

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KAPSABET
ELCLC CASE NO. E015 OF 2023

BETWEEN

**EASTERN PRODUCE KENYA
LIMITED.....PLAINTIFF/APPLICANT**

-VERSUS-

**KIMASAS FARMERS CO-OPERATIVE SOCIETY...
DEFENDANT/ RESPONDENT**

RULING

1. This ruling is in respect of an application by way of a Notice of Motion dated 25th March 2024 by the Plaintiff/Applicant through Kaplan and Stratton Advocates and currently represented by Oraro and Company Advocates and C.F Otieno & Company Advocates further to notice of change of Advocates dated 11th February 2025 and notice of appointment of Advocates dated 20th May 2025 respectively, for orders;

- a) That the Defendant/Respondent does produce for discovery and inspection by the Plaintiff/Applicant the original letter dated 8th November 1986 (The Letter herein) from Eastern Produce Africa Ltd to the Commissioner of Lands.
 - b) That the original letter dated 8th November 1986 from Eastern Produce Africa Limited to the Commissioner of lands, be produced to the Plaintiff/Applicant, within seven (7) days of the Court's order, failure to which the Defendant's defence be struck out with costs.
 - c) That such other or further orders as may be just be made to meet the ends of justice.
 - d) That costs of this application be provided for.
2. The application is premised upon an affidavit of nine (9) paragraphs sworn on 25th March 2024 by Denis Gitaka, the Legal Manager of the Applicant and a copy of the Letter allegedly from the Applicant to the Commissioner of Lands regarding the determination by the National Land Commission (NLC) in respect of transactions relating to the suit land reference number 9285. Also, the application is based on six grounds, inter alia;

a) The Respondent filed a historical land injustice claim with the NLC under NLC/HLI/255/2018 (the NLC Determination). The Respondent in the said proceedings relied on the letter. The Respondent in the said proceedings alleged that the Plaintiff had gifted in 550 acres.

b) The NLC in a determination dated 7th February 2019 ruled in favour of the Respondent on the basis inter alia, of the Letter and stated that the suit land should revert to the Respondent.

c) For purposes of the substantive hearing in respect of the main hearing, it is imperative that the Respondent produces the original Letter for inspection by the Applicant' Document Examiner Mr. Kenga.

3. The Respondent through MAC Law Advocates LLP, opposed the application by a Replying Affidavit of eighteen paragraphs sworn on 26th March 2024 by Daniel Biwott, the chairman of the Respondent. He averred in part, that the application and the entire suit is an afterthought and an abuse of the court process considering that the Letter has been used as evidence in

other cases namely a claim before the NLC, Kapsabet Civil Appeal No. 2 of 2023 seeking extension of time to file an appeal against the NLC determination or in Nairobi ELCJR NO. 5 OF 2020 which were all determined in favour of the Respondent. That the Applicant preferred appeals against the said decisions in Kapsabet Environment and Land Court (ELC) and Nairobi ELC.

4. Also, the Respondent averred that the Letter bears the Applicant's letter head and was issued to the Respondent by the area Superintendent P.G Scott, a white settler who cannot be found for purposes of producing the original copy of the said Letter. That the Respondent was only issued with a copy of the Letter and the applicant being the custodian of its documents, is in a better place to produce the Letter. That the Respondent was gifted 550 acres of LR 9285 by the Letter as revealed in a copy of the deed plan from the Director of Surveys marked 'DB' annexed to the affidavit but the Applicant only transferred 81.6 Ha of the land in dispute and has refused to transfer the rest to the Respondent. That by the Letter and the NLC

vide its decision dated 7th February 2019, the land was to revert to the Respondent.

5. By the Applicant's further affidavit of thirteen paragraphs herein sworn by the Applicant's Legal Manager Denis Gitaka, it is averred that the Letter came to the attention of the Applicant's counsel on or about April 2023 before filing this suit. That the Respondent admitted at paragraph 8 of the replying affidavit that the Letter was issued bearing the date 8th November 1986 hence, a forgery as it has been falsified. That the Respondent has the duty to produce documents which are the crux of the current proceedings. That the validity of the Letter has never been addressed in other proceedings between the parties and is a new cause of action.
6. On 15th October 2024 and 13th May 2025, the Court directed that the application be heard by way of written and oral submissions respectively; see **Order 51 Rule 16 of the Civil Procedure Rules 2010.**
7. Accordingly, learned Counsel for the Applicant filed submissions dated 24th February 2025 making reference to the application together with the supporting affidavit

supplemented by a further affidavit and the Respondent's replying affidavit opposing the application. Counsel urged the Court to allow the application as prayed and set out the background including that the Respondent filed a historic land injustice claim with the NLC in which it relied on the Letter from the applicant and the NLC determined the claim in favour of the Respondent. The main issue for determination identified in the application is whether the Letter should be produced for discovery and inspection. Counsel submitted that the Applicant requires the discovery of the Letter in possession of the Respondent to enable the Court address itself on the matters in controversy herein.

