



Digi Telecommunication Systems Limited v O-Keefe & 4 others (Environment & Land Case 26 of 2023) [2023] KEELC 20305 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 26 OF 2023
EK MAKORI, J
SEPTEMBER 28, 2023**

BETWEEN

DIGI TELECOMMUNICATION SYSTEMS LIMITED PLAINTIFF

AND

MARILYN DOREEN O-KEEFE 1ST DEFENDANT

HELEN 2ND DEFENDANT

LONNO LODGE LIMITED 3RD DEFENDANT

LANDS REGISTRAR, KILIFI 4TH DEFENDANT

THE ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. What is before this Court for determination is the 1st Defendant's Notice of Preliminary Objection dated 2nd May 2023 and that of the 3rd Defendant dated 3rd May 2023.
2. Accompanying the plaint dated 18th April 2023 is a Notice of Motion application of even date brought under Certificate of Urgency seeking among other reliefs:
 - i. Spent.
 - ii. That pending hearing and determination of this application the Court be pleased to issue a temporary injunction to restrain the defendants from selling, charging, transferring, leasing, and constructing on parcels number Kilifi/Jimba/1189,1190 (Orig No 397) plot number Kilifi/Jimba/395 and Kilifi/Jimba/390.
 - iii. That pending hearing and determination of this suit the Court be pleased to issue a temporary injunction to restrain the defendants from selling,



charging, transferring, leasing, and constructing on parcels number Kilifi/Jimba/1189,1190 (Orig No 397) Plot Number Kilifi/Jimba/395 and Kilifi/Jimba/390.

- iv. That this Court be pleased to order a Government surveyor to establish boundaries of Kilifi/Jimba/1138 and 1139 (Orig No 380) and Kilifi/Jimba/1189, 1190 (Orig. No 397) and Kilifi/Jimba/390 and 395
 - v. That the costs of this application be provided for.
3. The Preliminary Objections raised by the Defendants/Respondents' are on points of law essentially challenging the correctness of the matter on account of res judicata and that the suit is statutorily barred, the cause of action having started running in 2002.
 4. Parties were directed to file written submissions, which they did. The Court also directed that the Preliminary Objection takes precedence.
 5. The objection by the 1st Defendant/ Respondent is grounded on the fact that the suit is res judicata and offends the provisions of Section 7 of the Civil Procedure Act, CAP 21 Laws of Kenya, and based on the following grounds that the suit as presented is fraught with malafides, incurably defective, misconceived and hinged on the wrong provisions of the Law and Procedure. The suit as presented is a wanton abuse of the Court process, scandalous, frivolous, vexatious, and intended to embarrass the Court and the legal process. The Environment and Land Court sitting in Malindi in ELC No 134 of 2017 pronounced itself well on this matter pitting the Plaintiff and the 1st Defendant and a solution fronted in its ruling. The suit should be dismissed with costs.
 6. The 1st defendant on the doctrine of res judicata has cited the Indian case of Lal Chand v Raha Kishan, Air 1977 SC 789, and the Court's high calling of doing justice as stated by Odinga J. in Machakos Petition No 19 of 2020.
 7. The objection by the 3rd defendants/ respondents is grounded on the fact that the suit offends the mandatory provisions of Section 7 of the Limitation of Actions Act and Section 7 of the Civil Procedure Act 2010 and is based on the following grounds - The Plaintiff having acquired LR No Kilifi/Jimba/1138 & 1139 in the year 2002. It has been 21 years since the Plaintiff acquired LR No Kilifi/Jimba/1138 & 1139 and such the plaintiff is guilty of the doctrine of laches, the suit is time-barred by law and thus ought to be dismissed with costs to the 3rd defendant. The Plaintiff's entire suit is incompetent, fatally and incurably defective, the same being res judicata as the issues raised by the Plaintiff in this suit were raised in Malindi ELC Cause No 134 of 2017 between Jonathan Savage v Patrick Okeefe which suit was dismissed for failure to comply with the directions issued by Justice Olola on 21st March 2018. The Plaintiff's Director (the Plaintiff in the above-mentioned matter) appealed to the Court of Appeal against the decision of Justice Olola aforementioned in Malindi Civil Appeal No 54 of 2018 between Jonathan Savage v Patrick Okeefe wherein after the Appeal was heard, the Court dismissed the same with costs to the respondents. Therefore, the 3rd defendant submitted the current suit as an abuse of the process of the Court and as such ought to be dismissed with costs to the 3rd defendant.
 8. The plaintiff averred that on the limitation issue, the dispute at hand is the recovery of land whose timeline is 12 years. In this case, time started running on the 5th of March 2014 when the land Registrar decided on the issue of boundaries, which was canvassed by Olola J. in the case of Jonathan Savage v Patrick Okeefe. Besides, the plaintiff averred that in computing time, the Court should not reckon the time when COVID-19 ravaged the whole world.



9. On res judicata, the plaintiff submitted that quoted the decision in *IEBC v Maina Kiai & 5 Others [2017]* eKLR, which enunciated the test on what threshold to meet for res judicata to be achieved. The plaintiff was of the view that Jonathan Paul Savage is a Director of the plaintiff – a distinct legal personality as set out in the case of *Salomon v Salomon Co. Ltd [1895 – 1899]* All ER 33. Besides the suit was dismissed on technicalities for failure to comply with the directions of Olola J.
10. The issues that commend the decision of this Court are whether the current suit is time-barred and whether it stands afoul of the doctrine of res judicata.
11. As held by Law JA. in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd [1969]* thus:

“...so far as I’m aware, a preliminary Objection consists of 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. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. The thrust of the Preliminary Objection rests squarely on the jurisdiction of this Court, as held by Nyarangi JA.in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989]* eKLR:-

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

13. Parties did not favour me with the decision of Olola J. in *Malindi ELC Cause No 134 of 2017*, which was subject to appeal in *Malindi Civil Appeal No 54 of 2018* between *Jonathan Savage v Patrick Okeefe*. I have called for the physical file to ascertain what this Court - Olola J. said. The judge had ordered for amendment of the plaint in this manner:

“Accordingly, the plaintiff is hereby directed to make the necessary application to join all the proper and necessary parties herein within 30 days from today (read from 21st March 2018).In the event of failure to bring the necessary application within the said time, the suit shall stand dismissed without any further reference to this Court.”

