



Ndungu & 2 others v Patrick & 5 others (Environment and Land Case Civil Suit E009 of 2024) [2024] KEELC 7014 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7014 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E009 OF 2024**

**JO MBOYA, J
OCTOBER 24, 2024**

BETWEEN

**ISAAC KARIUKI NDUNGU 1ST PLAINTIFF
MAKAOPLUS PROPERTIES LIMITED 2ND PLAINTIFF
JAMES MWANGI MUTURI 3RD PLAINTIFF**

AND

**MAINA SHEM KAMAU PATRICK 1ST DEFENDANT
EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT
WALTER KIGERA WAIRERI 3RD DEFENDANT
LUCY NYOKABI MATHENGE 4TH DEFENDANT
DANIEL M. KIMANI 5TH DEFENDANT
ANTONY JAMES MUHORO NJOGU 6TH DEFENDANT**

RULING

Introduction and Background

1. The 3rd, 4th, 5th and 6th Defendants have approached the court vide the Notice of Motion Application dated the 2nd February 2024, brought pursuant to Sections 1A, 1B and 3A of the [Civil Procedure Act](#); Order 1 Rule 10[2] and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and wherein the named Applicants have sought for the following reliefs
 - i. That this Honourable court be pleased to order that the 3rd, 4th, 5th and 6th Defendants herein be struck out as parties in this suit.
 - ii. That the costs of this application be borne by the Plaintiffs.



- iii. That this Honourable court be pleased to grant such further orders and directions as may be just and expedient in the circumstances.
2. The instant application is premised [anchored] on the various grounds which have been enumerated at the foot thereof. Furthermore, the application is supported by the affidavit of Walter Kigera Waireri, the 3rd Defendant/Applicant [hereinafter referred to as the Deponent] and to which affidavit, the deponent has attached two [2] sets of documents including a copy of the sale agreement entered into on the 25th June 2020.
3. Upon being served with the subject application, the Plaintiffs/Respondents filed a replying affidavit sworn by Joseph Mwangi Moturi, namely, the 3rd Plaintiff/Respondent. Suffice it to state that the said replying affidavit indicates that same [Replying affidavit] has been sworn on behalf of the deponent as well as on behalf of the 1st and 2nd Plaintiffs/Respondents.
4. The application under reference came up for hearing on the 29th July 2024, whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. Furthermore, learned counsel for the Defendants/Respondents also indicated that same had also filed a preliminary objection dated the 5th February 2024.
5. Arising from the foregoing, the court ordered and directed that the application dated the 2nd February 2024 and the preliminary objection dated the 5th February 2024, respectively, be canvassed simultaneously. Additionally, the court ordered that the application and the preliminary objections be canvassed by way of written submissions.
6. Pursuant to and in line with the directions of the court, learned counsel for the 2nd to the 6th Defendants/Applicants proceeded to and filed written submissions. Besides, learned counsel for the Plaintiffs/Respondents also filed written submissions. For coherence, the two [2] sets of written submissions form part of the record of the court.

Submissions By The Parties:

a. Applicants' Submissions:

7. The Applicants filed written submissions and wherein same have adopted the grounds contained at the foot of the application as well as reiterated the averments in the body of the supporting affidavit. Furthermore, the Applicants have thereafter highlighted and canvassed three [3] salient issues for consideration by the court.
8. Firstly, learned counsel for the Applicants has submitted that the 3rd to 6th Defendants are directors of the 2nd Defendant. In addition, it has been submitted that the 3rd to 6th Defendants/Applicants herein only executed the sale agreement under reference in their capacities as directors of the 2nd Defendant and not otherwise.
9. Owing to the foregoing, learned counsel for the Applicants has submitted that to the extent that the 3rd to 6th Defendants/Applicants signed/executed the sale agreement in their capacities as directors of the 2nd Defendant, the said 3rd to 6th Defendants/Applicants cannot be impleaded and/ or sued in their personal capacity or otherwise.
10. Arising from the foregoing submissions, learned counsel for the Applicants has therefore submitted that the joinder of the Applicants as parties in the instant suit constitute[s] misjoinder and hence the names of the Applicants ought to be struck out. In any event, it has been contended that the Plaintiffs/ Respondents herein did not accrue any claim against the Applicants personally.