8. Counsel relied on the case of **Oracle Production Limited -vs-Decapture Limited & 3 others (2014) eKLR** that the true purpose of discovery is to level the litigation field to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. The case of **Selecta Kenya Gmbh & Co. Kg & another -vs-Peter Wanderi (2015) eKLR** on the relationship between

particulars and the pleadings in a case, was cited in the submissions.

9. Further, Counsel relied on the case of **Concord Insurance Co. Ltd-vs-NIC Bank Limited 92013) eKLR** regarding Pre-Trial discovery alongside **Halsbury's Laws of England, Volume 13** paragraph 38 that discovery of issues is limited to the matter raised in the particulars as relevance is tested by the pleadings and particulars. That in the case of **ABN Amro Bank N.V-vs-Kenya Pipeline Company Ltd (2019) eKLR**, the court noted that the purpose of discovery is for the just determination of the suit.
10. Furthermore, Mr. John Mbaluto learned counsel for the Applicant orally submitted in part that the Letter was relied upon by Respondent before the NLC. That it was discovered that the Letter had been altered as disclosed in the Forensic report dated 21st August 2023. That by the Letter, the Commissioner of Lands allegedly gifted the Respondent the suit land. Counsel referred to the authorities cited in the Applicant's written submission and submitted that the Letter is central to the claim as

pleaded by the Respondent thus, the Respondent cannot run away from the original copy of Letter for inspection and review.

11. Mr. Carey Otieno appearing alongside Mr. Mbaluto for the Applicant orally submitted, inter alia, that the Letter was allegedly addressed to the Commissioner of Lands by the Applicant. That the original of the copy of the Letter is what is required for inspection and review. Counsel associated himself with counsel Mbaluto's oral submissions.

12. By the Respondent's submissions dated 5th March 2025, reference is made to the application, the replying affidavit and that the Respondent is only aware of the Letter and not the letter dated 20th June 1986. That the Applicant had filed a myriad of cases including Kapsabet ELCLC No. E006 of 2023, Nairobi Civil Appeal No. E835 of 2023 and Kapsabet Misc JR No. 1 of 2025 then delineated four issues including the court's jurisdiction to determine the application and the suit and whether the respondent's defence should be struck out for failure to produce the letter. In discussing the issues in favour of the application,

it was submitted that the court has no jurisdiction under **Section 13 (2) of the Environment and Land Court Act 2015 (2011)** for reasons that the application and the suit are res judicata Kapsabet Civil Appeal No. 2 of 2023 and Nairobi ELC JR 5 of 2020 where the letter was relied upon. Also, that the matter is sub judice as the same letter has been used as evidence in **Kapsabet ELC MISC JR 1 of 2023 Republic-vs-NLC and others Ex parte Eastern Produce Kenya Limited, Kapsabet ELCC No. E006 of 2023; Eastern Produce Kenya Limited -vs- Kimasas Farmers' Cooperative Society & another, NBI Civil Application No. E379 of 2023; Eastern Produce Kenya Limited-vs-NLC & 3 others** and **Nairobi Civil Appeal No. E835 of 2023 Eastern Produce Kenya Limited-vs-NLC & another.** That the Respondent has given an explanation why the original Letter is not available for discovery and inspection since the same is not in possession of the respondent, it bears letter head of the Applicant and that only a photocopy was supplied to the Respondent.

13. Further, counsel submitted that the power to strike out pleadings is draconian and meant for only clear cases where there is no reasonable cause of action. That the application is meant to enable the Applicant get evidence from the Respondent to prove its case. That thus, the court should decline the invitation as captured in the application and dismiss the same with costs. To reinforce the submissions, counsel cited, inter alia, **Order 2 Rule 15 of the Civil Procedure Rules 2010** concerning striking out of pleading as well as the case of **Mutua & 51 others-vs-Eveready Batteries (K) Ltd (2005) eKLR and Washingtone Ochieng-vs-Strathmore University (2021) eKLR.**

14. Moreover, Ms Flora Nderitu learned counsel for the Respondent orally submitted, inter alia, that the Respondent relied on the Respondent's replying affidavit and written submissions as regards the Letter that had been used by the NLC before Nairobi ELC JR NO. 5 of 2020 and Kapsabet ELC Civil Appeal No. 2 of 2023, among others and not the one dated 8th November 1986. That the Letter had been used in various cases and if the Letter is a

forgery as alleged by the Applicant, the same ought to be litigated in a criminal forum. That the Respondent was supplied only with its carbon copy and the maker of the Letter was a white settler who left the Country and cannot be found at the moment. That examiner referred to in the Applicant's submissions that the issues in the application be ventilated during trial. She urged the court to dismiss the application with costs.

15. By their rejoinder to the Respondent's oral submissions, both learned Counsel for the Applicant submitted that the act of forgery is both civil and criminal and this Court can handle the same. That what is required is the original copy of the Letter for inspection and review and not its maker. Counsel implored the court to allow the application.