14. Instead of amendments, an appeal was preferred to the Court of Appeal in *Malindi Civil Appeal No 54 of 2018* between *Jonathan Savage v Patrick Okeefe*. It is reported as *Patrick Okeefe v Jonathan Savage [2020]* eKLR. The Superior Court dismissed the appeal in this manner:

“We have carefully considered the record of appeal as well as the submissions on record.

26. Regarding the boundary dispute and the action taken by the Land Registrar, the trial Court traced the history of the dispute very well. It observed that the appellants lodged a complaint with the Permanent Secretary several years ago; that the Permanent Secretary sent a team of the Public Complaints and Resolutions Committee to visit the site with a view to resolving the dispute, but the said officials were not able to resolve the dispute; eventually the Land Registrar directed that the status quo be maintained until the Ministry obtains



a Court order to correct erroneously erected boundaries affecting listed parcels of land.

27. It cannot therefore be said that boundaries between the parcels of land had been fully determined. The status quo was maintained pending determination of the dispute by Court.
 28. As rightly pointed out by the trial judge, to hold that the trial Court lacked jurisdiction would have been improper in the circumstances. We find no basis of interfering with the learned judge's decision.
 29. We now turn to the second ground of appeal. It is not disputed that parcels of land numbers 1138 and 1139 are owned by Digitel Communications System Ltd and not the respondent as pleaded. The learned judge was of the view that the defect could be corrected by way of an amendment to the plaint, instead of striking out the entire suit. He therefore ordered that an amendment to the plaint be effected. In so holding, the learned judge exercised his discretion. Did that amount to injudicious exercise of discretion? We do not think so. Ndichu Associates & Company Advocates drew the plaint on behalf of the respondent. It would have been unjust to punish the respondent for a basic error of law made by the respondent's advocates that could be corrected without occasioning prejudice to the appellant.
 30. We find that the trial Court was perfectly entitled to invoke the provisions of order 1 rule 10(2) of the Civil Procedure Rules to order amendment to the plaint to reflect the real owner of the property. The provisions of Article 159(2) (d) of *the Constitution* of Kenya, 2010 require that justice be administered without undue regard to procedural technicalities.
 31. All in all, we find this appeal lacking in merit and dismiss it with costs to the respondent.”
15. Meanwhile the matter went into a lull until the 21st of June 2023 when the matter was listed before this court for a mention for directions – parties oblivious of the orders by Olola J (supra) The court was notified that the orders of Olola J. had not been complied with. On 13th July 2023, this Court notified the parties of the effect of Olola J's orders dated 21st March 2018 which were self-regulating, and that the dismissal Orders by Olola J. took effect on 21st April 2018.
 16. Meanwhile from the primary suit I can see there is an application filed under certificate of urgency dated 24th July 2023 seeking to reinstate the suit that was dismissed (sic) on 13th July 2023. The application comes for an inter parte hearing on the 18th of October 2023.
 17. From the history above, we have two parallel files running over the same subject matter fatiguing this Court and the parties who are desirous of the conclusion of this matter. At best, this is an abuse of the entire court process occasioned by the lawyers representing the parties on a simple boundary dispute issue.
 18. As held by Wabwoto J. in *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others [2022]* eKLR, abuse of the Court process consists of the following:

”I also wish to add that the practice of filing new and separate cases despite the existence of a similar case relating to the same subject matter amounts to an abuse of the Court process. Courts usually frown on this practice since it leads to an unnecessary backlog of cases and a waste of the precious judicial time.



28. In the case of Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No 25 of 2002 (2009) eKLR 229, the Court of Appeal stated as follows:-

“The term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious, or oppressive.

29. Abuse of judicial process is a term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. It also means abuse of legal procedure or improper use of the legal process. It creates a factual scenario where a party is pursuing the same matter by two Court processes. In other words, a party by the two-court process is involved in some gambling, a game of chance to get the best in the judicial process.

30. The point to underscore is that a litigant has no right to pursue pari passu more than one process that will have the same effect at the same time or at different times with a view of obtaining victory in one of the processes or both. I have in previous decisions stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. Litigation is a contest by a judicial process where the parties place on the table of justice their different position clearly, plainly, and without tricks.

31. Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than the exercise of the right per se. The abuse consists of the intention, purpose, and aim of the person exercising the right, to harass, irritate, and annoy the adversary and interfere with the administration of justice

32. Abuse of the Court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.”

14. This matter has a bearing with Malindi ELC Cause No 134 of 2017 which is coming for hearing on October 18, 2023. This means the issues raised here have not been fully and finally determined. Let us all migrate to that file Malindi ELC Cause No 134 of 2017 to avoid the annoying proliferation of suits and waste of judicial time.

15. At the end, the entire suit and pending application are hereby struck out for being an abuse of the court process. Costs to abide by the outcome of Malindi ELC Cause No 134 of 2017.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER 2023

E. K. MAKORI



JUDGE

In the presence of:

Mr. Owino for the 1st defendant

Mr. Khalid for 3rd defendant

Court Clerk: Happy

In the absence of:

Mr Khatsoleh for the plaintiff

Mr. Ojwang for the 4th and 5th Defendants

