



Masaai Mara Council University & another v Walingo (Civil Case E007 of 2024) [2025] KEHC 7824 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7824 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL CASE E007 OF 2024
CM KARIUKI, J
MAY 29, 2025**

BETWEEN

MASAAI MARA COUNCIL UNIVERSITY 1ST PLAINTIFF

MASAAI MARA UNIVERSITY 2ND PLAINTIFF

AND

MARY KHAKONI WALINGO DEFENDANT

RULING

1. The Defendant/Applicant seeks to strike out the plaint based on the facts as stated in the application and the supporting affidavit of Professor Mary Khakoni Walingo, sworn on 2/9/2024.
2. The application is opposed via an affidavit of Dr. Kenndy Ole Keru, sworn on October 30, 2024. Parties were directed to file submissions to canvas the application.

Background

3. The Respondents instituted the present suit vide a plaint dated August 19, 2024, alleging that the Applicant had misappropriated the funds of the 1st Respondent, among other allegations.
4. The Respondents sought, among others, an order for forfeiture of the Applicant's assets to the tune of Kshs. 215,001,608.00.
5. Aggrieved by the said claim, the Applicant has brought the present application to challenge the present suit against her and seeks that the same be struck out with costs.

The Applicant's Argument

6. The applicant submits that the present suit is res judicata: it is time-barred; it is a suit in respect of which the Respondents lack locus standi; the Court lacks jurisdiction to hear and determine the suit;



and that it amounts to an abuse of the court process; and that the same ought to be struck out with costs to the Applicant. The submissions are anchored on the following heads:

i. The present suit contravenes the Doctrine of res judicata.

7. 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.

(Emphasis added).

8. It is well established that res judicata is a matter of fact before it becomes a matter of law. The Applicant submits that the present suit is res judicata.
9. First, the substance of the present suit is the misappropriation of funds by the 1st Respondent, which was directly and substantially in issue in the criminal proceedings in Nakuru Anti-corruption Case No. E002 of 2020 (Republic Vs. Professor Mary Khakoni Walingo & 4 Others), where the Applicant was charged with, among others, conspiracy to commit the offense of corruption under Section 47(3) and Section 48 of the *Anti-corruption and Economic Crimes Act*. (A copy of the charge sheet is marked as MKW.2).
10. The Applicant successfully challenged the criminal proceedings before the High Court at Nakuru in High Court Constitutional Petition No. E028 of 2022: Professor Mary Khakoni Walingo Vs. DCI & 5 Others. (A copy of the Petition is marked as MKW. 3).
11. Honorable Justice Chemitei, in a judgment delivered on March 21, 2024 (the said judgment), quashed the criminal proceedings against the Applicant and barred investigations and prosecution of the Applicant in connection with the charges contained in the impugned charge sheet. (A copy of the said judgment is marked as MKW. 4). The prosecution made a nolle prosequi application, which application was successfully challenged by the Applicant, and the matter was marked as closed. (The decision dismissing the nolle prosequi application is marked as MKW-7).
12. Second, the Respondents herein were parties to the said proceedings at the High Court, and they actively opposed the Applicant's Petition. As such, the judgment and the orders of the Court are binding on the Respondents. The said judgment and orders have not been challenged, and they are, therefore, the final orders of the Court. Reliance is made on *John Florence Maritime Services Limited & Another Vs. Cabinet Secretary Transport & Infrastructure & 3 Others* (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (August 6, 2021), in *communications Commission of Kenya & 5 Others VS. Royal Media Services Limited & 5 Others* [2014] eKLR and *Karia and Another Vs. The Attorney General and Others*, [2005] 1 EA 83, 89
13. From the foregoing, there is a former judgment in proceedings in which the Applicant and the Respondents were parties, upon which a final order that has not been challenged was made. The High Court in Nakuru had the requisite jurisdiction over the subject matter and the parties. The issues raised in the present suit were substantial in the proceedings at the High Court. Allowing respondents to reopen matters that a court of competent jurisdiction has determined is a violation of the Doctrine of res judicata.



ii. The present suit is time-barred

14. Section 4(2) of the Limitations of Actions Act provides that An action founded on tort may not be brought after the end of three years from the date on which the action accrued.
15. Section 26 of the Act provides for the extension of the Limitation period in the case of fraud. It specifically provides that in cases of fraud; the limitation period does not begin to run until the Plaintiff has discovered the fraud.
16. It, therefore, follows that an action of fraud cannot be brought more than three years after the discovery of the alleged fraud.
17. It is the Applicant's humble submission that the present suit is time-barred. The Respondents, in their plaint, plead that the alleged fraud was discovered in or around September 2019. The present suit was instituted on August 19, 2024, more than three years after the alleged fraud was discovered. As such, the present suit is time-barred, and the same should be struck out.

iii. The Respondents lack the locus standi to bring the present suit.

