



REPUBLIC OF KENYA



**Galot & 5 others v Kenya National Capital Corporation Limited (Civil Case 2054 of 1993)
[2025] KEHC 2559 (KLR) (Commercial and Tax) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2559 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 2054 OF 1993
A MABEYA, J
FEBRUARY 25, 2025**

BETWEEN

**MOHAN GALOT 1ST PLAINTIFF
LP GALOT 2ND PLAINTIFF
SP GALOT 3RD PLAINTIFF
GP GALOT 4TH PLAINTIFF
GALOT INDUSTRIES LIMITED 5TH PLAINTIFF
KING WOOLEN MILLS LIMITED FORMERLY MANCHESTER OUTFITTERS
SUITING DIVISION LIMITED 6TH PLAINTIFF**

AND

KENYA NATIONAL CAPITAL CORPORATION LIMITED DEFENDANT

RULING

1. This ruling determines 4 applications dated 10/11/2022, 21/8/2023, 22/8/2023 and 8/8/2023, respectively.

Application dated 10/11/2023

2. This application was brought under sections 1A, 1B, 3A and 63e of the *Civil Procedure Act* and Articles 159(2)(d) of the *Constitution*, the inherent jurisdiction of the Court. The application sought that the decretal sum on the judgment of 28/7/2022 be deposited in Court pending the determination of the individual share of each plaintiff or in the alternative, the said amount be deposited in a joint interest earning account in the names of all the plaintiffs.



3. In support of the application, the applicant relied on the grounds set out on the face thereof and the supporting affidavit sworn by the 4th plaintiff Ganeshlal Pusharam Galot on 12/11/2023. He stated on 28/7/2023, the Court entered judgment in favour of the plaintiffs against the defendant for Kshs. 48,951,536/= together with interest. That instead of the plaintiffs sitting down to determine how each will benefit from the said judgment, the 1st plaintiff started execution without involving other plaintiffs. That Bealine Kenya Auctioneers executed the warrants and proclamation against the defendant for Kshs. 217,821,241/= without the applicant's consent. That the 1st plaintiff's intention was to defraud the other plaintiffs of their share of the judgment amount.
4. The defendant filed grounds in support of the application. It stated that the warrants of attachment were fraudulent having been obtained under a process not recognized by law. That the said warrants were obtained secretly by the 1st plaintiff and had no force in law and thus not enforceable.

Application dated 21/8/2023

5. The application was brought under Order 50 rule 1 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act and article 50(1) of the Constitution of Kenya 2010. It sought to set aside the consent dated 16/8/2023. It was premised on the grounds set out on the face of it and the supporting affidavit sworn by Pravin Galot on 21/8/2023.
6. He deposed that the 1st, 5th and 6th plaintiff purported to sign and file a consent without the participation of the estate of the 4th plaintiff in the matter. That the intention of the consent was to compromise the execution proceedings to the exclusion of the 4th plaintiff. He stated that on 5/5/2023, the Court had dismissed the 1st plaintiff's application to have the decretal sum released to him.
7. That the Court was informed of the demise of the 4th plaintiff and the estate of the 4th plaintiff has substituted it. That the consent had been arrived at by fraud and deliberate concealment of material facts and collusion between the parties.
8. The application was opposed by the 1st plaintiff Mohan Galot vide a replying affidavit dated 4/9/2023. He stated that the consent had not been adopted and therefore the same could not be set aside. It was contended that the 4th plaintiff was not a beneficiary of the decretal sum as the registrar had determined the beneficiaries. That the Court was functus officio on the beneficiaries of the decretal sum. That the 4th plaintiff did not participate in the suit and neither did it file evidence or give evidence at the trial. That the substratum of the suit had collapsed and the 4th plaintiff had not preferred any appeal.
9. The 5th and 6th plaintiff raised a preliminary objection dated 4/9/2023. They stated that the application was incompetent and an abuse of the court process for having been drawn by an advocate who personally knew the 4th plaintiff and without leave for substitution. That the Court did not have jurisdiction to entertain the application since it was filed by a person with no locus pursuant to Order 24 rule 3(1) of the Civil Procedure Rules 2010. That the grounds in the application were resjudicata by dint of section 7 of the Civil Procedure Act.

Application dated 22/8/2023

10. The application was brought under Article 159(2)(d) of the Constitution of Kenya, section 5 of the Judicature Act, Rule 81(4) of the Civil Procedure Amendment No 2) rules 2012, Order 2 rule 15, Order 51 rule 1 of the Civil Procedure Rules.
11. It sought for the committal of George Odhiambo, the Managing Director National Bank of Kenya, Mohan Galot (1st plaintiff), Kangethe George Joseph Advocate, Maumo Emma Velma Achieng



