



**Bakamoyo Limited v Registrar of Titles & 4 others; Nyundo & 7 others (Interested Parties)
(Environment & Land Case 156 of 2015) [2024] KEELC 4064 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4064 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 156 OF 2015**

**LL NAIKUNI, J
APRIL 24, 2024**

BETWEEN

BAKAMOYO LIMITED PETITIONER

AND

REGISTRAR OF TITLES 1ST RESPONDENT

MOMBASA DISTRICT LAND REGISTRY 2ND RESPONDENT

COMMISSIONER OF LANDS 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

**KENYA DEPOSIT INSURANCE CORPORATION AS APPOINTED
LIQUIDATION OF IMPERIAL BANK (K) LTD (IN
LIQUIDATION) 5TH RESPONDENT**

AND

KENGA KIRAO NYUNDO INTERESTED PARTY

DONALD SCAVER MWAKIO INTERESTED PARTY

FRANCIS LEWA INTERESTED PARTY

ALEX NYANJE INTERESTED PARTY

SAMUEL KATANA KIMANDO INTERESTED PARTY

MATHIAS NYAMBU INTERESTED PARTY

SALIMU SAIDI MWANGUZA INTERESTED PARTY

AISHA SHERMOHAMAD JAM INTERESTED PARTY



RULING

I. Introduction

1. The Honorable Court was called upon to make a determination over two applications being the Chamber Summons application dated 26th January, 2023 and Notice of Motion application dated 21st June, 2023 by Bakamoyo Limited, filed by the Petitioner/Applicant herein. These applications were brought under numerous provisions of the law. These included, the provision of sections 68 and 69 of the *Evidence Act* cap. 80 as read together with sections 3 and 13 of the *Environment and Land Court Act*, No. 19 of 2011, section 56 (2) of the *Kenya Deposit Insurance Act*, No. 12 of 2012, Section 275 of the *Company's Act* 2015 and sections 1A,1B, 3 & 3A of the *Civil Procedure Act* cap 21 Laws of Kenya, order 51 of the *Civil Procedure Rules 2010* and all other enabling provisions of the Law respectively.
2. Despite of there being proper service of these two applications upon the Respondents, there were no responses nor submissions elicited accordingly. Ideally, the Applications were deemed to be unopposed. Nonetheless, the Honourable Court has decided to deal with them on merit and render this rule.

II. The Chamber Summons application dated 26th January, 2023

3. The Petitioner/Applicant sought for the following orders:-
 - a. Spent.
 - b. That leave be granted to the Petitioner/Applicant to seek for orders against the Kenya Deposit Insurance Corporation as Appointed Liquidator of Imperial Bank (K) Ltd (in liquidation).
 - c. That the Honourable Court be pleased to issue an order compelling the Kenya Deposit Insurance Corporation as Appointed Liquidator of Imperial Bank (k) Ltd (In Liquidation) to produce to the court the original title of the Property identified as L.R 28/IV/Mainland North/C.R 5097.
 - d. That the court be pleased to make certified copies of the original title of the Property identified as L.R 28/IV/Mainland North/C.R 5097 and a copy of the same be furnished to the Petitioner/Applicant for purposes of producing it during hearing.
 - e. That the costs of this Application be in the cause.
4. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 12th Paragraphed Supporting Affidavit of –Ahmed Anwar Mohamed, one of the directors of the Petitioner/Applicant herein sworn and dated January 26, 2023 with four (4) annexures marked as “AAM 1 to AAM 4”. The Deponent averred that:
 - a. Currently, there was perennial dispute over the ownership of the property identified as L.R 28/IV/Mainland North/C.R 5097 (hereinafter referred to as “The Suit Property”) forming the substratum of the issue in dispute in the suit herein.
 - b. The original title, which ought to be produced by the Petitioner during hearing, was currently in the custody of Imperial Bank (K) Ltd (In Liquidation).
 - c. The said Bank claimed to be holding the original title as lien over a loan purportedly owed to it.



