



**Exclusive Living East Africa Limited & another v Bulimu (Commercial Case E453 of 2020)
[2025] KEHC 461 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 461 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E453 OF 2020
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

EXCLUSIVE LIVING EAST AFRICA LIMITED 1ST PLAINTIFF

THE MARC OLIVER STRACK 2ND PLAINTIFF

AND

ANN MIDEVA BULIMU DEFENDANT

RULING

Introduction and Background:-

1. There are two applications for the court's determination; The Plaintiffs' Notice of Motion dated 8th July 2024 and the Defendant's ("The Defendant") Chamber Summons dated 12th September 2024. The Plaintiff's application is made under sections 1A, AB, and 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), Order 45 of the Civil Procedure Rules and Articles 48, 50(1) and 159(1) (d) of *the Constitution* and seeks an order directing that all assets belonging to the 1st Plaintiff ("the Company") including Rivulet Residences erected on L.R. No. 209/2389/16 ("the suit property") be handed over to the current directors of the Company being the 2nd Plaintiff ("The 2nd Plaintiff") and Alexander Joch. The Plaintiffs further seek the assistance of the Officer Commanding Station (OCS), Pangani Police Station in enforcing the aforementioned order. This application is grounded by facts set out on its face and the supporting affidavit and supplementary sworn by The 2nd Plaintiff on 8th July 2024 and 18th October 2024 respectively and it is opposed by The Defendant through her replying affidavit sworn on 12th September 2024.
2. The Defendant's application is made under Sections 1A, AB, and 3A of the *Civil Procedure Act* and Order 1 Rule 14 of the Civil Procedure Rules and seeks to strike out the 2nd Plaintiff from this suit. The application is supported by the grounds on its face and the Defendant's supporting affidavit sworn



on 12th September 2024 and it is opposed by the 2nd Plaintiff through his replying affidavit sworn on 18th October 2024. The court directed that the applications be disposed by way of written submissions which are on record and which I will make relevant references to in my analysis and determination later on.

The Plaintiffs' Application:-

3. The Company states that it is the owner of the suit property among other assets which are currently held illegally by the Defendant who is neither a director nor a shareholder of the Company. That for over 6 years which The Defendant has been in illegal ownership of the suit property, she has systematically defaced and run down the suit property and the homeowners and tenants are currently complaining about the Defendant's misuse of the common user facilities like the swimming pool that has been drained and, together with the basement parking and children play area, used to breed and rear chicken. They aver that as the Defendant continues to collect all the rent from the suit property, the Company has defaulted, and continues to default, in a financial facility (a debenture) which it is unable to service due to its inability to generate income from the suit property.
4. The Plaintiffs further state that the continued deterioration of the suit property and unauthorized dealings are aggravating the financial instability of the Company, thereby necessitating urgent intervention by the Court to safeguard the interests of the Company, hence the urgency of their application. They claim that the Defendant has purportedly sold and gifted units of the suit property to her family members and friends and although the purported sales and gifts are illegal and void ab initio, the actions of the Defendant have potentially and actually exposed the Company to unnecessary litigation. That unless this Court intervenes and grant the orders sought to enable the Company's directors to exclusive occupation and possession of the Company's assets, the Company will continue losing its assets and revenue and it may never ever recover in the future even if the suit herein were to succeed. 8.
5. The Plaintiffs contend that the Defendant has no legitimate claim over the assets of the Company and, even if she were, she has successfully excluded the rightful members and directors of the Company from the assets and revenue of the Company for the last 6 years. The Plaintiffs urge that they have a meritorious case with reasonably high chances of success and that it is therefore imperative that the Court intervenes urgently to address the above issues to prevent further irreparable damage to the suit property and financial standing of the Company.

The Defendant's Reply:-

6. The Defendant contends that the filing of the Plaintiffs' application has been done after the 2nd Plaintiff's attempt to use the police to gain access to the suit property to enforce an undisclosed court order failed. That it should be noted that 2nd Plaintiff purported to make a complaint with the office of the Deputy Inspector General of the police at Vigilance House which complaint was not copied to the Defendant as a result of which she was summoned and bullied by the police in top echelons of leadership in the Police Service to honour the summons. That even in the absence of a court order, the police demanded that the Defendant grant them access to the suit property to purportedly undertake an inspection of the premises and inspection of the documents in support of the ownership and occupation of the suit property. The Defendant states that she resisted the abuse of police authority and powers since there were no court orders authorizing the police to act as they intended and that this suit was also pending hearing and final determination before this court. She states that this unlawful conduct prompted her to raise a complaint with the Independent Policing Oversight Authority and the investigations thereon are ongoing.



