



**Githinji v Hared (Environment and Land Case E222 of 2023)  
[2024] KEELC 639 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 639 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE E222 OF 2023**

**JO MBOYA, J  
JANUARY 25, 2024**

**BETWEEN**

**JAMES MURIMI GITHINJI ..... PLAINTIFF**

**AND**

**MOHAMED ALI HARED ..... DEFENDANT**

**RULING**

1. Vide Notice of Motion Application dated the 13<sup>th</sup> December 2023; and which is premised on the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, and in respect of which the Defendant/Applicant herein has approached the Honorable court seeking for the following reliefs;
  - i. That pending hearing and determination of this Application, an order [sic] striking out the proceedings herein.
  - ii. That the Plaintiff's suit filed dated 19<sup>th</sup> June 2023 be struck out under Section 6 of the *Civil Procedure Act*, 2010; for being sub-judice pending the determination of case no. E054 of 2023 *Tradeline Investment Limited v Mohamed Ali Hared* before Milimani Commercial Magistrate's Court.
  - iii. That the costs of this Application be provided for.
2. The instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of Mohamed Ali Hared, sworn on even date and to which the Deponent has attached one annexure.
3. Upon being served with the current Application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 18<sup>th</sup> January 2023; and in respect of which same has annexed three [3] sets of documents, inter-alia, a copy of a Notice of the withdrawal of suit pertaining to Milimani MCELC E054 of 2023.



4. Suffice it to point out that the subject Application came up for hearing on the 24<sup>th</sup> January 2024, whereupon the advocate for the respective Parties covenanted to canvass and dispose the Application by way of oral submissions. Consequently and in this regard, the Application proceeded and was indeed disposed of vide oral submissions.

### **Parties' Submissions:**

#### **a. Applicant's Submissions:**

5. The Applicant herein adopted the grounds enumerated at the foot of the Application and furthermore reiterated the averments contained in the body of the supporting affidavit.
6. Other than the foregoing, Learned counsel for the Applicant thereafter raised and highlighted three [3] issues for consideration by the Honourable court.
7. Firstly, Learned counsel for the Applicant has submitted that the Plaintiff/Respondent herein is the sole Director in a company known as Tradeline Investment Limited, which company had filed and lodged a previous suit before the Chief Magistrate's Court vide MCELC E054 of 2023, pertaining to and concerning the same dispute.
8. Furthermore, Learned counsel contended that by virtue of being the sole Director in the said company, the Plaintiff herein is deemed to be one and the same person with the Company.
9. Premised on the foregoing, Learned counsel for the Applicant has therefore contended that the suit which was filed before the Chief magistrate's court by and on behalf of Tradeline Investment Ltd, [the Company], therefore ought to be deemed as a suit filed by the current Plaintiff.
10. Secondly, Learned counsel for the Applicant has submitted that the dispute/property which forms the basis of the suit in the lower court [Chief Magistrate's Court], is the same property, which underpins the current suit, by and on behalf of the Plaintiff.
11. Consequently and in this regard, Learned counsel for the Applicant has submitted that there is a likelihood of the two courts granting contradictory and conflicting orders pertaining to and concerning the said property.
12. Further and in any event, Learned counsel for the Applicant has submitted that the Plaintiff herein undertook the transfer of the suit property from the name of M/s Tradeline Investment Ltd unto his name, albeit during the pendency of the suit before the Chief Magistrate's court.
13. In this respect, Learned Counsel therefore contended that the actions by and on behalf of the Plaintiff herein were mischievous and thus ought not to be countenanced and/ or sanctioned by the Honourable court.
14. Owing to the foregoing, Learned counsel for the Applicant has therefore invited the court to find and hold that insofar as the suit before the Chief Magistrate's court and the one before this court touch on the same property, then the provisions of Section 6 of the Civil Procedure Act, Chapter 22 Laws of Kenya; are relevant and applicable in the instant matter.
15. In a nutshell, Learned counsel has implored the Honourable court to find and hold that the Application is meritorious and thus ought to be allowed.



