



REPUBLIC OF KENYA



**Swani Cofee Estates Limited v Terra Fleur Limited & another (Civil Suit 202 of 2008) [2023] KEHC 17348 (KLR) (Civ) (12 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17348 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL SUIT 202 OF 2008**

**A MABEYA, J**

**MAY 12, 2023**

**BETWEEN**

**SWANI COFEE ESTATES LIMITED ..... PLAINTIFF**

**AND**

**TERRA FLEUR LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CHANIA RIVER BANK ESTATES LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is an application dated February 18, 2022. It was brought under Articles 50 & 165 of the [Constitution](#), Order 8 Rule 3(1), 5, 7 and 8, Order 1 Rule 10(2) 14, Order 40 Rule 1 & 2 of the [Civil Procedure Rules](#), and Sections 3, 3A, 13 and 63(e) of the [Civil Procedure Act](#) Cap 21.
2. The pending orders in the application were that leave be granted to join the 2<sup>nd</sup> to 32<sup>nd</sup> intended defendants to the suit, and that a temporary injunction do issue to restrain the 2<sup>nd</sup> defendant and its representatives from interfering in any way with the suit property being LR Number 304/5 situate in Thika pending the determination of the suit. The application also sought leave to amend its plaint as per the annexed further amended plaint.
3. The grounds for the application were set out on the face thereof and in the supporting and further affidavits of Kamal Shah sworn on February 18, 2022 and June 6, 2022, respectively. It was contended that the matter was fully heard and was pending highlighting of final submissions on March 28, 2022.
4. That the plaintiff had discovered that the 2<sup>nd</sup> defendant had subdivided the suit property and sold portions thereof to the intended defendants in disregard to the doctrine of lis pendens. That in doing so, the 2<sup>nd</sup> defendant intended to waste the suit property with to impede the execution of a decree in the event the plaintiff succeeded in its claim.



5. That it was necessary to join the intended defendants to enable the court determine the issues with finality, and that the issues raised in the amended plaint would not be fully adjudicated upon without the presence of the intended defendants.
6. That the application was not *res judicata* as the reasons for amendment were not similar to the reasons raised in the applicant's applications dated June 31, 2021 and October 7, 2019 which raised different issues to the ones raised in the instant application. That an application for joinder could be brought at any stage and the averments that the instant application was inordinately late were wrong.
7. The application was vehemently opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants as well as the intended defendants.
8. The 1<sup>st</sup> defendant raised a preliminary objection dated March 14, 2022. It was premised on grounds that the application was *res judicata* as a similar application was heard and dismissed on July 1, 2021. That the court was *functus officio* and lacked jurisdiction to entertain the application.
9. The 1<sup>st</sup> defendant similarly filed a replying affidavit sworn by Hasit Shah on March 14, 2022. It was contended that the plaintiff moved this court by way of a certificate of urgency seeking injunction against the defendants from selling the suit property and the same was dismissed on April 24, 2008 wherein the court held that there was a valid sale.
10. That the plaintiff filed Civil Appeal No Nairobi 80 of 2008 on May 5, 2008 seeking an injunction and the same was also dismissed on December 4, 2009. That there was nothing to stop the statutory sale of the suit property and the same was sold to the 2<sup>nd</sup> defendant.
11. That the plaintiff attempted to stop the transfer process to the 2<sup>nd</sup> defendant and filed an application dated October 28, 2010 but the same was dismissed on the basis that the transfer had already been effected to a 3<sup>rd</sup> party. That the plaintiff filed an application to join the 2<sup>nd</sup> defendant to the suit and amend the plaint and the same was allowed. That the matter was heard and parties filed their submissions but the plaintiff filed another application dated October 7, 2019 for further amendment of the plaint and the same was dismissed by Okwany J on July 1, 2021 and directed parties to wait for judgment to be delivered.
12. That the matter was scheduled for highlighting of submissions on March 28, 2022. That the instant application was thus *res judicata* and the court was *functus officio* and lacked jurisdiction to hear it. That the court already found that the sale to the 2<sup>nd</sup> defendant was valid and therefore subsequent transfers were also valid.
13. That the plaintiff did not have any contract with the intended defendants who were strangers to the suit. The plaintiff was always aware that the property was subdivided and had ample time to amend its pleadings.
14. The 2<sup>nd</sup> defendant filed grounds of objection dated November 8, 2022. The grounds were that there was no real controversy between the plaintiff and intended defendants nor with the 2<sup>nd</sup> defendant and that Order 10(2) was inapplicable. That the application was *res judicata* and the reliefs sought had been overtaken by events. That this Court lacked jurisdiction to hear the matter as the issues raised had been determined through several rulings.
15. The 8<sup>th</sup>, 9<sup>th</sup>, 19<sup>th</sup>, and 20<sup>th</sup> intended defendants replied to the application vide the replying affidavit sworn by Dolly Achieng Ogonda, Joseph Jesse Masiga & Mary Atieno Onyango on September 21, 2022 whereas the 4<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> and 16<sup>th</sup> intended defendants opposed the application vide the replying



affidavit sworn by Geoffrey Mukonyoro Wathigo, Zabby Kariuki Chege, Loise Waanjira and Samuel Maina Waathigo on July 27, 2022. The two affidavits were similar.