- d. The Petitioner/Applicant had since filed a suit being “High Court (Nairobi) Commercial Civil Suit No 17 of 2019 Bakamoyo Limited Imperial Bank Limited (in receivership) seeking to recover the original title. The suit was however yet to be heard and determined.(Annexed in the affidavit and marked as “AAM – 2” were copies of the pleadings filed in the said suit).
- e. The suit was currently active before the Honourable Justice Majanja and was yet to be heard and determined. (Annexed in the affidavit and marked as “AAM – 3” was the status of the case as shown in the e-filing portal).
- f. The Petitioner/Applicant stood to suffer great prejudice since it could not produce the original title during hearing to prove its claim over the property and therefore sought that the original title be produced before court only for purposes of certified copies being made to enable the Petitioner/Applicant produce the same during hearing.
- g. The said Imperial Bank (K) Limited was currently under liquidation and it was a requirement by law that any suit/court action could only commence/proceed against the appointed liquidator, Kenya Deposit Insurance Corporation, with leave of the court.(Annexed in the affidavit and marked as “AAM – 4” was a copy of a Kenya Gazette notice dated 8th December 2021)
- h. It was therefore in the interest of justice that the appointed liquidator be directed to avail before court the original copy of the title for purposes of producing certified copies by the court for production by the Petitioner/Applicant during hearing.
 - i. The Petitioner/Applicant stood to suffer immense prejudice if the orders sought herein was not granted.
- j. None of the parties herein stood to suffer prejudice if the orders sought were granted.

III. The Notice of Motion application dated 21st June, 2023

5. The Petitioner/Applicant sought for the following orders:-
 - a. That this Honourable Court be pleased to find that the law firm of Messrs. Awuor & Company is duly on record to act for the Petitioner in this matter.
 - b. That the costs of this Application be in the cause.
6. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 12th Paragraphed Supporting Affidavit of –Ahmed Anwar Mohamed, one of the directors of the Petitioner/Applicant herein sworn and dated 21st June, 2023 with eight (8) annexures marked as “AAM - 1 to AAM - 8” annexed thereto. The Deponent averred that:
 - i. There was currently dispute amongst the directors and shareholders of the Petitioner due to the fraudulent activities on going in the said Company leading to the filing of this Application.
 - ii. Noteworthy the Petitioner had instructed the Law firm of Messrs. Awuor and Company Advocates to represent it in the above matter. (Annexed herein and marked as “AAM - 2 (a)-(b)” were copies of the board Resolution and Authority to Act.)
 - iii. Vide a consent that was adopted on 26th February, 2020 by Honourable Justice G.L Nzioka in “Miscellaneous Application No. e589 of 2019; Tajdin Alibhai Nathoo - Versus - Bakamoyo Limited, the Petitioner had 11 shareholders amongst them 4 being Directors namely; Mohamed Ahmed Shah, Kuldip Singh Jandu, Pravin K. Lakhani and Tajdin Alibhai (Annexed in the affidavit and marked as “AAM – 3” was a copy of the Order).



- iv. Despite the changes made at Petitioner's Company on 27th February, 2020 with regards to the shareholding and directorship the same was yet to reflect at Sheria House Company registry as it was still pending and in progress. (Annexed in the affidavit and marked as "AAM – 4" was a copy of the CR-12 Form).
- v. Subsequently, the Law firm of Messrs. Okubasu Munene & Kazungu Advocates LLP who were previously on record for the Petitioner had written to the Registrar of Companies on May 18, 2020 requesting for the changes. (Annexed in the affidavit and marked as "AAM – 5" was a copy of the letter dated 18th May 2020).
- vi. Importantly on April 15, 2020, Honourable Justice M.W.Muigai in "HCCC No. 17 of 2019; Bakamoyo Limited v Imperial Bank Limited & Hadi Badadurali Hasham" restrained the Defendants from dealing in any manner with Land Reference 28/IV/ Mainland North/CR 5097 which was the substratum of this matter. (Annexed in the affidavit and marked as "AMM – 6" was a copy of the ruling).
- vii. Moreso, a person by the name John Barasa Fwamba who purported to act for the Estate of Hadi Badadurali Hasham who was restrained and was now deceased purported to create confusion by instructing different advocates to act for the Petitioner in this matter.
- viii. Additionally, the said John Barasa Fwamba who was not a director also purported to have a Power of Attorney dated 4th October 2012 from the said deceased donating him powers to sign documents on behalf of the Petitioner which was drawn by the Law firm of Messrs. Archer & Wilcock Advocates. (Annexed in the affidavit and marked as "AAM – 7" was a copy of the said Power of Attorney.)
- ix. The said Power of Attorney was fake as noted in the letter from Law firm of Messrs. Archer & Wilcock Advocates dated April 28, 2023. (Annexed in the affidavit and marked as "AAM – 8" was a copy of the letter dated 28th April 2023.)
- x. None of the parties herein stood to suffer any prejudice if the orders sought herein were granted.
- xi. It would be in the interest of justice that the Application be allowed as prayed.