11. Secondly, learned counsel for the Applicants has submitted that to the extent that the Applicants acted for and on behalf of the 2nd Defendant, any action and/or claim can only lie against the 2nd Defendant. For good measure, it has been posited that the Applicants herein despite being directors of the 2nd Defendant, are separate and distinct from the 2nd Defendant. In this regard, learned counsel invited the court to take cognizance of the decision in *Salmon v Salmon* [1887] AC 22.
12. Thirdly, learned counsel for the Applicants has submitted that the 5th Defendant/Applicant is now deceased. In this regard, it has been contended that no suit can be maintained and/or sustained against the 5th Defendant/Respondent. To this end, learned counsel has invited the court to find and hold that the suit as against the 5th Defendant is invalid and ought to be struck out.
13. In a nutshell, learned counsel for the Applicants has submitted that the Plaintiffs/Respondents suit does not disclose any reasonable cause of action against the 3rd to the 6th Applicants. Consequently, and in the absence of a reasonable cause of action, learned counsel has implored the court to strike out and expunge the name of the 3rd to the 6th Applicants.

b. Respondents' Submissions:

14. The Respondent filed written submissions and in respect of which [Respondents] reiterated the contents of the replying affidavit sworn on the 3rd March 2024 and thereafter highlighted three [3] salient issues for determination by the court.
15. First and foremost, learned counsel for the Respondents has submitted that the 3rd to 6th Defendants/Applicants have been properly joined and impleaded in the suit. In this regard, learned counsel has posited that the 3rd to 6th Defendants/Applicants duly signed the sale agreement dated the 25th June 2020 as well as the further agreement dated the 16th December 2021. To the extent that the 3rd to 6th Applicants signed the two [2] sets of sale agreements, learned counsel for the Respondents has therefore contended that the named Applicants are proper party to the suit.
16. Secondly, learned counsel for the Respondents has submitted that other than signing the two [2] sets of agreements, namely, the agreement dated the 25th June 2020 and 12th December 2021, the 3rd to 6th Applicants also received payments arising from and attendant to the sale of the suit properties. In this regard, it has been contended that having received part of the purchase price in their personal capacities, the Applicants cannot now be heard to feign ignorance and hide behind the corporate seal of the 2nd Defendant.
17. Thirdly, learned counsel for the Respondents has submitted that the Application beforehand is merely intended to delay, obstruct and/or otherwise defeat the expeditious hearing and determination of the dispute beforehand. In particular, it has been contended that the application herein constitutes a delaying tactic being deployed by the Applicants with a view to concealing the fraud attendant to the sale of the suit property.
18. Premised on the foregoing, learned counsel for the Respondents has contended that the Application by the Applicants as well as the preliminary objection are premature and misconceived and thus same ought to be dismissed with costs. To this end, the Respondents have implored the court to proceed and dismiss the application and the preliminary objection, respectively.

Issues for Determination

19. Having reviewed the application dated the 2nd February 2024; and the Notice of preliminary objection dated the 5th February 2024; and upon taking into account the response thereto and finally upon



consideration of the written submissions filed by the respective parties, the following issues emerge [crystalise] and are thus worthy of determination;

- i. Whether the 3rd to 6th Defendants/Applicants were parties and/or privy to the sale agreement forming the basis of the suit and whether same have been properly joined.
- ii. Whether the Plaintiffs herein have any direct claims against the 3rd to 6th Defendants/ Respondents in their personal capacities or otherwise.
- iii. What orders ought to issue, if any

Analysis and Determination:

Issue Number 1 Whether the 3rd to 6th Defendants/Applicants were parties and/or privy to the sale agreement forming the basis of the suit and whether same have been properly joined.

