



Sagalla Ranchers Limited v Westermann’s Camp Limited & 4 others (Environment & Land Case E001 of 2023) [2024] KEELC 4488 (KLR) (Environment and Land) (6 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E001 OF 2023**

EK WABWOTO, J

JUNE 6, 2024

BETWEEN

THE SAGALLA RANCHERS LIMITED PLAINTIFF

AND

WESTERMANN’S CAMP LIMITED 1ST DEFENDANT

KALE HOLDINGS LIMITED 2ND DEFENDANT

WILMOT MWADILO 3RD DEFENDANT

PATRICK MBINGA 4TH DEFENDANT

THE LAND REGISTRAR, MOMBASA 5TH DEFENDANT

RULING

1. This Ruling is in respect to the 3rd and 4th Defendant’s application dated 6th October 2023 wherein the following reliefs are sought: -

1. That the court be pleased to strike out this suit as it is res judicata Voi HCC Suit No. 1 of 2018 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & Patrick Mbinga and Mombasa High Court Comm Suit No. 74 of 2019 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & 5 Others and subjudice Mombasa COACA No. E003 of 2023 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & Patrick Mbinga.
2. That the suit be struck out as it offends Section 7 of the Limitation of Actions Act Cap.22 of the Laws of Kenya.



3. That the suit herein be struck out otherwise for being frivolous, vexatious and a pure abuse of the court process.
 4. That the costs of this application be provided for.
2. The application is premised on 10 grounds and supported by an affidavit sworn by Wilmot Mwadilo the 3rd Defendant herein. It was averred that the issues raised by the Plaintiff in this suit relate to acquisition of land thus the reason for filing this suit in the Environment and Land Court. The agreement for sale of the subject land was executed on 29th July 1999 between the Plaintiff and the 1st defendant which land was transferred to the 1st Defendant's nominee the 2nd Defendant herein. The suit is therefore time barred as it offends the provisions of Section 7 of Limitation of Actions as the cause of action arose 24 years ago.
3. It was also averred that the 1st and 2nd Defendants have been in open and notorious occupation of the suit property from the year 1999 with full knowledge of the Plaintiff. The Plaintiff has never interfered or even attempted to evict the 2nd Defendants from the suit property. This clearly shows that the Plaintiff is being used by malicious persons hiding under the umbrella of the Plaintiff to harass, embarrass, intimidate and bully the 3rd and 4th Defendants. That additionally, the suit herein is res-judicata and sub-judice as the subject matter and the issues raised herein between the Plaintiff and the 3rd and 4th Defendants have in one way or the other been dealt with by the High Court and/or is still pending before the Court of Appeal in Mombasa COACA No. 3 of 2023 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo and Patrick Mbinga being an appeal from Voi HCC Suit No. 1 of 2018 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & Patrick Mbinga (formerly Mombasa HCCC No. 86 of 2014) and Mombasa HCCOMM No. 74 of 2019 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & 6 Others.
4. It was further averred that by filing this suit the Plaintiff is improperly attempting to re-litigate issues which have already been dealt with and/or are still pending before a court of superior jurisdiction.
5. It was contended that there has been internal wrangles and chaos in the management and directorship of the Plaintiff company caused by external interferences from persons who are neither members nor shareholders of the Plaintiff company and the same has led to filing of multiple suits in courts being Voi High Court Civil Suit No. 1 of 2018, Voi HCC No. 4 of 2016 Eric Banda & 35 Others =Versus= Sagalla Ranchers, Mombasa ELC Case No. 210 of 2013 (dismissed), Mombasa ELC Case No. 175 of 2014 (dismissed).
6. The 3rd and 4th Defendants contended that the suit herein has been filed without the authorization of the Plaintiff as no board resolution of the Plaintiff containing the seal of the Plaintiff has been annexed to evidence such authority. It was further contended that the Verifying Affidavit sworn by Raphael Lewela Mbinga is fraudulent, incurable, defective and bad in law and the same offends provisions of Order 4 Rule 1 of the Civil Procedure Rules.
7. The application was opposed by the Plaintiff vide a Replying Affidavit sworn by Raphael Lewela Mbinga one of the Plaintiff's Directors on 12th February 2024. It was averred that Voi HCC Suit No. 1 of 2018, Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & Patrick Mbinga (formerly Mombasa HCCC No. 86 of 2014 and Mombasa COACA No. 3 of 2023, Sagalla Ranchers Limited =Versus= Wilmot Mwadilo and Patrick Mbinga relates to L.R No. 12177/4 measuring 20,000 acres and the suit property relates to L.R No. 12177/1 measuring 404.7 hectares. The cause of action are different and distinct in both suits. It was also averred that the orders sought in Mombasa HCCOMM No. 74 of



2019 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & 6 Others are different with the current suit and have different parties.