## **b. Respondent's Submissions:**

16. The Respondent herein adopted and reiterated the contents of the Replying affidavit sworn on the 18<sup>th</sup> January 2024; and thereafter sought to highlight and canvass three[3] salient issues for consideration by the Honourable court.
17. First and foremost, Learned counsel for the Respondent has submitted that the suit before the Chief Magistrate's Court, which has been alluded to by counsel for the Applicant, was filed by M/s Tradeline Investments Ltd, which is a limited liability company and not otherwise.
18. Further and in addition, Learned counsel for the Respondent has contended that even though the Respondent is one of the Directors of M/s Tradeline Investment Ltd, namely, the Plaintiff in the Chief magistrate's court, same [the Plaintiff] is separate and distinct from the company.
19. To this end, Learned counsel for the Respondent cited and relied on, inter-alia, the holding in the case of *Salmond v Salmond* [1897] AC 22 and *Wandegaya Company Limited v Jenifer Muthoni Murigi* [2020]eKLR, respectively.
20. Secondly, Learned counsel for the Respondent has submitted that the Plaintiff/Respondent herein was never a party to the suit, which was filed by the company in the Chief Magistrate's court. Consequently and in this regard, learned counsel has therefore pointed out that the provisions of Section 6 of the *Civil Procedure Act*, therefore do not apply.
21. Thirdly, Learned counsel for the Respondent has submitted that in any event, the suit property, which was hitherto registered in the name of M/s Tradeline Investment Ltd, was transferred to and is currently registered in the name of the Plaintiff herein.
22. Additionally, Learned counsel for the Respondent has submitted that following the transfer of the suit property to and in favor of the Plaintiff herein, the company which had hitherto filed the suit in the chief magistrate's court filed a Notice of withdrawal of the said suit and which Notice of withdrawal is pending endorsement by the court [ Chief Magistrates's Court].
23. Based on the foregoing, Learned counsel for the Respondent has therefore implored the court to find and hold that the Application beforehand, which is anchored on the Doctrine of Res-sub-judice, is misconceived and legally untenable.

## **Issues for Determination:**

24. Having reviewed the Application beforehand, as well as the Response thereto and upon taking into account the submissions ventilated on behalf of the respective Parties, the following issues do emerge and are thus worthy of determination;
  - i. Whether the Plaintiff herein, who is a natural person can be deemed to be synonymous with a Limited liability company or at all.
  - ii. Whether the instant suit is barred and/or prohibited by the Doctrine of Res-sub-judice or otherwise.



## Analysis and Determination:

### Issue Number 1. Whether the Plaintiff herein, who is a Natural person can be deemed to be synonymous with a Limited liability company or at all.

25. The Defendant/Applicant has filed the instant application contending that the current suit replicates and/or is similar to a suit, namely, Milimani MCELC No. E054 of 2023, between *Tradeline Investment Ltd vs Mohamed Ali Hared*.
26. Whilst ventilating his contention that the current suit replicates the one which was hitherto filed in the Chief Magistrate's court, Learned counsel for the Applicant has contended that the current Plaintiff is the sole director of the M/s Tradeline Investment Ltd and hence same ought to be deemed to be one and the same person with the company.
27. Furthermore, Learned counsel for the Applicant has submitted that insofar as the Plaintiff herein is one and the same with M/s Tradeline Investment Ltd, same (Plaintiff) cannot be allowed to originate and sustain the current suit during the pendency of (sic) the suit in the lower court, namely, the Chief Magistrates Court.
28. Arising from the submissions by Learned counsel for the Applicant, the question that comes to fore and which deserves due interrogation and adjudication, is whether a Director, subscriber, promoter and/or shareholder of a limited liability company can be deemed to be one and the same person with the company, either as contended by the Learned Counsel for the Defendant/ Applicant or otherwise.
29. Whereas Learned counsel for the Applicant contends that the Plaintiff herein ought to be deemed as being one and the same person with the limited liability company, it is elementary learning that a Director of a company is separate and distinct from the company.
30. For coherence, upon the incorporation of a company, the company becomes a Juristic person [Legal Person], with a separate legal identity, known to law and thus the company is distinct from her subscribers, shareholders and/or directors.
31. In this respect, it is worthy to take cognizance of the famous dictum in the case *Salmond v Salmond* [1897]AC 22; cited and referenced in the case of *Joel Ndemo Ong'au & another v Loyce Mukunya* [2015] eKLR where the Court stated and held thus;
  1. Perhaps the most recent decision of the High Court as cited by the Plaintiff in this connection is the finding of my learned brother, Gikonyo J. in the *Kolaba Enterprises case* (supra). The Judge detailed as follows:

“It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of *Salomon & Co Ltd v Salomon* [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved.

Needless to say, that separate legal personality of a company can never be departed from except in instances where the statute or the law provides for the lifting of piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent



and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality. ”

32. Furthermore, the concept of corporate personality of a company was also highlighted and amplified by the Court of Appeal in the case of *Ardhi Highway Developers Ltd v Westend Butchery Ltd & 6 Others* [2015]eKLR, where the court referenced another important decision and thereafter stated as hereunder;

42. Lord Denning MR in his characteristic literary style summed up the law in *Moir v Wallersteiner*[1975] 1 ALL ER 849atp. 857, as follows:

“It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in *Foss V. Harbottle*[1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue”.

33. Without endeavoring to exhaust all the cases wherein the dichotomy between a company and her directors have been highlighted and expounded, it is worthy to cite the holding in the case of *George W M Omondi & another v National Bank of Kenya Ltd & 2 others* [2001] eKLR, where the court held thus;

“It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see *Salmon v a Salmon & Co Ltd* [1897] AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own.

From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights. The contention by counsel for the plaintiff that the investment in LVF is by the plaintiffs and they are accordingly the proper plaintiffs in this action is manifestly without legal foundation. And although it is true that the appointment of a receiver manager has the effect of rendering the board of directors *functus officio*, it does not destroy the corporate existence and personality of the company. That appointment makes the directors unable to act in the name of the company but, as I understand the law, it does not make them in their capacity as members equally disabled.

