



**Charo v Sharif & 3 others (Environment & Land Case E21 of 2022)
[2024] KEELC 14103 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E21 OF 2022
EK MAKORI, J
DECEMBER 20, 2024**

BETWEEN

JAPHET NOTI CHARO PLAINTIFF

AND

ABDULAZAK MUHSIN SHARIF 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

DIRECTOR OF SURVEY KENYA 3RD DEFENDANT

THE COUNTY GOVERNMENT OF KILIFI 4TH DEFENDANT

RULING

1. The application for disposal is the one dated the 1st day of March 2024 seeking for the following orders:
 - a. That the Honourable Court be pleased to strike out the plaintiff's suit
 - b. That costs of this application be provided for.
2. The same is supported by the affidavit sworn by the applicant, Abdulrazak Muhsin Shariff, on the 6th day of March 2024. The respondent, Japheth Noti Charo, has filed his replying affidavit in response to the said application, which is opposed.
3. The application was disposed of through written submissions. From the materials placed before me, I frame the issues for this court's determination as whether, based on the applicant's averment and the respondent's rejoinder, this suit should be struck out and who should bear the costs.
4. The applicant avers that the cause of action in this matter involves land ownership, known as Portion No. 9313 Malindi, in which the respondent claims to be the owner.



5. The applicant avers that he is the registered proprietor of the suit property and that the alleged land the respondent claims, Plot No. M5 does not exist since it was compulsorily acquired and extinguished for the expansion of Malindi town.
6. The applicant contends that Malindi ELC No. 104/2013 Abdulrazak Muhsin Shariff v Kadzo Masha Kazungu and Morris Mlewa also existed, the parties being husband and wife and the former the sister to the respondent. The suit touched on the same suit property. It was heard, and judgment was obtained against the defendants well within the respondent's knowledge. Contempt proceedings were brought in regarding the arrest and committal of the respondent. In those proceedings, the respondent was fined Kshs. one Million (1,000,000/-) and, in default, a jail term of 90 days.
7. The applicant contends that the respondent has no structures on the said suit property and is not in occupation.
8. The applicant states that, still oblivious of this, the respondent approached this court over the suit property for which he was charged with contempt.
9. The applicant believes this suit is fit to be struck as it does not disclose a cause of action, is frivolous, scandalous, and otherwise abuses the court process.
10. The respondent avers that the application before the court is based on issues that can be ventilated as Defence to the plaintiff's suit at the hearing. The plaintiff herein is not a party in Malindi ELC No. 104 of 2013, nor was he called to testify as a witness in that suit. The issues raised in this suit are entirely distinct from the issues raised in Malindi ELC No. 104 of 2013. The parties are not the same, and the claim is not the same.
11. On the issue of contempt proceedings against him, citing several authorities, it is submitted that this was duress brought to bear on him to get his freedom, which was under siege.
12. The Court of Appeal in the case of Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR established that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. Similarly, in the case of Crescent Construction Co. Ltd v Delphis Bank Ltd [2007] eKLR, the same court stated thus:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”
13. In D.T. Dobie & Company (Kenya) Ltd. v Muchina (1982) KLR 1 it was stated as follows:

“...No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it...”
14. Applying those principles here, the respondent is well aware that litigation on the suit property in Malindi ELC No. 104 of 2013 was determined in favour of the applicant. He was summoned and indicted for contempt in those proceedings as reported in Abdulrazak Muhsin Sheriff v Kadzo Masha



Kazungu & 2 others [2018] eKLR, where this Court (Olola J.) found the respondent as a contemnor and stated as follows:

“While it was possible to ignore the conclusion the Plaintiff made from overhearing the conversation between the OCS and Mr. Noti, it is telling that the Respondents do not deny that such a conversation occurred. Indeed, other than the general denials, they do not deny that they visited the suit property on the said 5th of September 2017. As it were, an extract of the Occurrence Book (OB) from Malindi Police Station (marked REX 9) corroborates the fact that the Plaintiff made a report at the said Station at 1135 hours. It is further apparent from the extract that the Police, to their credit, quickly visited the scene of the alleged “Threatening of Breach of Peace, and at 1234 hours, the OCS records under OB No. 33 as follows:-

“Return/Follow Up-OCS CI Mwachia, IP Getende, PC Ali, and PC Omondi all book back from the scene of threatening breach of peace where it has been established that one Janja Noti and his son, namely Tumaini went to the parcel of land LR No. 9303 and started fencing and the person was clearing the Parcel of land from doing their work (sic). It is known they were not found at the fence but they refilled two holes which had been made by the Surveyors. Efforts are underway to trace Janja and his son to record their statements to shed light on their allegations that the land belongs to them, case PUI.”

21. Arising from the foregoing, I think there is sufficient circumstantial and direct evidence to corroborate the fact that the Respondents not only visited the suit premises but that they did so pursuant to their claim that the parcel of land belongs to them. Indeed, from the circumstances herein, it can reasonably be inferred that the Plaintiff is indeed telling the truth when he asserts that the Respondents were shown the title and Court decree and that they insisted that the same were “fake” and that they would not obey the same. That must be the reason they have not denied the averments contained in paragraphs 18 and 19 of the Plaintiff’s Supporting Affidavits.

22. As it were, I am in agreement with the submissions of the Learned Counsel for the Plaintiff that the most important aspect of obedience of an order of the Court is knowledge of its existence. If a person becomes aware of an order of the Court which binds him he has no option but to obey it. Such a person need not be a party to the suit. As was stated in Refrigeration and Kitchen Utensils Ltd –vs.- Gulabchand Popatlal Shah & Another Civil Application No. Nair 39 of 1990:-

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it... It would be most dangerous to hold that the Suitors or their solicitors, could themselves judge whether an order was null or valid, whether it was regular or irregular.....they should come to Court and not take upon themselves to determine such a question....he should apply to the Court that it might be discharged. As long as it exists, it must not be disobeyed.”



23. Arising from the foregoing, I am satisfied that the 1st Defendant and the said Japhet Noti Charo alias Janja are in contempt of the Orders of this Court. For defying this Courts authority, they shall be punished as appropriate.
24. Accordingly, a warrant of arrest shall henceforth issue to the OCS Malindi Police Station to apprehend the 1st Respondent and Japheth Noti Charo, a.k.a Janja, and to henceforth bring them to this Court jointly and/or severally in order for each and every one of them to show cause why they should not be committed to civil jail as prayed under Prayer No. 3 of the Motion dated 27th October 2017.”
15. He was later punished for contempt of the court orders issued to implement the decree from this court in the former suit. He left the property. The pleadings also show that the suit’s substratum changed and cannot be reversed even if we go on a full hearing.
16. In *Mwalingo & 542 others v Hedge Farm Limited* [2022] KEELC 3617 (KLR), Odeny J. held as follows:
- “On the issue as to whether this suit is res judicata, Section 7 of the *Civil Procedure Act* provides:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court...
- Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.
- It is noteworthy that the judgment delivered in Mombasa ELC Petition No. 2 of 2018 on 22 October 2020 shows that the suit property herein was part of the subject properties in the former case. The issue raised herein is substantially similar to those raised in the aforementioned Petition.”
17. We are dealing with the same issues raised in the former suit, which were litigated, and the court’s judgment and decree implemented well within the knowledge of the respondent; as already stated, the suit property has long been muted, changed hands, and is in the occupation of other parties.
18. Based on the foregoing, the current suit is vexatious and represents an abuse of the court process, and it is struck out with the cost.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Otara, for the Plaintiff

Happy. Court Assistant

In the Absence of:



Mr. Ole Kina for the Defendant