IV. Submissions

7. On September 27, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 21st June, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that, none of the parties obliged and on 12th October, 2023 a ruling date was reserved on notice by the Honourable Court accordingly.

V. Analysis & Determination.

8. I have carefully read and considered the pleadings herein being the two applications filed by the Petitioner/Applicant, the relevant provisions of the *Constitution of Kenya*, 2010 and statutes.
9. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the Chamber Summons application dated January 26, 2023 is merited and whether the parties are entitled to the relief sought.



- b. Whether the Notice of Motion application dated June 21, 2023 is merited and whether the parties are entitled to the relief sought
- c. Who will bear the Costs of two applications dated January 26, 2023 and June 21, 2023.

Issue No. a). Whether the Notice of Motion application dated 26th January, 2023 is merited and whether the parties are entitled to the relief sought.

10. To correctly examine this sub – title, the Honourable Court would need to critically refer to several provisions of the *Kenya Deposit Insurance Act*, No. 12 of 2012 to commence the proceedings. As a starting point, the Honourable Court will refer to the provisions of section 56(2) of the Act which states as follows:-

“No injunction may be brought or any other proceeding may be commenced or continued against the institution or in respect of its assets without the sanction of the court.”

11. This court notes that the provision of Section 55 which precedes Section 56 of the said Act provides for the powers of the Corporation, that is the Kenya Deposit Insurance Corporation, as a liquidator. While the provision of Section 55 (1) of the Act sets out the powers of a liquidator as inter alia, carrying on the business of an institution so far as may be necessary for the beneficial appointing of professionals to assist in the performance of the duties, paying any classes of creditors in full, making any compromise or arrangement with creditors. The above provisions are covered under Part VI of the Kenya Insurance Deposit Act which has a heading on receivership, liquidation and winding up. Section 55 (2) of the *Kenya Deposit Insurance Act* expressly permits a party aggrieved with the exercise of the liquidation powers to apply to the High Court thereby granting jurisdiction to this court.

12. The provision of section 43 of the *Kenya Deposit Insurance Act* addresses the issue of appointment of the Kenya Deposit Insurance Corporation as a receiver. The provision of Section 43(1) of the said Act provides that the Central Bank shall, in consultation with the Cabinet Secretary whenever the circumstances require, appoint the corporation to be the sole and exclusive receiver of any institution. Sub-section 2 thereof states that the Central Bank shall appoint the corporation as the sole receiver of any institution if the Central Bank determines ‘inter alia’ that the institution assets are less than the institution’s obligations to its creditors, an unsafe or unsound condition to transact business exists or other cause that warrants the exercise of the relevant power in the interests of the institution, its depositors or other creditors.

13. The provision of section 53 (2) of the said Act provides as follows:-

“In the course of the receivership, the Corporation may recommend to the Central Bank that the institution be liquidated in which case the Central Bank shall appoint the corporation as the liquidator.”

14. According to the Petitioner, there was currently dispute over ownership of the property identified as L.R. 28/IV/Mainland North/C.R 5097 forming the substratum of the issue in dispute in the suit herein. The original title, which ought to be produced by the Petitioner during hearing, is currently in the custody of Imperial Bank (K) Ltd (In Liquidation).