16. I have duly considered the application, the replying affidavit, further affidavit, both written and oral submissions in entirety. So, the issues for determination are thus;

a) The application of res judicata and sub judice doctrines at this stage of the suit.

b) Subject to issue (a) above, is the application merited?

c) The orders to issue for the ends of justice.

17. **Black's Law Dictionary 10th Edition** defines the term 'Sub Judice' as follows;

'Before the court or Judge for determination,'

18. According to **Black's Law Dictionary** (supra) the legal doctrine of '**Res judicata**' means an affirmative defence that bars a second lawsuit on the same claim or any other claim arising from the same transactions that could have been raised in the first suit. This refers to an earlier judgment on the merits and involvement of the same parties or those in privity with them.

19. **Sections 6 and 7 of the Civil Procedure Act Chapter 21 Laws of Kenya** provide for the legal doctrines of '**sub judice**' and '**res judicata**' respectively. This Court is conscious of all the respective ingredients thereunder.

20. The Respondent referred to a myriad of cases at paragraphs 3, 4, 13 and 16 of the replying affidavit. The same are stated in paragraphs 3, 12 and 14 hereinabove. The Respondent's Counsel urged the court to apply sub

judice and res judicata doctrines and strike out or dismiss the application and the suit.

21. The Applicant contested the respondent's allegations of sub judice and res judicata. In the further affidavit, the respondent averred that the validity of the Letter has never been addressed in other proceedings between the parties. That this matter is a new cause of action.

22. Notably, to strike out a pleading is draconian. It only applies in clear cases where there is no reasonable cause of action; see **Washington Ochieng case** (supra).

23. In **D T Dobie & Company Ltd-vs-Muchina (1982)** **eKLR**, the Court of Appeal held;

'The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the court ought not to deal with any merits of the case..... as far as possible indeed, there should be no opinions expressed upon the

application which may prejudice the fair trial of the action.....’

24. The Respondent raised ‘sub judice and res judicata’ being points of law, in the response to the application and the Applicant’s submissions. In the circumstances, they require the court to ascertain or weigh rivaling facts at the trial; see **Mukisa Biscuit Manufacturing Company Ltd-vs-West End Distributors Ltd (1969) EA 696.**

25. It the case of **Kensalt Limited-vs-Water Resources Management Authority (2020) eKLR**, the Supreme Court of the Republic of Kenya held;

‘It was premature to determine the rights of the parties at the in.....it would in our view cause injustice.....’as the issues in controversy between the parties may not be determined on merit.....’

26. Undoubtedly, sub judice and res judicata doctrines are inapplicable at this stage of the suit as fair trial is an unlimited right under **Articles 50 (1) as read with Article 25 (c) of the Constitution of Kenya 2010**; see also **James Kanyiita Nderitu & another-vs-Marios Philotas Ghikas & another (2016) eKLR.**

27. Regarding the second issue, section 22 of the Civil Procedure Act Cap 21 stipulates that the court can order discovery of documents whose function is to provide the parties with relevant documentary materials before the trial so as to assist them in appraising the strength or weakness of their relevant cases. Thus, it targets at providing the basis for the fair disposal of the proceedings before or at the trial; see **Oracle, Concord Insurance Co. Ltd ABN Amro Bank cases** (all supra) and **Halsbury's Laws of England Volume 13 paragraph 1.**

28. Clearly, the Letter features at paragraphs 4, 6,8 of the plaint dated 7th September 2023 and prayers a, b and c at the foot thereof. It is also document No. 24 of the Plaintiff's list of documents of even date. The Letter relates to the report dated 21st August 2023 by Emmanuel Kenga, Forensic Document Examiner being document Number 1 per the Applicant's Plaintiff's list of documents.

29. Also, the Letter is revealed at paragraphs 6, 10 and 13 of the statement of defence dated 22nd September 2023. At paragraph 11 thereof, the Respondent denied the

allegations of fraud concerning the Letter as set out at paragraphs 8 and 9 of the plaint.

30. On the third issue, to grant the orders sought in the application at this stage, would pre-empt the determination of the issues in dispute. It would be imperative to hear the suit on merit.

31. Furthermore, if the matter is determined at this interlocutory stage, the parties are likely to be prejudiced thereby.

32. Wherefore, I find the application dated 25th March 2025 devoid of merit. The same is hereby dismissed with costs in the cause.

33. It is so ordered.

DATED and **DELIVERED** at **KAPSABET** this **18th** day of **NOVEMBER 2025**

HON. G M A ONGONDO

JUDGE

In the presence of;

1. Mr Steven Odhiambo instructed by Mr John Mbaluto
learned Counsel for the Applicant/Plaintiff

2. Ms Kayeli instructed by Ms Flora Nderitu learned Counsel for the Respondent
3. Walter Kipkorir, Court Assistant