18. The Black's Law Dictionary defines locus standi as 'the right to bring an action or to be heard in a given forum.'
19. Reliance is made on Alfred Njau & Others Vs. City Council of Nairobi (1982) KAR 229,
20. Section 55 of the *Anti-Corruption and Economic Crimes Act* provides that the process of forfeiting unexplained assets is a function of the Ethics and Anti-Corruption Commission (EACC). The process falls within the realm of criminal law and should be instituted after an investigation that shows that a person may have unexplained assets.
21. The Applicant submits that the Respondents do not have the locus standi to bring the present suit. In the present suit, the Respondents are seeking, among others, an order of forfeiture.
22. Under the *Anti-Corruption and Economic Crimes Act*, the process of forfeiture is a function of the EACC, to be performed after a complaint has been filed, investigations have been conducted, and the matter has been concluded. The Act does not grant complainants the right to lodge a formal complaint, enabling the EACC to conduct investigations and initiate the forfeiture process. As such, the Respondents lack the locus standi to institute and maintain the present suit.

iv. This Honorable Court does not have the jurisdiction to hear and determine the present suit.

23. The Court of Appeal in the seminal case of Owners of the Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Ltd. [1989] KECA 48 (KLR) stated the following on jurisdiction:

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court lacks jurisdiction, there would be no basis for continuing proceedings pending other evidence. A court of law suspends its proceedings in respect of the matter before it the moment it holds the opinion that it lacks jurisdiction.

24. Under Section 55 of the *Anti-corruption and Economic Crimes Act*, the process of forfeiture shall be instituted upon completion of investigations by the EACC. This process falls within the realm of criminal law. As such, the Court clothed with the requisite jurisdiction to hear this matter is the Anti-Corruption and Economic Crimes Court. The process of forfeiture should be instituted in the proper Court by the EACC, following the procedure outlined in Section 55 of the Act.



v. The present suit is an abuse of the court process.

25. Order 2, Rule 15 of the *Civil Procedure Act* provides that a pleading may be struck out if it is scandalous, frivolous, or vexatious and if it is an abuse of the process of Court.

26. In the case of County Council of Nandi Vs. Ezekiel Kibet Rutto & 6 Others (2013) eKLR, the Court stated the following on pleadings that are scandalous, frivolous, vexatious, or amount to an abuse of court process:

A scandalous pleading is a pleading that attempts to portray the opposing party in a derogatory or unfavorable negative light. It attempts to disparage the other party from the proceedings. Such pleadings border on defamation....

A frivolous pleading lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all.....

A vexatious pleading, in my view, is a pleading whose only purpose is to annoy or irritate the other party to the suit.... Its main quality is that it stands out as a pleading only aimed at harassing the other party.

A pleading that is an abuse of the process of Court, in my view, encompasses...situations where a litigant is using the process of Court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons.

Respondent's Submissions

27. The Defendant herein is the former Vice Chancellor of the 1st Plaintiff, whose tenure came to an end on September 24, 2023, having served in the institution for two terms each of five (5) years.

28. The Plaintiffs herein, after the said tenure came to an end, undertook an audit. It became apparent that during the second term for the Defendant herein, much money was lost and could not be accounted for. The said monies were received and/or taken by the Defendant herein, hence necessitating the filing of this suit.

29. Defendant herein does not dispute the said facts but has filed the instant application on the basis that because criminal proceedings against her were terminated, then the instant cause of action pegged on the Doctrine of unjust enrichment cannot be sustained.

30. The Defendant further alleges that the cause of the action is time-barred, as the criminal charges relate to alleged acts committed in 2019. However, the instant suit is pegged to the full term of the Defendant, which only came to an end on September 24, 2023. As such, time has yet to lapse, as it was barely a year ago.

31. The instant application is thus not supported by facts, and most of the issues raised therein remain disputed and require scrutiny, which will only be possible in a full trial where all issues and facts will be tested through cross-examination and an accurate account of the events will be determined on their merits. It is thus only fair that this application is declined, and the suit heard on its merits in a full trial.

Whether the suit is an abuse of the court process

32. Order 2 Rule 15 of the *Civil Procedure Act* provides that pleadings may be struck out if they are scandalous, frivolous, vexatious, and/or amount to an abuse of the court process.



33. Striking out pleadings is a draconian act and should be used sparingly, only as a last resort, where the Court notes that the case is hopeless and there is no chance of it being given any breath, even through amendment. Reliance is made on the case of *D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Another* (1980, Co-operative Merchant Bank Ltd. Vs. George Fredrick Wekesa (Civil Appeal No. 54 of 1999).and *In Yaya Towers Limited Vs. Trade Bank Limited (In liquidation)* (Civil Appeal No. 35 of 2000), *Blue Shield Insurance Company Ltd Vs. Joseph Mboya Oguttu* (2009) eKLR and *Crescent Construction Co. Ltd. vs. Dephis Bank Ltd.* (2007), eKLR.

Whether this suit is res judicata?

