



REPUBLIC OF KENYA



Makini Housing Co-operative Society Limited & 2 others v Mwangi & 4 others (Environment and Land Appeal E024 of 2023) [2025] KEELC 701 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 701 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E024 OF 2023
LC KOMINGOI, J
FEBRUARY 20, 2025**

BETWEEN

**MAKINI HOUSING CO-OPERATIVE SOCIETY LIMITED 1ST APPELLANT
BEATRICE MUKABI 2ND APPELLANT
KALUKI MURIU NDIRITU ADVOCATES LLP 3RD APPELLANT**

AND

**RHODA WAITHERA MWANGI 1ST RESPONDENT
VITALIS OMOLO AWUOR 2ND RESPONDENT
JACKLINE ATIENO OGOM 3RD RESPONDENT
ETYANG OITA 4TH RESPONDENT
HENRY KWAME MALOVA 5TH RESPONDENT**

(Being an Appeal against the Ruling of Hon. V. Kachuodho (PM) in Kajiado Chief Magistrate’s Court ELC Case No. E093 of 2022 delivered on 24th October 2023)

JUDGMENT

1. In the Ruling dated and delivered on 24th October 2023 in CM ELC Case No. E093 of 2022, the learned Hon. V. Kachuodho held:

“... I find the Plaintiffs have expressly averred issues of fraud against the 3rd and 4th Defendants as pleaded in the Plaint, a course of action most definitely arises, which issues can only be subjected to proof, and/or fully ventilated and conclusively determined at full hearing. I would therefore, at this interlocutory juncture refrain from striking out the 3rd and 4th Defendants until all issues are conversed...”



2. Aggrieved by the said Ruling, the Appellants filed this Appeal seeking setting aside of the Ruling and the same be substituted with an order allowing the striking out of the 2nd and 3rd Appellants' names from the suit as per the Notice of Motion application dated 15th September 2023 on the grounds that:
 1. The learned trial Magistrate erred in law and in facts by failing to find that there was a misjoinder of the 2nd and 3rd Appellants as parties in the suit.
 2. The learned trial magistrate erred in law and misdirected herself by failing to find that the 2nd and 3rd Appellants being agents of a disclosed principal (1st Appellant) could not be sued in the proceedings under common law principle on agency relationship.
 3. The learned trial magistrate erred in law and misdirected herself by failing to find that the Respondents' pleadings had not disclosed any reasonable cause of action against the 2nd and 3rd Appellants.
 4. The learned trial magistrate erred in law and in facts by failing to strike out the names of the 2nd and 3rd Appellants in the suit for misjoinder.
 5. The learned magistrate erred in law and misdirected herself by failing to frame issues for determination and exercise her discretion judiciously thus arrived at a wrong conclusion.
 6. The learned trial magistrate erred in facts and in law by ignoring the Appellant's submissions and cited judicial precedents thus arrived at a wrong conclusion.
3. This appeal was canvassed by way of written submissions.

The Appellants' submissions

4. Counsel submitted that the issue for determination was whether the trial Court erred in failing to strike out the said names and whether the Appellants were entitled to the reliefs sought.
5. Counsel submitted that the 2nd and 3rd Appellants were wrongly included as parties in the Amended Plaint dated 16th August 2023 since the Respondents were not seeking any orders against them adding that there was no contract between the Respondents and 2nd and 3rd Appellants who were agents of the 1st Appellant. Therefore, their application dated 15th September 2023 seeking to be struck out as parties in the suit should have been allowed and the trial court should have held that their presence in the suit was a misjoinder as agents cannot be sued where there is a disclosed Principal. Counsel submitted that Order 1 Rule 10(2) of the Civil Procedure Rules authorised the Court to order striking out of names improperly joined in suits while making reference to the cases of: *Kepha Marita Okemwa suing as the Personal representative of the Estate of Johnson Okemwa Nyakundi vs Mega Choice Ltd & another* [2021] eKLR and the Court of Appeal in *City Council of Nairobi vs Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR and *Anthony Francis Wareheim t/a Wareheim & 2 others vs Kenya Post Office Savings Bank*.
6. As such, the Appeal should be allowed with costs to the Appellants.

