



REPUBLIC OF KENYA



**Milan & another v Ibrahim & 3 others (Civil Case 540 of 2007)  
[2023] KEHC 23342 (KLR) (Civ) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23342 (KLR)

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

**CIVIL  
CIVIL CASE 540 OF 2007**

**JN MULWA, J  
OCTOBER 12, 2023**

**BETWEEN**

**STOJANOVIC MILAN ..... 1<sup>ST</sup> PLAINTIFF  
JACKSON NGANGA WAWERU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HAYAT AKASHA IBRAHIM ..... 1<sup>ST</sup> DEFENDANT  
NURI AKASHA ..... 2<sup>ND</sup> DEFENDANT  
BONIFACE NGATIA IREGI ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. There are two applications before the Court for determination, dated 15/7/2022 and 25/1 2023.  
The first application is dated 15/07/2022, is brought by the 2<sup>nd</sup> Defendant Nuri Akasha, in which he seeks the following orders:
  - i. That paragraphs 4,15a and 17a in the Plaint dated 19th July 2007 be struck out.
  - ii. That the judgment in Nairobi Criminal Case No. 153 of 2004 (dated 2nd February 2007) be hereby declared inadmissible evidence in this suit pursuant to s.46 of the *Evidence Act*.
  - iii. That the copies of the typed Proceedings of Nairobi Criminal Case No.153 of 2004 be hereby declared inadmissible evidence in this suit pursuant to s.84 of the *Evidence Act* and multiple hearsay.



2. In response, the 1<sup>st</sup> Plaintiff/Respondent filed a Preliminary Objection dated 15<sup>th</sup> July 2022 in opposition to the application together with the 3<sup>rd</sup> Defendant/Respondent's Submissions dated 11<sup>th</sup> April 2023 on the following grounds:
  - i. The Notice of Motion application dated 15<sup>th</sup> July 2022 is incompetently and irregularly drawn and filed by the firm of Bryant & Associates Advocates.
  - ii. The firm of Bryant & Associates Advocates had/have no instructions to act for and represent the 3<sup>rd</sup> Defendant/Applicant in this suit.
  - iii. The said firm of Bryant & Associates Advocates were not properly on record to draw and file the Notice of Motion Application dated 15<sup>th</sup> July 2022 for and on behalf of the 3<sup>rd</sup> Defendant/Applicant in this suit.
  - iv. The firm of Bryant & Associates Advocates was irregularly and improperly playing the legal role and functions of Wandugi & Co. Advocates who are still on record to act for and represent the 3<sup>rd</sup> Defendant/Applicant in this suit.
  - v. The Notice of Appointment of Advocates for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants dated 9<sup>th</sup> October 2017 and filed on 26<sup>th</sup> April 2018 by Harun Ndubi Advocate and the Notice of Change of Advocates dated 8<sup>th</sup> March 2022 and filed by Bryant & Associates Advocates are both incompetent and irregular.
  - vi. The Notice of Change of Advocates for the 3<sup>rd</sup> Defendants/Applicants dated 25<sup>th</sup> January 2023 drawn and filed by Bryant's Law LLP is incompetent and irregular.
  - vii. The 3<sup>rd</sup> Applicant's submissions dated 11<sup>th</sup> April 2023 drawn and filed by Bryant's Law LLP are incompetent and not properly on record.
  - viii. The Notice of Motion Application dated 15<sup>th</sup> July 2022 and the submissions dated 11<sup>th</sup> April 2023 are incompetent, irregular, scandalous and vexatious and are an abuse of the court process aimed at continuing delays, and frustrating hearing and determination of the 1<sup>st</sup> Respondent's case.
3. From the record, the court notes that the firm of Bryant Law LLP filed their Notice of change of Advocates on 25<sup>th</sup> January 2023 a year later after they had filed the application dated 15<sup>th</sup> July 2022. This is a clear indication that indeed they were not properly on record and ought to have filed their notice of change of advocates before filing the said application in order to be properly on record.
4. Order 9 Rule 5 of the *Civil Procedure Rules* states as follows:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

Order 9 Rule 9 of the *Civil Procedure Rules* states that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—