15. The said Bank claims to be holding the original title as lien over a loan purportedly owed to it. The Petitioner/Applicant has since filed a suit being Nairobi High Court Commercial Civil Suit No 17 of 2019 Bakamoyo Limited Imperial Bank Limited (in receivership) seeking to recover the original title. The suit is however yet to be heard and determined. (Annexed in the affidavit and marked as



“AAM – 2” are copies of the pleadings filed in the said suit). The suit is currently active before the Honourable Justice Majanja and is yet to be heard and determined. (Annexed in the affidavit and marked as “AAM – 3” is status of the case as shown in the e-filing portal). The Petitioner/Applicant stands to suffer great prejudice since it cannot produce the original title during hearing to prove its claim over the property and therefore seeks that the original title be produced before court only for purposes of certified copies being made to enable the Petitioner/Applicant produce the same during hearing. The said Imperial Bank (K) Limited is currently under liquidation and it is a requirement by law that any suit/court action can only commence/proceed against the appointed liquidator, Kenya Deposit Insurance Corporation, with leave of the court. (Annexed in the affidavit and marked as “AAM – 4” is a copy of a gazette notice dated December 8, 2021).

16. The Petitioner therefore requires the court’s leave to continue with these proceedings against the Respondent. By and large, having taken all the surrounding facts and inferences of this matter, I discern that this Honourable Court has the jurisdiction to deal with the same and being that the dispute in this case concerns land, I proceed to grant the prayer on leave.
17. Therefore, the upshot of all this is that, I am persuaded that the Notice of Motion application dated 26th January, 2023 is meritorious and hence all the reliefs sought thereof must be allowed according.

Issued No. b). Whether the Notice of Motion application dated 21st June, 2023 is merited and whether the parties are entitled to the reliefs sought

18. Under this sub title and from the given facts herein, the issues are rather straight forward and simple to tackle. The Petitioner sought to have the Law firm of Messrs. Awuor & Company is duly on record to act for the Petitioner in this matter. According to the Applicant, there was currently dispute amongst the directors and shareholders of the Petitioner due to the fraudulent activities on going in the said Company leading to the filing of this Application. Noteworthy the Petitioner has instructed the Law firm of Messrs. Awuor and Company Advocates to represent it in the above matter. (Annexed herein and marked as “AAM - 2 (a)-(b)” are copies of the board Resolution and Authority to Act.) Vide a consent that was adopted on February 26, 2020 by Honourable Justice G.L Nzioka in “Miscellaneous Application no. E589 of 2019; Tajdin Alibhai Nathoo - Versus - Bakamoyo Limited, the Petitioner has 11 shareholders amongst them 4 being Directors namely; Mohamed Ahmed Shah, Kuldip Singh Jandu, Pravin K. Lakhani and Tajdin Alibhai (Annexed in the affidavit and marked as “AAM – 3” is a copy of the Order).
19. Despite the changes made at Petitioner’s Company on 27th February, 2020 with regards to the shareholding and directorship the same is yet to reflect at Sheria House Company registry as it is still pending and in progress. (Annexed in the affidavit and marked as “AAM – 4” is a copy of the CR-12). Subsequently, the firm of Okubasu Munene & Kazungu Advocates LLP who were previously on record for the Petitioner had written to the Registrar of Companies on 18th May 2020 requesting for the changes.(Annexed in the affidavit and marked as “AAM – 5” is a copy of the letter dated May 18, 2020.)
20. The right to counsel is a constitutional unction in the 2010 Supreme law of Kenya. Of course, there are circumstances when an Advocate may be barred from appearing in a matter. But these are laid down in the law, particularly the Advocates Act, Chapter 16 of the Laws of Kenya and the Advocates (Practice) Rules 1966 as made pursuant to the Act, and the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct, May 2017, Gazette Notice No. 5212. A party has a right to choose an Advocate of his own Choice. That right extends to a case where the party decides to have legal representation through as many Advocates as he can afford or think as appropriate. The only caution he should have in mind is that the Advocates’ legal fees in terms of party and party costs lie in



the discretion of the taxing master who, when faced with a situation of a claim for fees for more than one Advocate there has to be a certificate of the judge to that effect.