16. It was contended that the suit property was legally sold to the 2<sup>nd</sup> defendant by the Bank of India in exercise of its statutory power of sale after the 1<sup>st</sup> defendant defaulted in its loan. That the 2<sup>nd</sup> defendant then sold and subdivisions to the intended defendants who were innocent purchasers for value without notice. That the plaintiff had numerous attempts to obtain injunctive orders but failed and the intended defendants had made developments to their individual properties.
17. The 21<sup>st</sup>, 22<sup>nd</sup>, and 24<sup>th</sup> intended defendants opposed the application *vide* grounds of opposition dated May 11, 2022. The 21<sup>st</sup> interested defendant also filed grounds of opposition separately dated March 24, 2022.
18. It was contended that the application was *res judicata* as a similar application for amendment of plaintiff had been determined before. That the plaintiff was aware of the subdivision since March 14, 2011 and a delay of 11 years was inordinate. That allowing the application would re-open the suit afresh to the prejudice of the 1<sup>st</sup> and 2<sup>nd</sup> defendants whose witnesses had already been heard. That no cause of action had been disclosed against the intended defendants and the plaintiff and 1<sup>st</sup> defendant were the real parties to determine the dispute.
19. The 5<sup>th</sup>, 13<sup>th</sup>, and 26<sup>th</sup> intended defendants filed grounds of opposition dated March 16, 2022 whereas the 28<sup>th</sup> and 29<sup>th</sup> intended defendants were dated April 8, 2022. They both premised their opposition on grounds that the claim was statute barred as the subdivision to the intended defendants was disclosed in the 2<sup>nd</sup> defendant's defence and counterclaim dated March 11, 2011.
20. That the application was an afterthought and the joinder of the intended parties was unnecessary as they were innocent allottees for value from the 2<sup>nd</sup> defendant.
21. The 12<sup>th</sup>, 18<sup>th</sup> and 23<sup>rd</sup> filed grounds of opposition dated March 24, 2022. They contended that the subdivision of the suit property was disclosed in the 2<sup>nd</sup> defendant's defence thus the plaintiff was guilty of laches. That the intended defendants were innocent and bona-fide purchasers for value and the application was made in bad faith.
22. This Court has considered the affidavits on record and submissions. I will begin by determining the preliminary objection dated March 14, 2022 by the 1<sup>st</sup> defendant. It also covers most of the points of objections and responses by the defendants and intended defendants.
23. A Preliminary Objection was described in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696* to consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.
24. I have seen the most recent ruling of July 1, 2021 delivered by Okwany J. When faced with two applications for transfer of the suit and for amendment of the plaintiff, she found that the matter was pending judgment and the applications were misconceived. She held that: -

“As I have already stated in this ruling, the main suit has already been fully heard and has been pending judgment before Amin J. It is not clear to this court why the said Amin J. did not deliver the said judgment despite the facts that it has been pending since May, 2017. Be that as it may, I am of the view that the mere fact that the judgment has not been delivered is not *carte blanche* for parties to re-open the case through fresh-applications for amendment and to transfer the concluded case to a different court.



My take is that parties should in the circumstances of this case, await the judgment of the court and depending on the outcome move the court appropriately. For the above reasons, I find that the applications are misconceived and misplaced. Consequently, I strike them out with no orders as to costs. I direct that the proceedings taken by Amin J at the hearing be typed so that this court can give directions on the pending judgment.”

25. What more can this Court add? This is not an appellate court for it to sit on that finding. There is no application to review and set aside that ruling. There is no room for any of the parties to file applications such as the instant one whereas the suit has been fully heard and is pending judgment.
26. Undoubtedly, this application is not only frivolous and misconceived, it is also *res judicata*. In any event, the Court has seen all the rulings made by different courts on the applications for injunction filed by the applicant such as those dated April 24, 2008, December 4, 2009 and October 28, 2011, respectively. There is a similar order of injunction sought in the present application. The same is obviously *res judicata*.
27. In the ruling of October 28, 2011, the court found that the application before it was *res judicata* and the applicant could not feign ignorance of the transfer from the defendant to the third party (2<sup>nd</sup> defendant) and it misled the court to obtain temporary orders.
28. Again, the issue of the applicant’s knowledge of the transfer to the 2<sup>nd</sup> defendant has been determined upon and cannot be re-opened. In all the above rulings, the courts found that there was a valid sale to the 1<sup>st</sup> defendant. Any consequential sale to the 2<sup>nd</sup> defendant and intended defendants cannot be invalidated. There is no real dispute between the plaintiff and the intended parties.
29. The applicant has abused court process by filing one application after another seeking similar orders and raising similar issues. Despite the ruling by Okwany J clearly finding that the application by the applicant pending judgment was misconceived and the direction that parties ought to wait for judgment, the applicant still found it fit to file the instant application. This is a clear abuse of process and disregard to court orders. The application must fail.
30. The upshot is that the application dated February 18, 2022 is unmerited and is *res judicata*. The same is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the intended defendants who responded to the application.
31. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF MAY, 2023.**

**A MABEYA, FCIarb**

**JUDGE**