On that view, it was open to the two plaintiffs in the name of the company, but only in the name of the company, to institute the present proceedings which relate to alleged wrongs against the company qua company.

34. Arising from the foregoing, there is no gainsaying that the Plaintiff herein cannot by any stretch of imagination be deemed and/or contended to be one and the same person with M/s Tradeline Investment company Ltd, which filed the previous suit before the Chief magistrate’s court.

35. To surmise, the submissions that were ventilated by and on behalf of the Learned counsel for the Applicant, are clearly misconceived and in any event, premised on misconception of the elementary and hackneyed company principle, which has been highlighted in the preceding paragraphs.



36. In short, my answer to issue number one [1], is that the Plaintiff herein is separate and distinct from the limited liability company, irrespective of whether same (Plaintiff) is the sole Director or otherwise.

**Issue Number 2. Whether the instant suit is barred and/or prohibited by the Doctrine of Res-sub-judice or otherwise.**

37. The substratum of the Application beforehand is to the effect that the current suit violates the Doctrine of res-sub-judice, insofar as there is (sic) an existing suit touching on and concerning the same subject matter.

38. Before venturing to interrogate whether or not the Doctrine of res-sub-judice does apply and inflict the instant case, it is imperative to discern, decipher and appreciate the requisite ingredients that underpin the Doctrine of res-sub-judice.

39. To this end, it is imperative to take cognizance of the dictum of the Supreme Court of Kenya in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR, where the court stated and observed as hereunder;

(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter.

This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

40. Having appraised myself of the requisite ingredients that underpin the application of the doctrine of res-sub-judice, it is now appropriate to revert back and to discern whether the said ingredient are available and applicable to the instant matter.

41. To start with, it was incumbent upon the Applicant to demonstrate that there is indeed a similar suit between the same Parties and touching on the same subject dispute. However, it is instructive to note that whilst discussing issue number one [1], the court has found and held that a limited liability company is separate and distinct from her Directors.

42. Consequently and in the premise, it cannot thus be said that the suit which was filed by M/s Tradeline Investment Ltd, [ a Limited Liability Company], is deemed to have been filed by the current Plaintiff.

43. To the contrary, the limited liability company, which filed the suit in the subordinate court, [ the Chief Magistrate’s Court], is sperate and distinct in the eyes of the law.

44. Secondly, it was admitted by Learned counsel for the Applicant that the suit property, which is the subject of the instant matter, was hitherto registered in the name of the limited liability company, but same was subsequently transferred to and in favor of the current Plaintiff.



45. Taking the foregoing position into account, it then means that the suit property currently belongs to and is registered in the name of the Plaintiff herein and thus the propriety or otherwise of the certificate of title can only be interrogated in the instant matter.
46. Thirdly, Learned counsel for the Respondent submitted that the suit which was hitherto filed by M/s Tradeline Investment company Ltd has in any event, been withdrawn on the basis of a Notice of withdrawal dated the 12<sup>th</sup> June 2023, which is only pending endorsement by the Chief Magistrate in terms of the provisions of Order 25 of the Civil Procedure Rules, 2010.
47. In my humble view, even assuming that the suit in the Chief magistrate's court was filed by the same Plaintiff herein, [which is not the case], there is evidence that the said suit is the subject of a Notice of withdrawal.
48. In view of the foregoing, there is no gainsaying that the suit, which has taken the center stage in the arguments by and on behalf of the Applicant herein, is substantially withdrawn save for the administrative endorsement of the said Notice by the court. For good measure, the holding of the Supreme Court of Kenya in the case of Nicholas Kiptoo Korir arap Salat versus Independent Electoral and Boundaries Commission and 6 Others, [2014] eKLR, suffices
49. Notwithstanding the foregoing, it is my finding and holding that the current suit, [which has been filed by the Plaintiff], in his personal capacity, cannot be deemed to be the same as the one that was filed by a limited liability company.
50. In the premises, the contention that the instant suit is barred and or prohibited by dint of the provisions of Section 6 of the Civil Procedure Act, is indeed misleading, erroneous and mistaken.
51. Simply put, the foundation upon which the current application is premised, is legally untenable.
52. In a nutshell, my answer to issue number two [2] is to the effect that the Doctrine of res-sub-judice does not apply to and in respect of the instant suit, either as contended or at all.

**Final Disposition:**

53. Arising from the foregoing analysis, it is evident and apparent that the Applicant herein has neither established nor proved the pre-requisite ingredients underpinning the Doctrine of res-sub-judice. Consequently, the application beforehand is not meritorious.
54. In a nutshell, the Application dated the 13<sup>th</sup> December 2023, be and is hereby dismissed with costs to the Plaintiff/Respondent.
55. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.**

**OGUTTU MBOYA**

**JUDGE.**

In the Presence of;

Benson - Court Assistant.

Mr Solomon Olonde h/b for Mr. Abdiwakil Adhan h/b for Mr. Hussein for the Defendant/Applicant.

Mr. Munyuga for the Plaintiff/Respondent.