- Advocate and Tiego Makonya Tutus Tidal Advocate to civil jail for a term of six months for disobeying the order of 28/7/2022. That the advocates conduct be deemed to be inconsistent with the practice of advocates for blatantly advising the clients to pay out the 4th plaintiff. That the 1st plaintiff be directed to deposit the entire decretal amount released to him by the defendant in Court or in a joint interest earning account.
12. The applicant relied on the grounds on the face of the Motion and the affidavit of Pravin Galot sworn on 22/8/2023. He stated that he was an ad litem administrator of the estate of the 4th plaintiff and the 4th plaintiff was apprehensive that the 1st plaintiff would attempt to cheat him in the share of the decretal amount.
 13. That there had been criminal cases against the 1st plaintiff and based on this background, the 4th plaintiff informed the advocates of the defendants to caution them against releasing the funds. That the 1st plaintiff and the defendant prepared a consent purporting to compromise the suit and all pending applications. That the consent was procured by fraud, deceit and concealment of material facts. That the defendant has since paid the decretal sum to the 1st plaintiff and his advocates including the 4th plaintiff's share.
 14. The application was opposed by the 1st plaintiff Mohan Galot vide an affidavit sworn on 4/9/2023. He stated that the suit was about overpayment of the facilities offered to the 5th and 6th plaintiff. That he solely guaranteed the facility given to the 6th plaintiff and the 4th plaintiff did not pay or overpay anything and was thus not entitled to anything. That the decretal sum emanated from the overpayment by the 5th and 6th plaintiff and therefore the 4th plaintiff has no right to the decretal sum.
 15. The 5th and 6th plaintiff filed a response to the application vide a replying affidavit sworn by Tiego Mak, Ongoya Titus Tidal dated 28/8/2023. He stated that the application was a ploy by the advocate of the 4th plaintiff to frustrate him. That he was not a party to the proceedings and he was aware that there had been no existing orders directed to him dated 28/7/2022.
 16. In addition, the 5th and 6th plaintiff raised a preliminary objection dated 4/9/2023. They contended that the 4th plaintiff was not a party to the suit as he had not been admitted to substitute the 4th plaintiff. That the 4th plaintiff did not have locus to institute the application as per the provisions of Order 24 rule 3(1) of the Civil Procedure rules 2010. That the grounds in the application were res-judicata.
 17. In response to the applications dated 21/8/2023 and 22/8/2023, the defendant filed grounds of opposition dated 15/9/2023. It contended that the consent on record was legitimately on record as per the satisfaction and settlement of the Court in its ruling dated 28/7/2022. That the parties legitimately and legally recorded the consent as they were the parties to the suit. That the interest of the defendant is to solely fulfil its obligation to effect settlement of the decree of the Court.

Application dated 8/8/2023

18. The application was brought pursuant to section 1A, 1B and 3A of the *Civil Procedure Act*, Order 24 rule 3, order 22 rule 22 and order 51 rule 1 of the Civil Procedure Rules 2010. It sought for the substitution of the 4th plaintiff Ganeshlal Pusharam Galot (deceased) with Pravin Galot the legal representative.
19. The application was based on the grounds outlined on the face of the Motion and the supporting affidavit of Pravin Galot of even date. He stated that the 4th plaintiff passed away on 12/5/2023 and he had been appointed as the legal representative of the estate. That unless substitution is done within one year the plaintiff's suit will be abate.



20. The applications were canvassed by way of written submissions which I have carefully considered.
21. The 4th plaintiff with respect to its application for substitution submitted that substitution of a party was a matter of right. The 4th plaintiff was deceased and Pravin Galot had been appointed as a legal representative and therefore he was entitled to represent the estate of the deceased. On the application dated 10/11/2022, it was submitted that the decretal sum was in favour of all the plaintiffs and therefore, since they had not agreed on the ratio each decree holder will receive it ought to be deposited in Court. On the application for setting aside the consent, it was submitted that the consent becomes fraudulent when it excludes one party.
22. The 1st plaintiff submitted that Pravin Galot did not have locus to file the applications before Court as they were filed by a stranger in the proceedings. That judgment having been entered, there was no longer a cause of action. That the 4th plaintiff did not have a share of the decretal sum since the Court upheld the decision of the registrar who had stated that there was an overpayment by the 5th and 6th plaintiff. That the 4th plaintiff was just a guarantor who never lost his properties and therefore the judgment could only refer to the 5th and 6th plaintiff.
23. With respect to the application dated 8/8/2023, the applicant sought for leave to substitute the 4th plaintiff who is now deceased with Pravin Galot, the legal representative. This application was unopposed and on 5/10/2023, the Court allowed the substitution.
24. In the application dated 10/11/2023, the 4th plaintiff sought that the decretal sum be deposited in Court pending the determination of the individual shares of each plaintiff. The 4th plaintiff expressed concerns that the 1st plaintiff might retain the entire decretal sum for himself, as he had been conducting himself as though the judgment was solely in his favor.
25. On 25/8/2023, the Court had directed the 1st plaintiff to hold the decretal sum and not to utilize the same until further orders of the Court. Looking at the judgment, the Court did not order that the money belong to any of the plaintiff. It only entered judgment against the defendant in accordance with the order on accounts made by the registrar. The Money belong to the 5th and 6th plaintiff. How the said plaintiffs are to divide the same among the 1st to 4th plaintiff is not for this Court. That is an internal Company issue to be determined according to those companies' structures. The application is for dismissal.
26. The application dated 21/8/2023 was by the 4th plaintiff seeking to set aside the consent dated 16/8/2023. He argued that the 1st, 5th and 6th plaintiff had purported to file a consent without his involvement and therefore it was arrived at by fraud and deliberate concealment of material facts and collusion between the parties. The 1st plaintiff responded that 4th plaintiff was not a beneficiary of the decretal sum as the registrar had determined the beneficiaries.
27. Additionally, the 1st plaintiff stated that the 4th plaintiff did not participate in the suit. The 5th and 6th plaintiff's raised a preliminary objection on the grounds that the 4th plaintiff was a stranger to the suit and therefore did not have locus to file the application. It was also contended that the grounds upon which the application was founded was resjudicata.
28. In defining a preliminary objection, the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696, termed the same as consisting a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.