20. The Plaintiffs' suit beforehand is premised and anchored on the sale agreement entered into and executed on the 25th June 2020 and which sale agreement appears to have been entered into and executed between the 1st Plaintiff and the 1st Defendant herein. For good measure, the sale agreement touched on and concerned various plots, whose details were captured and highlighted in the preamble of the sale agreement.
21. On the other hand, it is evident that the sale agreement which was entered into and executed between the 1st Plaintiff on one hand and the 1st Defendant on the other hand, was executed in the presence of various witnesses, whose names have been highlighted at the foot of the sale agreement.
22. For ease of reference and appreciation, the name of the witnesses who attested to the execution of the sale agreement are provided as hereunder;
 - i. Walter Kigera Waireri
 - ii. Antony Muhoro
 - iii. Lucy Nyokabi Mathenge,
 - iv. Daniel M Kimani
23. From the body of the sale agreement, a copy of which has been annexed to the supporting affidavit, the said persons [details in terms of the preceding paragraph] are indicated to have signed the said agreement as witnesses by virtue of being officials of Embakasi Ranching Company Ltd.
24. Looking at the sale agreement, there is no gainsaying that the sale agreement was entered into and executed between the 1st Plaintiff and the 1st Defendant. In this regard, it is evident that the primary parties who entered into the sale are the vendor namely, the 1st Defendant and the purchaser namely, the 1st Plaintiff.
25. On the other hand, it is apparent that the company [the Second Defendant] appears to have been involved in the sale agreement merely by virtue of the fact that the properties which were being sold, were still registered in her [2nd Defendant's name]. In this regard, the involvement of the 2nd Defendant may have been necessary with a view to confirming the legitimacy of the plot certificates and the share certificates.
26. Notwithstanding the foregoing, even assuming that the 2nd Defendant was involved in the sale as a party [which is not evident on the face of the agreement], the 2nd Defendant became involved as a body



cooperate. For good measure, there is no gainsaying that the 2nd Defendant is an independent legal entity, which is separate and distinct from her directors, shareholders, promoters and officers.

27. Having provided the foregoing background, it is now apposite to revert to the issues beforehand. In respect of the issue herein, the question that the court must engage with is whether the Plaintiffs/ Respondents can implead and sue the 3rd to 6th Defendants/Applicants, who merely signed the sale agreement as witnesses on behalf of the 2nd Defendant.
28. In my humble view, the 3rd to 6th Defendants/Applicants were acting for and on behalf of the 2nd Defendant in their official capacities as directors. Indeed, the basis upon which the 3rd to 6th Applicants executed the sale agreement is evident on the face of the sale agreement. Instructively, it is shown that the 3rd to 6th Defendants were officials on account of the 2nd Defendant company.
29. By virtue of having executed the sale agreement as witnesses albeit on behalf of the 2nd Defendant, the question that does arise is whether the 3rd to 6th Defendants/Applicants [who are shown to be officials] became parties and privy to the sale agreement/contract.
30. To my mind, an agreement/contract only binds the primary parties thereto. Suffice it to posit that the primary parties as pertains the sale agreement dated the 25th June 2020 are the vendor and the purchasers on the other hand. Consequently, where a dispute does arise touching on and concerning a contract, the only parties who can be disputants are the primary parties thereof. Instructively, it is the parties to the contract who derive a benefit therefrom and accrue liabilities thereunder.
31. On the other hand, a person who merely signed as a witness does not derive any benefit therefrom or accrue any liability thereunder. For good measure, a witness whether acting on behalf of a company or otherwise cannot be made a party in a suit pertaining to and/or concerning breach of the contract, if any.
32. To this end, it suffices to reference the holding of the court of appeal in the case of Agricultural Finance Corporation v Lengetia Farm Limited & Jack Mwangi [1985] eKLR

As it stated in Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

33. Likewise, the legal implications of the doctrine of privity of contract and the tenor thereof, were also elaborated in the case of Savings and Loans Kenya Ltd vs Karangaita Kanyenje Gakombe Company Ltd [2015]eKLR, where the court stated and observed as hereunder;

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In Dunlop



Pneumatic Tyre Co Ltd V Selfridge & Co LTD [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation V Lengetia Ltd (supra), Kenya National Capital Corporation Ltd V Albert Mario Cordeiro & Another (supra) and William Muthee Muthami V Bank Of Baroda, (supra).