- (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
5. In the present Application, it is clear that the firm of Bryant Law LLP came on record after they had already filed this application on 25<sup>th</sup> January 2023 and by then the firm of Wandugi & Co. Advocates were still on record for the 3<sup>rd</sup> Defendant/Applicant.
6. It is evident that the said law firm did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules by either filing a consent between themselves and the firm of Wandugi & Co. Advocates or they could as well have sought leave to come on record from this court. This court therefore finds that the firm of Bryant Advocates LLP was not properly on record as it did not follow the right procedure as required by law. Based on the above, the Application dated 15<sup>th</sup> of July 2022 is hereby dismissed with costs.
7. The second application is dated 25/03/2023. The Applicant is the 4<sup>th</sup> Defendant. It seeks an order that this court do strike out the 3<sup>rd</sup> Defendant from the suit. The application is predicated on the grounds set out on its face and supported by the 4<sup>th</sup> Defendant's Supporting Affidavit in which it averred that the 3<sup>rd</sup> Defendant was sued in his capacity as an agent and or servant of the Government and as such he should have not been sued since all civil proceedings by or against the Government are instituted by or against the Attorney General of the Republic of Kenya. The Attorney -General further avers that, the 3<sup>rd</sup> Defendant should not have been sued since he would appear as a witness for the Government whenever necessary in the suit.
8. The 2<sup>nd</sup> Defendant did not oppose the 4<sup>th</sup> Defendant/Applicant's application.
9. In opposition to the application the 1<sup>st</sup> Plaintiff/Respondent filed grounds of Opposition dated 7<sup>th</sup> February ,2023 that:-
  - i. The Application is frivolous, vexatious in nature and an attempt by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Applicants to further delay the hearing and determination of this decades old suit.
  - ii. The Applicants have had more than sixteen (16) years to file same/similar application but knowingly and deliberately failed and/or refused to do so.
  - iii. The issues raised in the application are the same and/or similar issues raised in the pleadings by the 1<sup>st</sup> Plaintiff and 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  - iv. The issues raised in the application can and ought to be subsumed and argued in the main suit for determination.
  - v. The application is brought in bad faith and is an abuse of the court process.
10. The court has considered the parties' respective affidavits in support of and grounds of oppositions of the application as well as their respective written submissions, and flags the only one issue that falls for determination is: Whether the application is merited.

Section 4(1) of the Government Proceedings Act (Cap 40 Laws of Kenya) provides that:

“ Subject to the provisions of this Act, the Government shall be subject to all those liabilities in tort to which if it were a private person of full age and capacity, it would be subject –



(a) in respect of torts committed by its servants or agents.

.... Provided that no proceedings shall lie against the Government by virtue of paragraph (a) in respect of any act or omission would, apart from the provisions of this Act, have given rise to a cause of action in tort against that servant or agent or his estate.

11. The 3<sup>rd</sup> Defendant was the investigating officer in the Criminal case, and therefore not liable in his individual capacity. The case of *Bishop V. Attorney General of Uganda & another* EALR 1967 was cited wherein the Chief Justice Udoma found that: -

“Since both the Government and the Minister in his capacity as Minister could not be made liable for the same tort at the same time, and the Attorney General was already a Defendant, the second Defendant was wrongfully joined in his capacity as Minister and no cause of action had been disclosed against him”

In the case of *Johnson Kobia M'Mpvi v. Kenya Revenue Authority & another* (2008) eKLR the High Court held that: -

“The plaintiff ought to have enjoined the Attorney General in the suits, as the Attorney General is the one who carries all the legal burdens on behalf of the government, so that when officers of the government do wrong to the citizens of this country, the Attorney General is the one to be sued on behalf and instead of such officers.”

12. Section 2 (1) of the *Government Proceedings Act* states that:

An officer in relation to the Government includes the President, the Vice President, a Minister, an Assistant Minister and any Servant of the Government.

The above provisions show that the 3<sup>rd</sup> Defendant was an officer of the state under Section 2 (1) and was carrying on duties of Investigation in his professional capacity.

13. The court notes that the plaint in this suit shows that the parties named and described in this case are as follows:

Stojananovich Milan.....1<sup>st</sup> Plaintiff

Jackson Nganga Waweru.....2<sup>nd</sup> Plaintiff

versus

Hayat Akasha Ibrahim.....1st Defendant

Baktash Akasha.....2nd Defendant

Nuri Akasha.....3rd Defendant

Boniface Ngatia Iregi.....4th Defendant

Dr. John Khaminwa.....5th Defendant

Attorney General.....6th Defendant

14. The court record shows that a Notice of Withdrawal of a party was filed on 27th May, 2019, removing the 2<sup>nd</sup> Defendant Baktash Akasha from the suit, therefore no longer a party to the suit. The court also notes that the parties by their Advocates filed a consent to have the 5<sup>th</sup> Defendant, Dr. John Khaminwa



dropped from the case on 7th April, 2017. In the Premises, the Court finds appropriate to remove the 3rd Defendant Boniface Ngatia Iregi from the suit which is hereby done thus leaving the following parties:

Stojananovich Milan.....1<sup>st</sup> Plaintiff

Jackson Nganga Waweru.....2<sup>nd</sup> Plaintiff

versus

Hayat Akasha Ibrahim.....1st Defendant

Nuri Akasha.....2nd Defendant

Attorney General.....3rd Defendant

Consequently, the Applicant's Notice of Motion application dated 25<sup>th</sup> March 2023 is allowed with no orders on costs.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF OCTOBER 2023.**

**JANET MULWA**

**JUDGE**