29. From the foregoing, preliminary objections should be raised on a point of law only. Based on the objection before Court, the points of law raised were on the competency of the application in view of Order 24 rule 3(1) of the Civil Procedure Rules 2010 and the plea of res-judicata.
30. Order 24, rule 3 provides that: -
1. Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
31. In this case, the applicant filed an application for substitution following the demise of the 4th plaintiff. Notably, this application was filed before the application dated 21/8/2023. Since the application for substitution was unopposed, the court allowed it. Consequently, the application is properly before the Court and is deemed competent.
32. On the plea of res judicata, section 7 of the *Civil Procedure Act* provides that:-
- “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.”
33. This provision establishes the principle that once a matter has been conclusively determined by a competent Court, it cannot be re-litigated between the same parties. In the present case, the application before Court seeks to set aside the consent dated 16/8/2023 on the grounds that it was entered in the absence or without the participation of the 4th plaintiff.
34. Although the issue is about a consent which had not been litigated upon, it is clear, as contended by the 5th and 6th plaintiffs, that what is in issue is who is entitled to the decretal sum? I think that this is something that had been litigated upon and settled by the deputy registrar when he undertook accounts. His order which found that the 5th and 6th plaintiff had overpaid the defendant was adopted as a judgment of the Court. That part of the judgment has never been set aside.
35. Accordingly, in so far as the application makes insinuations that the decretal sum belongs to other parties and not exclusively the 5th and 6th plaintiff, that is an issue which was long settled. It is not open to review in the present application. The judgment must itself be reviewed before the issue of who takes what in the decretal sum can be dealt with. In any event, I have already held that the same belong to the 5th and 6th plaintiff who should make that determination internally.
36. In the premises, I hold that the plea of res-judicata was well taken and is hereby upheld. The preliminary objection is hereby sustained and the application is struck out.
37. The application dated 22/8/2023 sought that the Managing Director of National Bank of Kenya, 1st plaintiff, Kang’ethe George Advocate, Maumo Emma Velma Ochieng and Tiego Makonya be held in contempt for disobeying the orders given on 28/7/2022.



38. In *North Tetu Farmers Co. Ltd v Joseph Nderitu Wanjohi* [2016] eKLR, the court cited with approval the *Modern New Zealand* which laid out the elements of Civil Contempt as follows: -

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that: -

- (a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
- (b) the defendant had knowledge of or proper notice of the terms of the order;
- (c) the defendant has acted in breach of the terms of the order; and
- (d) the defendant's conduct was deliberate.”

39. On 28/7/2022, the Court delivered a judgment in favor of the plaintiff against the defendant. The 4th plaintiff has argued that the 1st, 5th and 6th plaintiff, along with the defendant and their respective advocates, acted in contempt of Court by entering into a consent that seeks to undermine or defeat the judgment.

40. Contempt of court arises when there is a willful and deliberate disregard of a court order. The judgment delivered on 28/7/2022 was in favor of all plaintiffs and any action that seeks to undermine or frustrate its enforcement could amount to contempt. Upon examining the consent signed by the 1st, 5th and 6th plaintiff and the defendant, it is not clear how it seeks to undermine the judgment of the Court. If it be the issue of the payment of the decretal sum, this Court has already expressed its view on who the judgment in that respect was in favour of.

41. For contempt to be established, it must be demonstrated that a clear and specific court order was deliberately violated. In this case, while the exclusion of the 4th plaintiff from the consent may be of concern, there is no evidence that the consent violated any express directive of the Court. The exclusion alone does not automatically amount to contempt unless it can be proven that the consent was executed with the intention of obstructing the enforcement of the judgment.

42. In the premises, having examined all the applications, I find and hold that: -

- a. The application dated 8/8/2023 is hereby allowed
- b. The applications dated 10/11/2022, 21/8/2023 and 22/8/2023 are dismissed.
- c. Each party to bear own costs.

It is so ordered.

SIGNED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2025.

F. GIKONYO

JUDGE