34. The Doctrine of res judicata is provided by Section 7 of the *Civil Procedure Act*. The section reads as follows: -

“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.”

35. Explanation – (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
36. The instant suit is properly before this Court, it relates to a civil matter, involves different parties, and different causes of action, based on facts that occurred after the determination of the former suit and arose after the lapse of the tenure of the Defendant sometime on or around September 24, 2023, and this, therefore, shows that this is a suit different from the former criminal matter. Reliance is made on *John Florence Maritime Services Limited & Another Vs. Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015) eKLR.

Whether the suit is time-barred?

37. The cause of action is based on the Doctrine of Unjust Enrichment, noting that the Defendant's tenure only came to an end on September 24, 2023. Therefore, the time had not lapsed, as it was barely a year later when the instant suit was filed.
38. The Defendant/Applicant is alleging, which is misplaced, that the time began running from 2019 when the issues of misappropriation of funds were first raised, but that is far from the truth. The Defendant continued as an employee and Vice Chancellor of the 1st Plaintiff until September 24, 2023, and the period began running from that date when her tenure came to an end.
39. The Plaintiffs/Applicants herein submit that the cause of action for unjust enrichment crystallized upon the lapse of the tenure of the Defendant/Applicant, and this is because before then, the Applicant maintained a suspension account, which was only closed after her tenure. It was at this stage that it was realized that Defendant had unjustly enriched herself at the expense of the 1st Plaintiff/Respondent herein.

Whether the Plaintiffs herein have requisite locus standi?

40. The first plaintiff is the University which had employed the applicant and the second plaintiff is the chairman of the University Governing council thus, the Plaintiffs herein are entitled to a right to be



heard, and they indeed have an interest in this matter and thus can sustain a standing in this matter, especially noting the cause of action is pegged on the Doctrine of unjust enrichment.

41. The 1st Plaintiff, as such, was greatly aggrieved by the Defendant by unjustly enriching herself at the expense of the 1st Plaintiff. The 1st and 2nd Plaintiff are thus entitled to be heard and have a serious stake in these proceedings. They, therefore, cannot be said to be without locus standi. Reliance was made on the cases of the Law Society of Kenya vs. Commissioner of Lands and Others, Nakuru High Court Civil Case No. 464 of 2000, SAMUEL KAMAU MACHARIA VS. KENYA COMMERCIAL BANK LIMITED, KENYA COMMERCIAL FINANCE COMPANY LIMITED [2003] KEHC 725 (KLR), Chase International Investment Corporation and Another Vs. Laxman Keshra and Others (1978) KLR 143 and the case of Joel Mwangangi Kithure Vs. Priscah Mukorimburi (2022) KEELC 1490 (KLR).
42. The Defendant, in her application, seems to suggest that the only person with locus standing to file this suit is the EACC. However, it is contended that as ably demonstrated hereinabove, the cause of action in this suit is pegged on the Doctrine of unjust enrichment, and the Plaintiffs herein can bring this case on the institution without having to first make a complaint to the EACC.
43. It is further worth noting that Article 22 of *the Constitution* of Kenya, 2010, has since expanded the right to be heard and the persons who can approach the Court, which reinforces the fact that the Plaintiffs herein indeed have the requisite locus standi to institute the instant suit.
44. From all the foregoing, it is crystal clear that the Plaintiffs/Respondents herein have the requisite locus standi to prosecute their suit and for the same to be determined on merits.
45. The Defendant herein seems to have made up her case based on the proceeds of the Crime and Anti Money Laundering Act and failed to read the pleadings filed by the Plaintiffs herein, whose case is purely pegged on the celebrated Doctrine of unjust enrichment. The plaint makes no mention of the aforesaid Act, and had Plaintiff wished to rely on the same, then they would have expressly pleaded the same.
46. As captured under paragraph 31 of the plaint, the instant suit is pegged on the Doctrine of unjust enrichment, and the same is properly brought by the Plaintiffs herein as the entity that suffered and lost the money at the expense of the Defendant who unjustly benefited.
47. Firstly, the instant suit is not res judicata; it is also not time-barred, and further, this Court has jurisdiction to entertain this suit.
48. Secondly, the Plaintiffs have demonstrated that the instant suit is based on the Doctrine of Unjust Enrichment and, therefore, ought to be heard on its merits.
49. The Plaintiffs have shown and demonstrated that they have locus standi, and as such, this matter ought to be expedited and fixed for a main hearing, where all issues shall be heard and determined on merits and with finality.
50. From all the foregoing, the application in its entirety is devoid of any merit. The Applicant has failed to prove the allegations made therein on a balance of probability, and the application warrants dismissal and suit be set down for hearing. Thus, the court makes the orders;
 - i. The application is dismissed, and the costs abide with the result of the suit.

RULING DELIVERED, DATED AND SIGNED THIS 29TH DAY OF MAY, 2025.

JUSTICE CHARLES KARIUKI



JUDGE

