



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waitiki v Muchena t/a Arimi Kimathi & Co. Advocates & another (Civil Case E734 of 2021) [2025] KEHC 3720 (KLR) (Commercial and Tax) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3720 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**COMMERCIAL AND TAX**  
**CIVIL CASE E734 OF 2021**  
**A MABEYA, J**  
**MARCH 26, 2025**

**BETWEEN**

**JULIUS CHUMBI WAITIKI ..... PLAINTIFF**

**AND**

**PATRICK KIMATHI MUCHENA T/A ARIMI KIMATHI & CO.**  
**ADVOCATES ..... 1<sup>ST</sup> DEFENDANT**

**JOHN MBIJIWE T/S BEALINE AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Plaint dated 3<sup>rd</sup> August, 2021, the plaintiff pleaded that pursuant to advertisements in the Star Newspaper in February, 2016, he attended some public auction conducted by the 2<sup>nd</sup> defendant and purchased thereat a property known as LR No. 337/1500 (Original No. 337/1202/85) for a sum of Kshs.17 million.
2. However, after paying for the said property, he discovered that the property was being sold by the 1<sup>st</sup> defendant as a decree holder in respect of Misc. Cause No. 483 of 2015. That after being issued with a Certificate of Sale on 26<sup>th</sup> March, 2016, he was unable to cause the said property to be transferred to him as the building erected thereon straddled three other properties, to wit, LR Nos. 337/1498, 337/1499 and 337/1501, respectively.
3. In view of the foregoing, the plaintiff claimed that the defendants had fraudulently sold him the said property through misrepresentation. He prayed for a declaration that the sale conducted on 26<sup>th</sup> February, 2016 was frustrated by the turn of events and is therefore rescinded and for judgment in the sum of Kshs.17 million being the purchase price he had paid.



4. By a Motion on Notice dated 31<sup>st</sup> February, 2024, brought under sections 1A, 1B, 31 and 34 of the [Civil Procedure Act](#) and Order 51 of the [Civil Procedure Rules](#), the 1<sup>st</sup> defendant applied to strike out the suit for want of jurisdiction, for being an abuse of the court process and for being incompetent and untenable in law by dint of section 34 of the [Civil Procedure Act](#).
5. The grounds for the Motion were that pursuant to taxation of various bills of costs, the 1<sup>st</sup> defendant applied for attachment of LR No. 337/1500 ('suit property') belonging to his erstwhile client, one Michael Mwasa Kilonzo. The suit property was sold to the plaintiff in execution of the decree arising from the said taxations and the 1<sup>st</sup> defendant received Kshs.12,618,212/= from the sale. On 9<sup>th</sup> June, 2016, the Court in HCOM Misc. No. 438 of 2015 vested the suit property on the plaintiff.
6. It was later discovered that the premises erected on the suit property straddled 3 other properties, to wit, LR Nos. 337/1498, 337/1499 and 337/1501. The plaintiff sued in CMCC No. 752 of 2020 to nullify the sale but the same was struck out. That the plaintiff applied in HCOM Misc. No. 438 of 2015 for the refund of the purchase price of Kshs.17 million and setting aside of the public auction. The court allowed the same but later reviewed the same vide a ruling of 30<sup>th</sup> January, 2024.
7. That by instituting the present suit, the plaintiff sought to relitigate the issues already determined in CMCC No. 752 of 2020 and HCCOM Misc. No. 438 of 2015. That the matter was res judicata. That by dint of section 34 of the [Civil Procedure Act](#), all questions arising out of execution of a decree should be determined in the same suit and not a separate suit. That in the premises, the present suit was fatally defective, incompetent, misconceived and untenable in law.
8. The plaintiff opposed the Motion vide his replying affidavit sworn on 20<sup>th</sup> November, 2024. He stated that the application was a relentless effort by the 1<sup>st</sup> defendant to go to all means to ensure that the plaintiff does not get justice. He set out what he termed to be the conduct of defendants that proved that assertion. These were; the opposition to CMCC No. 752 of 2020 and having it struck out, the application for review that was allowed on 30<sup>th</sup> January, 2024 in HC Misc. No. 483 of 2015. That the Court had on 3<sup>rd</sup> June, 2024 directed that the matter do proceed to hearing in the normal manner.
9. That the issue that had not been determined was not whether the 1<sup>st</sup> defendant had a saleable interest but the failure to ensure that the suit property was transferred to him. That the Court should avoid technicalities that are aimed at derailing it from the bigger objective which is to do ultimate justice.
10. That this Court has jurisdiction to determine the issues raised in this suit. That the issues raised in the suit had not been determined. That it would be draconian to strike out the suit yet the issues raised therein have not been determined. That section 34 of the [Civil Procedure Act](#) was not applicable as the plaintiff was not a party to those proceedings which were between an advocate and client. That the application was being brought too late in the day after the Court had set it down for pre-trials. That in the circumstances, the application should be dismissed.
11. The parties filed their respective submissions which I have considered. I have also considered the authorities relied upon.
12. This is an application to strike out the suit on the grounds that the Court has no jurisdiction, that the issues raised are *res-judicata* and that the same is an abuse of the court process.
13. On *res-judicata*, it was contended that the issues raised herein had been raised in CMCC No. 752 of 2020 which was struck out and in HCOM Misc. No. 483 of 2015.
14. The doctrine of *res-judicata* is encapsulated in section 7 of the [Civil Procedure Act](#). It bars a court from trying a suit in which the subject matter has been determined by a court of competent jurisdiction in



a previous suit between the same parties. From the record, it is clear that CMCC No. 752 of 2020 was not determined on merit. It was simply struck out as the issues raised therein were pending in HCOM Misc. No. 483 of 2015. Accordingly, it cannot be said that the issues were determined in that suit.