The Respondents' submissions

7. On whether the 2nd and 3rd Appellants were wrongly joined in the suit, Counsel submitted that although Order 1 Rule 10(2) of the Civil Procedure Rules gave the Court the authority to order for striking out of wrongly joined parties, Order 1 rule 10 of the Civil procedure Rules allowed for joinder of all parties who would help the Court arrive at a just determination. And that the 2nd and 3rd Respondents were relevant parties in the suit who should not be aided in escaping liability.



Counsel submitted that agents of disclosed principals could be held liable on grounds of fraud, misrepresentation and deceit pointing out that the 2nd Appellant was the 1st Appellant's Secretary to the Board in charge of office administration who was the receiver of all the money paid by the Respondents. The 2nd and 3rd appellants were therefore added to the suit after the Respondents received evidence that they were engaging in activities meant to undermine the Respondents case. Their presence in the suit was thus necessary to help the Court adjudicate the dispute. To support the issue that joinder, misjoinder or non joinder should not defeat justice, Counsel made reference to the following cases: Afroplast Industries Ltd vs Sanlam Insurance Co. Ltd & another [2021] eKLR, Wash tech Kenya Ltd & another vs Vivo Energy Kenya Ltd [2020] eKLR, Blue Shield Insurance Co. Ltd vs Joseph Oguttu Mboya.

8. On the ground of Appeal that the Respondents case had not disclosed a reasonable cause against the 2nd and 3rd Appellants, counsel submitted that the Appellants were being litigious by filing numerous applications an act that should be curtailed by the court adding that the Appellants have never filed a defence against the suit for it to be dealt with, but have been filing applications. Therefore, the Appeal should be dismissed with costs.

Analysis and Determination

9. I have considered the grounds of Appeal, the Record of Appeal, the rival submissions and the authorities cited. I find that the issue for determination is:
 - i. Whether the Learned trial Magistrate erred in failing to strike out the 2nd and 3rd Appellants from the suit.
 - ii. Whether this Appeal is merited;
 - iii. Who should bear costs of the suit.
10. This is an Appeal from the ruling of Honourable V. Kachuodho (R.M) which she declined to strike out the Appellants from the suit in the Lower court
11. The Appellants claim that they were wrongly joined in the suit because the 2nd and 3rd Appellants were the 1st Appellant's agents and should not be sued for any action or inaction of the principal. The Respondents argued that it was necessary to join them in the suit for to arrive at a just determination adding that they had 'footprints' all over the suit and were also engaging in activities that would undermine the suit.
12. The Learned trial Magistrate rejected the application to strike out the 2nd and 3rd Appellants from the suit on grounds that there were questions of fraud that had been pleaded and it was therefore necessary to have the issue canvassed in a full hearing.
13. I have considered the Amended Plaintiff dated 6th March 2023 in which the Respondents aver that the 2nd and 3rd Appellants have been in cahoots with the 1st Appellant to extort money from them and frustrate their quest to recover the land.
14. Order 1 Rule 9 of the Civil Procedure Rules provides that: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
15. On the issue of misjoinder, the Court of Appeal in *Mangira & another v Assets Recovery Agency; Ali Cars Limited (Interested Party)* [2024] KECA 1488 (KLR): held: Order 1 Rule 9 of the Civil Procedure Rules, 2010 which provides that no suit shall be defeated by reason of the misjoinder or



non- joinder of parties, and the Court may in every suit deal with the matter in controversy in so far as regards the rights and interests of the parties actually before it. The provisions of Article 159(2) (d) of *the Constitution* also apply in that justice should be done without undue regard to procedural technicalities...”

16. Similarly, the Court of Appeal in *Nature Pharmacy Ltd & another v Gichuhi* [2022] KECA 827 (KLR) where the court also held that: “... In any case, Order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non- joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. To our mind, no prejudice was occasioned to the second appellant by a being made a party to this suit...”
17. While the Appellants submitted that the issue of wrong parties is not a procedural technicality and cannot be cured by Article 159, I am of the opinion that should the suit be determined and found that the 2nd and 3rd Appellants were wrongly enjoined in the suit, this determination will not be fatal and is curable. It more injurious to strike them out and then later find that they ought to have been parties to the suit.
18. In conclusion, I find no merit in this appeal and it is accordingly dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF FEBRUARY 2025.

L. KOMINGOI

JUDGE.

In The Presence Of

Ms. Wanjiru for Mr. Ndiritu for the Appellants.

Mr. Kipkirui Kemboi for the Respondents.

Court Assistant – Mutisya.

