
20. The court in *Kipngetich Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones* (2021) eKLR held as follows: -

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“25. From the Complaint herein filed, I note that the deceased was a shareholder of Sambut Tea limited and held 125 acres on land parcel No LR No 9932/3. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in case of *Trouistik Union International & Another v Jane Mbeyu & Another* (2008) IKLR (G&F) 730 where it was held that’;

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the *law of succession Act*. That section confers that power on personal representatives and on them alone”

26. The issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiff/Respondent was not an administrator to the deceased’s estate herein, he lacked the capacity to sue on behalf of the deceased’s estate which renders the suit incompetent. Indeed the Court of Appeal authoritatively delivered itself on the issue of locus standi in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* (1982-99) 1 KAR, *Morjaria v Abdalla* [1984] KLR 490 and in *Trouistik Union International* (supra) to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.
27. The issue of locus standi being a point of law which goes to the root of any suit, its absence therefore renders a suit fatally defective. The issue of the lack of locus standi cannot therefore be termed as a mere technicality as the Plaintiff/Respondent herein would want us to believe and therefore the provisions of Article 159 (2) (d) of the *Constitution* cannot in the present circumstance salvage this suit.”
21. From the foregoing, it is clear that the Plaintiffs lacked capacity to institute the suit herein because they were not administrators of the deceased estate. This being a point of law renders the suit fatally defective



and cannot be cured by Article 159 (2) (d) of the Constitution. The suit is therefore struck out and the Notice of Motion application dated May 7, 2024 allowed to that extent. The Plaintiffs to bear costs.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 16TH DAY OF OCTOBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Choni Advocate for the Plaintiffs

Kanate Advocate for the Defendants

Court Assistant – Mr. Samuel Shitemi