8. In respect to the requirement of the Board Resolution, it was averred that the same is not fatal and can be cured by filing the it any time before the hearing of the suit.
9. In respect to the limitation of actions, it was averred that Section 26 of *Limitation of Actions Act* extends the limitation period in cases where the action is based on fraud and the period of limitation does not begin to run until when the party has discovered fraud. It was argued that it was not until July 2021 or thereafter that the Plaintiff's discovered fraud and annexure "RLM2" was attached in support of this.
10. Parties also filed written submissions in support and opposition to the application. The 3rd and 4th defendants filed written submissions dated 5th February 2024 and the 1st and 2nd Defendants filed written submissions dated 8th March 2024 in support of the application. The Plaintiff filed written submissions dated 28th February 2024 in opposition to the application. The court has duly considered the said submissions on record.
11. Parties were also granted an opportunity to highlight their written submissions. Learned Counsel Mr. Kinyanjui submitted on behalf of the 3rd and 4th Defendants/Applicants, Learned Counsel Mr. Mwai for 1st and 2nd Defendants while Learned Counsel Mr. Kurgat highlighted the Plaintiff's written submissions.
12. The Applicants stated that the verifying affidavit had not been filed together with the plaint. The suit is filed outside the 12 years statutory period and that the same is res judicata.
13. Learned Counsel Mr. Mwai urged the court to consider the 1st and 2nd Defendant's submissions on record and grant the orders sought in the application.
14. Learned Counsel Mr. Kurgat highlighted the Plaintiff's submissions. He added that there is no prejudice on the part of the Defendants to justify the striking out of the suit. The defects if any do not go to the root of the suit and that a Verifying Affidavit should not be struck out on account of minor errors. Failure to annex the Board Resolution cannot invalidate the suit. The Board Resolution can be filed any time before hearing of the suit. The suit is not res judicata. The court has jurisdiction to hear the suit and the same raises more meritable issues. No limitation can be applied on a case of where fraud has been pleaded.
15. The court has considered the application, the written submissions filed and oral submissions made by Counsel for the parties and is of the view that the following are the main issues for consideration herein: -
 - i. Whether this suit is res judicata in view Voi HCC Suit No. 1 of 2018 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & Patrick Mbinga (formerly Mombasa HCCC No. 86 of 2014) and Mombasa COA Case No. 3 of 2023 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo and Patrick Mbinga and Mombasa HCCOMM No. 74 of 2019 Sagalla Ranchers Limited =Versus= Wilmot Mwadilo & 6 Others.
 - ii. Whether this suit is time barred.
 - iii. Whether the plaint dated 22nd August 2023 is defective on the ground that the verifying affidavit is defective and for want of a Board Resolution from the Plaintiff company



16. In the case of *Henderson vs Henderson* (1843) 67 ER 313 res-judicata was described as follows;

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigations in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The pleas of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time”.

17. Section 7 of the *Civil Procedure Act*, reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated as follows: -

- i) The suit or issue raised was directly and substantially in issue in the former suit.
- ii) That the former suit was between the same party or parties under whom they or any of them claim.
- iii) That those parties were litigating under the same title.
- iv) That the issue in question was heard and finally determined in the former suit.
- v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

18. The aforesaid provision was applied in the case of *Abok James Odera vs. John Patrick Machira* Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of res judicata there must be:

- (i). a previous suit in which the matter was in issue;
- (ii). the parties were the same or litigating under the same title;
- (iii). a competent court heard the matter in issue;
- (iv). the issue had been raised once again in a fresh suit.

19. The court has carefully perused the pleadings in the matters referred to by the Applicants and the current suit and it is evident that this current suit relates to and seeks reliefs in respect to L.R. No. 24784 and 12177/1 measuring approximately 404.7 hectares which is exclusively different to 12177/4 measuring 20,000 acres. Equally some of the parties in the suit referred to by the Applicants are different herein and as such this suit is not res judicata.