15. As regards HCOM Misc. No. 483 of 2015, I need not rehearse the same. I will quote paragraphs 20 and 21 of the ruling dated 28<sup>th</sup> February, 2023.

“20. The issues raised I (*sic*) HCC No. 734 of 2021 arose out of the execution of the decree arising out of these proceedings. It is therefore wrong to state that the issues therein are not for this forum. Section 34 of the Civil Procedure Act is clear on the issue of subsequent proceedings. It dictates that proceedings that arise out of a decree or order of the court are to be determined in the same proceedings and not elsewhere.

21. Accordingly, it was not necessary to institute HCC No. 734 of 2021. HCC No. 734 of 2021 is therefore stayed and the issues emanating from the impugned sale shall be determined herein.”

16. Those were firm findings regarding this suit. Although the ruling was subsequently reviewed, those findings were never disturbed. Indeed, the ruling of 30<sup>th</sup> January, 2024 that reviewed the ruling of 28<sup>th</sup> February, 2023 actually re-affirmed that the issues in this suit be determined in those proceedings.

17. In view of the foregoing, it is clear that those issues had not been determined. I therefore hold that the matter is not *res-judicata*.

18. The applicant argued that this suit is not subject to section 34 of the Civil Procedure Act as he was not a party in Misc. No. 483 of 2015. That the said proceeding was as between an advocate and his client. That in this suit, he has raised issues relating to fraud and misrepresentation against the advocate and the auctioneer who conducted the public auction.

19. Section 34 of the Civil Procedure Act provides as follows: -

“(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”

20. In HCCA No. 21 of 2018 *Agriculture Food and Fisheries Authority v Joseck Ibrahim Okemwa*, the Court held: -

“Since the vehicle was sold as a result of the execution of the orders in Kisii Misc. Civil Application No. 185 of 2016, any application seeking to set aside, vary or in any way implicate those orders should be filed in that case. The decision by the trial Magistrate is



underlined by the provision of Section 34 (1) of the Civil Procedure Act which deem such proceedings to be a suit for that purpose...”

21. In South Nyanza Sugar Co. Ltd v Alfred Sagwa Mdeizi t/a Pare Auctioneers (2010) eKLR, Makhandia J, as he then was, held: -

“Section 34 of the Civil Procedure Act strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law, the Learned Magistrate held that the applicant if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of Section 34 of the Civil Procedure Act, this conclusion was clearly erroneous.”

22. From the foregoing, it is clear that the letter and spirit of section 34 of the Civil Procedure Act is that no independent suit should be initiated to canvass, ventilate or determine issues that arise out of execution proceedings. All such issues should be ventilated in the suit in which the decree the subject of execution arose.
23. A reading of the plaint discloses that the cause of action in this suit emanate and/or arise from the execution of the decree in HC Misc. No. 483 of 2015. It is not an issue of costs now but the subsequent proceedings that concern the execution of the said decree. The cases of Rockland Kenya Ltd v Commissioner General of Kenya Revenue Authority (2020) eKLR and Nairobi West Hospital Ltd v Joseph Kariha & Another (2012) eKLR are not applicable.
24. It is true that the provision talks of “all questions between the parties to the suit.” It has not referred about persons who were not parties. The fact that the plaintiff was not a party in the HC Misc. No. 483 of 2015 does not exonerate him from section 34 aforesaid. The section is clear that “matters relating to execution of a decree” are to be dealt in the same suit. Any proceeding under that section including one challenging an auction is to be treated as a suit.
25. In view of the foregoing, I do not agree with the contention that this suit is independent of HC Misc. No. 483 of 2015 in so far as it is predicated on the execution for the decree arising therefrom.
26. In any event, the prosecution of this suit will be contrary to the orders made in the said HC Misc. No. 483 of 2015 wherein it was directed and ordered that all matters of fact and law raised in this suit be heard and determined therein.
27. This Court observes that Order 22 of the Civil Procedure Rules makes extensive provisions as regards execution of decrees and subsequent proceedings. It cannot be said that affirming the letter and spirit of section 34 of the Civil Procedure Act is dealing with a technicality. The plaintiff has the liberty and avenue to raise the issues raised in this suit in HCC Misc. No. 483 of 2015 and the door to justice has not been shut on him.
28. As already stated above, this suit was stayed in the ruling of 28<sup>th</sup> February, 2023. That order has not been set aside. I believe that suit cannot be subject to striking out until HC. Misc. No. 483 of 2015 is concluded.
29. Accordingly, I find that the application is without merit and the orders sought therein are declined.
- It is so ordered.

**SIGNED AT KISUMU THIS 12<sup>TH</sup> DAY OF MARCH, 2025.**

**A. MABEYA, FCI Arb**



**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF MARCH, 2025.**

**F. GIKONYO**

**JUDGE**