7. The Defendant states that when the intended takeover of the suit property by 2nd Plaintiff through the police failed, he has now resorted to this court through the present application which application demonstrates the Plaintiffs' unwillingness to have this matter determined on merits. That the suit was fixed for hearing on 30th October 2024 but the Plaintiffs are committed to make every effort to scuttle the hearing of the suit on merits, their application being one of the means of scuttling the hearing. She claims that 2nd Plaintiff is plotting to forcefully enter and take possession of the suit property to scuttle the hearing of this suit on merits and has been seeking the assistance of home owners at the suit property by inciting them against the Defendant and in blatant disregard of existing court orders on status quo.
8. The Defendant claims that 2nd Plaintiff has had a dalliance with the police who have visited the suit property many times to effect arrest on her and her workers and has also caused her workers and the Defendant to be incarcerated without any cause or justification and prosecuted on trumped up charges in Makadara Mccr Case Number E5091/21 which case has since been withdrawn and she was discharged. The Defendant contends that a just determination of this suit on merits will go a long way in defining her standing in the Company and instead of prosecuting this suit which suit was commenced by the Plaintiffs against her, the 2nd Plaintiff has decided to use a different arena to force his way into the suit property.
9. The Defendant further states that although the Plaintiffs had an opportunity to prosecute this case last year, they adjourned the same and thereafter filed a suit before the Environment and Land Court namely Milimani Elclom/E002/2023 seeking judgment against her on prayers which are a replica of the prayers in this suit. That she filed an application seeking orders staying the suit pending hearing and determination of this suit, a declaration that the filing of the suit offended the provisions of Section 6 of the *Civil Procedure Act*, that the suit did not disclose a festering land dispute between the Company and the Defendant, as well as a declaration that the suit and the application were an abuse of the process of the court. That on 24th January 2024, the ELC delivered a ruling in which the matter was stayed until this suit is heard and determined and that the status quo prevailing on the suit property was to be maintained. The Defendant states that the status quo orders issued in the said suit have not been set aside and/or varied and the Plaintiffs are therefore acting in breach of the said orders in purporting to seek the orders sought in the current application which orders the Defendant believes are sought as an appeal against the status quo orders in a clandestine manner which action should not be countenanced by this court.
10. The Defendant avers that the prayers sought in the application are crafted for the benefit of the 2nd Plaintiff and the application is void for want of instructions by the Company thus ripe for striking out. She states that the 2nd Plaintiff is not suited in this matter as shown by the averments made in the amended plaint and the prayers thereon hence her application seeking to have 2nd Plaintiff struck out. That the application is unmerited and deserving to be dismissed with costs to her in that the orders sought cannot be granted at an interlocutory stage since the same are final in nature and should the same be considered at an interlocutory stage, the court will be left with nothing to determine after the hearing of the suit on merits thus causing an embarrassment to the court. That this court has already addressed the issues and orders sought by the Plaintiffs now, in the ruling delivered on 19th May 2022 where the Plaintiffs sought among others, orders compelling me to surrender all company's assets in the Defendant's possession, to produce all the documents relating to the management of the Company, to produce the total inventory of property originally in the name of the Company and to give up possession of the units the Defendant is occupying at the suit property. As such, the Defendant contends that the Plaintiffs' application is res judicata



