

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCLC E059 OF 2025

MAIMUNA HASHAM AJI1ST
PLAINTIFF
YUSRA AHMED ABDALLA2ND
PLAINTIFF
HUSSEIN ABDALLA SALIM 3RD
PLAINTIFF
(ALL SUING AS ADMINISTRATORS OF THE ESTATE OF
AHMED ABDALLA BAKHSHWEIN)
ESTHER WAMAITHA MURIUKI4TH
PLAINTIFF

VERSUS

**AGUNGA & COMPANY LIMITED
DEFENDANT**

RULING

1. The application dated 18th June 2025 seeks the following principal orders:

- a. **That an order be issued that this court lacks jurisdiction to hear determine or dispose of the suit filed by the plaintiffs;**
- b. **That the present suit be struck out with costs to the defendant for having been filed in contravention of the provisions of Section 6 of the Civil Procedure Act Cap 21 of the Laws of Kenya.**

2. The application is premised on the grounds that another case **ELC Land Case Number E034 of 2025** is still pending; that the earlier case was filed by the same plaintiffs in this case; that the subject matter in that case emanates from a transaction that was executed between Ahmed Abdullah Bakhshwein of whose estate the plaintiffs are now administrators, and Agunga and Company Limited; that however, the plaintiff instituted the said suit against Alfred Agunga and his wife Pamela Auma Ogola; that Alfred and Pamela responded to that earlier suit and

raised the issue of having been sued wrongly owing to the fact that they were never involved in the execution of the sides sale and purchase agreement which had indeed been executed by the defendant in the presence suit; that in the foregoing the present suit is *res sub judice* and violates the provisions of **Section 6** of the Civil Procedure Act Cap 21 of the Laws of Kenya as it is similar in all respects to **Malindi ELC Number E034 Of 2025** which is spending before this court.

ANALYSIS AND DETERMINATION

3. This court has already prepared and delivered a ruling in respect of the application in **Malindi ELC Number E034 of 2025** in which it has dismissed the preliminary objection raised therein by way of a notice of motion dated 6th June 2025 as the motion lacked merits. This court stated as follows in that ruling:

“Regarding the first issue, it is noteworthy that the plaintiff claims that the 1st and 2nd defendants have been consistently trespassing into the suit property. The allegations of actions in paragraph 9 thereof is that of actions commenced or perpetrated by natural persons, for example, sending armed youth with crude weapons to destroy the fence belonging to the plaintiffs and destroying the structures and pit latrines on the site. Those are matters pleaded specifically against the 1st and the 2nd defendants. The court does not know whether or not they were involved in those actions. Where the suit has been filed against them, it is for the plaintiffs to eventually prove his case against them, and if he does not do so the case will be dismissed at their risk as to costs. It is therefore for the plaintiff to take care not to join persons who are not liable for the actions that he alleges. The defendants have indicated that there is a company with which an agreement was executed. This is merely an averment from the defendants. It is not from the plaintiffs in the present case. If the plaintiffs

eventually find out that there was indeed that kind of agreement, it is for the plaintiffs to elect whether to join that company to the present suit or not, of course again at their own risk. For now, they have opted not to. Whether they can succeed without such joinder is an issue for their own contemplation and not the court. The court can not decide whom they ought to sue unless it is absolutely necessary. Furthermore, the self-explanatory provisions of Order 1 Rule 5 of the Civil Procedure Rules state that a claim may not be dismissed for misjoinder or non-joinder of parties. On that ground alone, the request by the defendants to strike out the suit for failure to join Agunga and Company Limited fails.”

4. Whether it is due to the objection raised by the defendants in the earlier case regarding non-joinder of Agunga & Co Ltd that the present case has been filed, this court may not know. The principle remains that a plaintiff is at liberty to sue whoever he wishes and establish their claim against them and that plaintiff who has not been diligent enough stands the risk of suing the wrong parties and suffering the consequences of costs thereof.
5. The defendants in **Malindi ELC E034 of 2025** have already averred that they are neither directors or shareholders in the entity named as defendant in the present suit. The plaintiff in that earlier case claims against them *as individuals* in respect of certain acts they are said to have undertaken with regard to the suit land.
6. While the claim in **Malindi ELC E034 of 2025** is not premised on a sale agreement, the claim in the present suit is premised on what the plaintiffs regard as a forged and invalid sale agreement purportedly executed between the parties herein on 3rd May 2011. The plaintiffs herein do not claim that the defendants in **Malindi ELC E034 of 2025** were parties to

that agreement. The defendant in the present case, a limited liability company is an entity capable of being sued on its own. The very fact that the defendant in **Malindi ELC E034 of 2025** have disowned any directorship and shareholding in the defendant hearing is indicative of the fact that Agunga and Company Limited can be, and have been properly joined, to the present suit. Furthermore, whereas the earlier suit seeks only injunction and damages against the natural persons named as defendants therein, the present suit seeks *inter alia* orders of declaration that the alleged sale agreement dated **3rd May 2011** relied upon by the defendant company Agunga and Company Limited (not the defendants in **Malindi ELC E034 of 2025**) is null void and of no effect.

7. Notably, the 1st defendant in **Malindi ELC E034 of 2025** has sworn the supporting affidavit to the present motion seeking a striking out, knowing very well that in the other suit he is crying foul that Agunga & Co Ltd has not been joined as a defendant in respect of the alleged agreement dated **3rd May 2022**. He is thus guilty of approbation and disapprobation in the same breath. He can not be allowed to do that by this court.
8. This court finds that both suits are totally distinct and independent of one another so far as the pleadings by the plaintiffs are concerned. The issue of the present case being *res sub judice* **Malindi ELC E034 of 2025** does not therefore arise. The application dated **18th June 2025** therefore lacks merit and it is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Malindi on this 17th day of December, 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to read "Mwangi Njoroge".

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**