21. Courts have stated often that the right to legal representation even in civil cases should not be impeded. It is a constitutional right that is implicit in the provisions therein. No one should forum-shop Advocates for the adverse party. The right to legal representation should not be unnecessarily hindered. I wish to refer to the case “Supasave Retail Limited v Coward Chance (a firm) and others”; “*David Lee & Co (Lincoln) Ltd v Coward Chance (a firm) and others* (1991) 1 ALL ER” it was stated,

“Cozens-Hardy MR laid down the test as being that a court must be satisfied that real mischief and real prejudice will, in all human probability, result if the solicitor is allowed to act.....As a general rule, the court will not interfere unless there be a case where mischief is rightly anticipated.”

22. Besides, the provision of order 9 rule 5 of the [Civil Procedure Rules, 2010](#) provides for situations where a party wishes to change Advocates. In such a case, the change is not complete unless and until the Notice is filed and served on all parties. In this matter, the Plaintiff did not change his Advocates whom he had instructed earlier: he only appointed another law firm to act alongside the initial firm. Thus, the Rule does not apply here. The Applicant must have known that his contention on this was leading him nowhere and beat a hasty retreat while seeking shelter in the provision that I refer to below.
23. For all these reasons, therefore, I find no justifiable and/or good cause reason as to why the prayers sought from the Notice of Motion application dated June 21, 2023 should not be granted. I hold the application must succeed.

ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 6th December, 2023.

24. It is now well established that the issue of Costs are at the discretion of the Court. The [Black Law Dictionary](#) defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

25. In other words, Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 of the [Civil Procedure Act](#), cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the [Civil Procedure Act](#) provides as follows;-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

26. A careful reading of the provision of section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book [The Code of Civil Procedure](#),



18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

27. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
28. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In the case of “*Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

29. In this case, the Applicant shall be entitled to costs for both the Chamber Summons application dated 26th January, 2023 and the Notice of Motion application date 21st June, 2023. However, the costs shall in the cause as the matter is still ongoing.

VI. Conclusion & Disposition

30. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to these two applications, this court arrives at the following omnibus decision and makes the orders below:-
- a. That the Chamber Summons application dated January 26, 2023 by the Petitioner/ Applicant be and is hereby found to have merit and is allowed in its entirety
 - b. That the Notice of Motion application dated 21st June, 2023 by the Petitioner/ Applicant be and is hereby allowed in its entirety.
 - c. That leave be and is hereby granted to the Petitioner/Applicant to seek for orders against the Kenya Deposit Insurance Corporation as Appointed Liquidator of Imperial Bank (k) Ltd (In Liquidation).
 - d. That the Honourable Court be and is hereby pleased to issue an order compelling the Kenya Deposit Insurance Corporation as Appointed Liquidator of Imperial Bank (K) Ltd (in liquidation) to produce to the court the original title of the Property identified as L.R 28/IV/ Mainland North/C.R 5097 on costs of Kenya Shillings twenty Thousand (Kshs. 20, 000.00/=) for logistical expenses to be met by the Petitioner.
 - e. That the court be pleased to make certified copies of the original title of the Property identified as L.R 28/IV/Mainland North/C.R 5097 and a copy of the same be furnished to the Petitioner/Applicant for purposes of producing it during hearing.



- f. That this Honourable Court be and is hereby pleased to find that the law firm of Messrs. Awuor & Company is duly on record to act for the Petitioner in this matter.
- g. That for expediency sake, the matter to be mentioned on 15th May, 2024 for the Pre – Trial Conference directions and hearing 12th September, 2024.
- h. That costs to be awarded to the Petitioner/Applicant for both the Chamber Summons application dated 26th January, 2023 and the Notice of Motion Application dated 21st June, 2023 in the cause.

It is so ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 24TH DAY OF APRIL 2024.

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**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. Mr. Omar, the Court Assistant.
- b. M/s. Awuor Advocate for the Petitioners/Applicants.
- c. Mr. Wamwea Advocate for the Respondent – the Kenya Deposit Insurance Corporation Limited.
- d. M/s. Omondi Advocate for the Interested Parties.

JUSTICE L.L. NAIKUNI