Thus in Agricultural Finance Corporation V Lengetia Ltd (supra), quoting with approval from Halsbury’s Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

34. Flowing from the foregoing discussion, it is my finding and holding that the 3rd to 6th Defendants/Applicants herein were neither parties nor privy to the sale agreement dated the 25th June 2020. In this regard, the 3rd to 6th Defendants/Applicants cannot therefore be impleaded and/or joined in the suit touching on and/or concerning breach of the sale agreement/contract.

Issue Number 2 Whether the Plaintiffs herein have any direct claims against the 3rd to 6th Defendants/ Respondents in their personal capacities or otherwise.

35. Other than the question of privity of contract, which has been discussed at the foot of issue number one [1], there is also the question as to whether the Plaintiffs/Respondents have any direct/personal claims against the 3rd to 6th Defendants/Applicants or otherwise.
36. To start with, the sale agreement dated the 25th June 2020, which underpins the suit before the court shows that the 3rd to 6th Defendants/Applicants witnessed the documents as officials of the 2nd Defendant. For good measure, the involvement of the 3rd to 6th Defendants/Applicants in the witnessing of the sale agreement was underpinned by their [Applicants] portfolio as directors.
37. Having witnessed the sale agreement as officials/directors of the 2nd Defendant, the question that does arise is whether the 3rd to 6th Defendants/Applicants were personally involved in the matter beforehand.
38. Put differently, the question that the court must engage with is whether the involvement of the 3rd to 6th Defendants/Applicants was in their personal capacities or otherwise. Suffice it to point out that if the 3rd to 6th Defendants/Applicants were involved in the transaction in their personal capacities, then the Plaintiffs, would be entitled to take out a suit against the 3rd to 6th Defendants/Applicants.
39. Nevertheless, I beg to reiterate that the taking out of a suit against the 3rd to 6th Defendants/Applicants, in their personal capacity, if at all, would also be subject to the doctrine of privity of contract [whose import and tenor has been discussed elsewhere hereinbefore].



40. Be that as it may, the issues that concerns the court at this juncture is whether the 3rd to 6th Defendants/Applicants who acted for and on behalf of the 2nd Defendant [Embakasi Ranching Company Limited], can be sued for actions or omissions of the company.
41. In my humble view, it is trite and hackneyed that a company, the 2nd Defendant not excepted, is separate and distinct from its promoters, subscribers, officials and/or directors. In this regard, if any director acted for and on behalf of the company in his/her official capacity, the actions attendant to the activities complained of shall be deemed to be the actions of the company.
42. In such a situation, if anyone, the Plaintiffs not excepted are aggrieved, then the intended suit can only be filed as against the company and not the officials and/or directors. For the umpteenth time, I beg to underscore that there exists a dichotomy between a company and its shareholders/directors.
43. To buttress the foregoing exposition of the law, I beg to cite and reference the holding in the case of Omondi v National Bank of Kenya Ltd [2001]eKLR, where the court stated and observed as hereunder;

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.

44. Arising from the foregoing, it is my finding and holding that the Plaintiffs/Respondents herein cannot purport to sue and/or implead the 3rd to 6th Defendants/Applicants in their personal capacity, yet it is evident that same [3rd to 6th Defendants/Applicants] acted as officials of the 2nd Defendant.
45. Before departing from the issue herein, it is worthy to mention that the Plaintiffs have contended that the 3rd to 6th Defendants also received part of the payment on account of the purchase price in their personal names/capacities. The payment if at all, in favour of the 3rd to 6th Defendants/Applicants, would not in my view supersede the terms of the sale agreement dated the 25th June 2020. Instructively, the terms of the said sale agreement are binding on the primary parties.
46. Other than the foregoing, the Plaintiffs/Respondents have also posited that the 3rd to 6th Defendants/Applicants also executed another sale agreement dated the 16th December 2021. Nevertheless, I have seen the handwritten agreement dated the 16th December 2021 and yet again it is evident that the said 3rd to 6th Defendants/Applicants signed as witnesses, on behalf of the Second Defendant Company.
47. Without belabouring the point, I am unable to decipher any arguable legal point that can warrant the joinder of the 3rd to 6th Defendants/Applicants in this suit. To this end, I am wholly in agreement with learned counsel for the Applicants that the 3rd to 6th Defendants/Applicants have been misjoined in the suit. [See Order 1 Rule 9 of the Civil Procedure Rules, 2010].