11. It is the Defendant's further position that although the 2nd Plaintiff avers that he is a co - shareholder / director of the Company with one Alexander Joch, the truth is that the Company has three shareholders/directors being the 2nd Plaintiff, Alexander Joch and the Defendant but the other two directors made a boardroom coup to remove her from the shareholding and directorship of the Company which illegalities and irregularities have been addressed at a great length in her counterclaim filed in this case. That both the 2nd Plaintiff and Alexander Joch are well aware of the background information relating to increment in the share capital of the Company and allotment of shares to the Defendant but they have decided to conceal the truth. The Defendant avers that she is keen on having this matter heard on merits on whether she acted fraudulently as claimed by the Plaintiffs and whether the decision of the Registrar of Companies followed the laid down procedure in acting the way he did and that there is no report on what happened to her shares to date
12. The Defendant states that she also made a complaint with the Office of the Director of Criminal Investigations seeking forensic audit of the documents presented to the Office of the Registrar of Companies among others and knowing he had engaged in a fraudulent act and instead of co- operating with the investigating officers, the 2nd Plaintiff rushed to the constitutional court in MILIMANI HIGH COURT CONSTITUTIONAL PETITION NUMBER E355 OF 2022 seeking conservatory orders prohibiting the police from investigating, arresting ,commencing, maintaining or continuing with criminal proceedings against him. That the court held that he did not satisfy that the police had abused their powers in summoning him in the course of the investigations and the conservatory orders sought were denied.
13. The Defendant states that the 2nd Plaintiff has failed to disclose that the lease in relation to the suit property was signed by both her and 2nd Plaintiff and that the casual averments by 2nd Plaintiff on the acquisition of the land and development of the suit property are a red herring and made in ignorance of the uncontroverted facts which the Defendant states she has laid bare in the statement of defence and counterclaim filed in this case. She states that she was actively involved in the development of the suit property and that as pleaded in this suit, 2nd Plaintiff was at all material times her spouse and their union was blessed with a child who is now ten years old. They established their matrimonial home in the Pent-house at the suit property in the year 2018 but 2nd Plaintiff left the matrimonial property shortly thereafter and has never returned to date. The Defendant claims she lives with the minor at the matrimonial home and her occupation of the premises is therefore not illegal as alleged and that the same is with the sanction of the family court in the case namely Milimani HCFOS/E013/2020.
14. The Defendant denies the claim that the homeowners and tenants are complaining about the misuse of common user facility and run down of the suit property and that this is a creation by the 2nd Plaintiff to advance his theory in relation to the premises to grant him access through a back door. She further denies the allegations that she has been gifting units of the suit property to her family members and that in any case, any family members involved in the development and management of the units have filed their respective statements and documents in this case and their position is well known. In short, The Defendant states that all the allegations made in the Plaintiffs' application have been addressed in the statement of defence and counterclaim as well as witness statements and bundle of documents filed by her in this suit and it will therefore be fair to dismiss the application and grant the parties an opportunity to give evidence in the matter at the hearing of the suit.
15. In summary, the Defendant states that the inescapable conclusion is that the application is a gross abuse of the court process and ought to be dismissed with costs to pave way for hearing of this suit on merits.



The Defendant's Application:-

16. As stated, The Defendant seeks to strike out the 2nd Plaintiff as a party in this suit for the reasons that the claim in this suit relates to the shareholding of the Company and its development and assets and that the prayers sought are sought by the Company against the Defendant which has the capacity to sue and be sued in its name.