20. On whether the suit is time barred, Section 7 of the *Limitation of Actions Act* provides as follows ;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”



21. The purpose of the law of limitation was stated in the case of *Mehta v Shah* [1965] E.A 321, as follows;
- “The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”
22. In the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104 Potter, JA stated the rationale of the law of limitation as follows: -
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
23. Section 26 of Cap 22 stipulates that:
- “Where, in the case of an action for which a period of limitation is prescribed, either-
- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:
24. In the case of *Justus Tureti Obara vs Peter Koipeitai* [2014] eKLR wherein J. Okong’o held that;
- “I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”
25. The Plaintiff pleaded fraud on the part of the Defendants at paragraph 23 of its plaint and specifically to the effect that the Plaintiff never executed the instrument of transfer made on 2nd November 2012 and that the alleged signatures of the said transfer had no authority to execute the same on behalf of the Plaintiff. The Plaintiff equally seeks a declaration that the Certificate of Lease issued to the 2nd Defendant on 2nd November 2012 regarding Subdivision L.R No. 24787 is illegal, null and void ab initio. The suit herein was filed on 25th August 2023 which was within the stipulated 12 years period and as such the Applicants’ contention that the suit is time barred is misplaced.
26. On whether the suit offends provisions of Order 4 Rule 1 of the Civil Procedure Rules 2010 as there is no affidavit sworn in verification of the averments made in the plaint, the Applicants argued that there was no Board Resolution authorizing Raphael Lewela Mbinga to sign the said affidavit and or institute the suit on behalf of the Plaintiff. This position was supported by the 1st and 2nd Defendants who argued



- that the plaint is not accompanied by a valid verifying affidavit contrary to Order 4 Rule 1(3) of the Civil Procedure Rules the purported Verifying Affidavit which purportedly accompanies the plaint has been sworn by an officer of the Plaintiff company duly authorized under the seal of the company to swear the affidavit contrary to Order 4 Rule 1(3) and that the Plaintiff has not filed a resolution of the Plaintiff company authorizing the filing of the suit. The Plaintiff on the other while placing reliance on the cases of Peeraj General Trading & Contracting Company Limited Kenya & Another =Versus= Mumias Sugar Company (2010) eKLR, Republic =Versus= General and 13 Others Misc. Application No. 67 of 2005 (2005) eKLR and Raymark Limited =Versus= John Lokoria (2021)eKLR submitted that the mere failure to file the board Resolutions with the plaint does not necessarily invalidate the suit,
27. Order 4 Rule 1 (4) of the Civil Procedure Rules 2010, deals with particulars to be contained in a plaint and states that:
- “ where the Plaintiff is a corporation, the verifying affidavit shall be sworn by an Officer of the Company duly authorized under seal of the company to do so.”
28. In the case of Leo Investments Ltd v Trident Insurance Company Ltd (2014) eKLR Odunga J (as he then was) found that the mere failure to file the resolution of the Corporation together with the Plaint did not invalidate the suit and the associated himself with the decision of Kimaru J (as he then was) in the case of Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR where the court held as follows: -
- ” ...such a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence is, therefore, not fatal to the suit.”
29. In the case of Spire Bank Limited v Land Registrar & 2 others [2019] eKLR the Court of Appeal stated as follows: -
- “ ...It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
30. The Plaintiff describes itself as a limited company and therefore the deponent of the Verifying Affidavit ought to demonstrate that he or she has authority to do so. In the instant suit, I have seen the plaint dated 22nd August 2023. I have also seen that the same was accompanied by a Verifying Affidavit sworn by Raphael Lewela Mbinga on 22nd August 2023 who swore the Verifying Affidavit as one of the affected party directors.
31. In view of the above, it is clear that the person deponing the affidavit ought to have demonstrated that it had the authority to do so. However, lack of the same at this stage cannot invalidate the suit since the same can always be availed any time before the hearing of the suit. As such the Applicants objection on this aspect fails.



32. In view of the foregoing, this court comes to the inescapable conclusion that the application is without merit and the same is hereby dismissed with costs to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT VOI THIS 6TH DAY OF JUNE 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Chepchumba h/b Mr. Kurgat for the Plaintiff/Respondent.

Mr. Mwai for the 1st and 2nd Defendants.

Ms. Randa h/b for Mr. Gikandi for the 3rd and 4th Defendants/Applicants.

Court Assistants: Mary Ngoira and Norah Chao.