48. Additionally, I also hold the view that to the extent that the 3rd to 6th Defendants/Applicants were not primary parties to the impugned sale agreement, the suit beforehand does not disclose any reasonable cause of action as against the Applicants.
49. Suffice it to point out that what constitute a reasonable cause of action has been highlighted and elaborated in various decisions. In this regard, it is imperative to reference the holding in the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another (Civil Appeal 37 of 1978)* [1980] KECA 3 (KLR) (Civ) (18 March 1980) (Judgment), where the court stated as hereunder;
- There is some difficulty in affixing a precise meaning to the term reasonable cause of action¹..... In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But; obviously some meaning must be assigned to the term 'reasonable'..... a pleading will not be struck out unless it is demurrable and something worse than demurrable."
50. Simply put, I come to the conclusion that the Plaintiffs' suit as against the 3rd to 6th Defendants/Applicants discloses no reasonable cause of action. In this regard, the continuation of the suit as against the named Applicants shall not only embarrass the Applicants but shall also subject same to incur unnecessary legal costs.

Issue Number 3 What orders ought to issue, if any

51. Courts of law, this court not excepted, are obliged to ensure that all parties who approach the seat of justice are afforded a reasonable latitude to canvass and ventilate their claims. To my mind, the right of parties to approach the seat of justice and to have their claims determined in a plenary [conventional] manner ought not to be taken away lightly.
52. On the other hand, even though parties have a right to approach the seat of justice and partake of the right to fair hearing, it must be underscored that the right to fair hearing does not mean that a party shall be heard even when the claim being propagated is outrightly misconceived and legally untenable. [See the decision in the case of Industrial and Commercial Development Corporation versus Daber Limited [2001] eklr]
53. To my mind, courts of law must balance the rights and interests of the parties to be heard versus the obligation of the parties to approach the court, only when same [parties] have reasonable causes of actions, to eliminate mischief and wastage of Court's time.
54. Suffice it to posit, that where a party approaches a court of law with a claim and/or suit which is clearly misconceived and legally untenable, then the court must be constrained to terminate such a suit and save the adverse party unnecessary anxiety, pain and expense.
55. In my humble view, the claim by the Plaintiffs as against the 3rd to 6th Defendants/Applicants is one clear cut case that warrants summary intervention. In this regard, it is my finding and holding that the Plaintiffs' case does not disclose any reasonable cause of action and thus merits being struck out as against the named Applicants.

Final Disposition:

56. Having considered the thematic issues which were highlighted in the body of the ruling, it must have become crystal clear that the Plaintiffs herein have no lawful claim and/or reasonable cause of action against the 3rd to 6th Defendants/Applicants.



57. In the premises, I find and hold that the Application dated the 2nd February 2024 is meritorious. Consequently, same be and is hereby allowed. In the upshot, the 3rd, 4th, 5th and 6th Defendants/Applicants be and are hereby struck of from the record.
58. As pertains to costs, it suffices to posit that same are at the discretion of the court. Besides, it is not lost on the court that the substantive dispute is still pending. Furthermore, the 2nd Defendant remains as a party. In this regard, I proceed to and do hereby exercise discretion by directing that each party shall bear own costs of the Application and the Preliminary Objection.
59. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2024.

OGUTTU MBOYA

JUDGE.

In the Presence of:

Benson - Court Assistant.

Ms Mutua h/b for Mr. Macharia Gakuo for the 2nd, 3rd, 4th, 5th & 6th Defendants/Applicants.

Mr. Maina h/b for Ms. Roda Maina for the 1st Defendant/Respondent.

Mr. Chege for the Plaintiffs/Respondents.