The 2nd Plaintiff's Reply:-

17. In response, the 2nd Plaintiff states that the Defendant's application is frivolous, vexatious, an abuse of the court process, and a deliberate delay tactic meant to frustrate the hearing of the main suit and that the assertion that no relief is sought in his favour is misleading. The 2nd Plaintiff depones that he has a legitimate interest in the matter due to his role as a director in the Company's operations and the facts underlying this suit. That the reliefs sought in the main suit are directly related to his role as a director, and the outcome of this suit will have a direct impact on him, not only as a director but also in his capacity as a stakeholder in the Company. The 2nd Plaintiff states that even though the Company and himself are separate legal entities, where the circumstances of the case suggest that a director has a personal interest in the matter, such a director may remain a party to the suit. The 2nd Plaintiff states that the Defendant has made adverse allegations against him in the statement of defence and counter-claim and he ought to be given an opportunity to be heard on the same.
18. The 2nd Plaintiff avers that this suit was instituted by both Plaintiffs seeking to restrain the Defendant from unlawfully collecting rental income from the suit premises and to assert the Plaintiffs' proprietary rights over the suit property. That the application is a tactic by the Defendant to delay the conclusion of the suit so she can continue illegally collecting rental income from the suit property and that her continued illegal collection of rental income from the suit property further demonstrates her intent to delay the hearing and perpetuate her unlawful activities for as long as possible.
19. The 2nd Plaintiff contends that the application has been filed after the matter was already set down for hearing and that this timing clearly indicates that the Defendant is not acting in good faith but is instead using the application as a delay tactic to avoid the determination of the main suit. The 2nd Plaintiff states that under Order 1 Rule 9 of the Civil Procedure Rules, no suit shall be defeated by reason of misjoinder or non-joinder of parties and that under Article 159(2)(d) of *the Constitution*, justice shall be administered without undue regard to procedural technicalities and he urges the court to focus on the substance of the case rather than technical issues of joinder. That even if it were assumed that his joinder was improper, which is denied, striking him out would not serve the ends of justice, as the court can still proceed to hear the case and determine the real issues in controversy. As such, the 2nd Plaintiff contends that the application is filed in bad faith and constitutes an abuse of the court process and in view of the foregoing, he prays that the court dismisses the application with costs.

Analysis and Determination:-

20. I have carefully gone through the applications, the responses thereto and the submissions. I propose to first deal with the Defendant's application that seeks to strike out the 2nd Plaintiff as a party in this suit. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant,



or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

21. Order 1 Rule 14 of the Civil Procedure Rules further provides for the time and manner in which the application envisaged under Order 10 (2) above is to be brought: “Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.” From these provisions, it is clear that an application to strike out a Plaintiff may be made either before or at the trial and that what is important for the court is that the parties before it will enable the court “...effectually and completely to adjudicate upon and settle all questions involved in the suit” . I therefore find no fault in the timing of The Defendant’s application as has been suggested by The 2nd Plaintiff as the same has rightfully and timeously been filed before the trial. On whether the presence of the 2nd Plaintiff is necessary to effectually and completely adjudicate upon and settle all questions involved in the suit, I am inclined to find in the affirmative for a number of reasons. The 2nd Plaintiff has stated that as a shareholder and director of the Company, he has a grievance against The Defendant more so in the manner in which changes were effected in the Company’s shareholding, nominal share capital and directorship. Such changes have an effect on both the Company and other shareholders and as such, the court will be interested in what both of them have to say in respect of those changes.
22. Whether The 2nd Plaintiff’s suit against The Defendant will succeed is a matter of evidence at trial and in any event, going through the pleadings, both The 2nd Plaintiff and The Defendant have a lot say about each other and it will only serve the interest of justice if both of them are retained as parties in this suit so that all issues in controversy involving them are determined by the court. I therefore find no merit in The Defendant’s application and I urge the court to dismiss the same.
23. Turning to the 2nd Plaintiff’s application and without belabouring on the same, it is my finding and I agree with the Defendant, that the orders it seeks were determined by the court in the ruling of 19th May 2022. The 2nd Plaintiff had sought inter alia that the Defendant surrenders her occupation of the premises in the suit property and all company assets in her possession to which the court stated that “...granting the orders sought in the application at this interlocutory stage will be tantamount to making final orders on the main suit without analyzing the evidence to be presented by the parties at the hearing” . I note that the 2nd Plaintiff’s present application is just but a glossed-up version of its previous application as it substantively seeks the same orders, that of surrendering the suit property and or assets of the Company, which prayers/orders have already been determined by the court. The position of the court has not changed and remains that the prayers being sought by the 2nd Plaintiff are final in nature and are capable of disposing of the suit without hearing the parties and I therefore urge the court to decline to grant the same.
24. I advise the parties to ready themselves for the hearing of this matter at the earliest so that all the issues raised in their pleadings including this application are determined with finality after all the parties have been heard.

Conclusion and Disposition:-

25. For the above reasons, I find no merit in both applications. The same are dismissed with each party being ordered to bear its own costs. The court will proceed and hear the main suit on a priority basis.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

J.W.W. MONG’ARE



JUDGE

In the Presence of:-

Mr. Kipkorir holding brief for Kiplangat for the Plaintiffs.

Mr. Kariuki for the Defendant.

Amos - Court Assistant

