



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Oduor (Trading as Beachland Developers) & 10 others v Wandoe (Purporting to Have Authority of Madin Clearing & Forwarding Ltd) & 3 others (Environment & Land Case E001 of 2025) [2025] KEELC 1492 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1492 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE E001 OF 2025**  
**SM KIBUNJA, J**  
**MARCH 26, 2025**

**BETWEEN**

**JABESS ODUOR [TRADING AS BEACHLAND DEVELOPERS] . 1<sup>ST</sup> PLAINTIFF**  
**VARUN GUPTA [TRADING AS BEACHLAND DEVELOPERS] . 2<sup>ND</sup> PLAINTIFF**  
**JACKSON MWACHOFI ..... 3<sup>RD</sup> PLAINTIFF**  
**JAROM GATUA ..... 4<sup>TH</sup> PLAINTIFF**  
**ANTONY KILONZO ..... 5<sup>TH</sup> PLAINTIFF**  
**JAIRUS NYAMONGE ..... 6<sup>TH</sup> PLAINTIFF**  
**CAR PARK WINES & SPIRITS ..... 7<sup>TH</sup> PLAINTIFF**  
**NANCY ODANGA ..... 8<sup>TH</sup> PLAINTIFF**  
**YUSRA SUBKI ..... 9<sup>TH</sup> PLAINTIFF**  
**HAMYAR AHMED ..... 10<sup>TH</sup> PLAINTIFF**  
**SIMON ODHIAMBO ..... 11<sup>TH</sup> PLAINTIFF**

**AND**

**STELLA WANDOE [PURPORTING TO HAVE AUTHORITY OF MADIN CLEARING & FORWARDING LTD] ..... 1<sup>ST</sup> DEFENDANT**  
**MADIN CLEARING & FORWARDING LTD ..... 2<sup>ND</sup> DEFENDANT**  
**BAMBURI SUPERMARKET LIMITED ..... 3<sup>RD</sup> DEFENDANT**  
**INSPECTOR GENERAL OF POLICE [REPRESENTED BY THE ATTORNEY GENERAL] ..... 4<sup>TH</sup> DEFENDANT**



## RULING

### Notice Of Motion Dated 10th January 2025

1. The plaintiffs moved the court through the notice of motion dated 10<sup>th</sup> January 2025 seeking for orders inter alia:
  - a. Stay of execution of exparte orders made on 10<sup>th</sup> December 2024 by Hon. D. Nyambu, CM in Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, compelling OCS Nyali Police Station to provide the escort and provide assistance to the execution of the orders for vacant possession on plot L.R.No. MN/1/12056 against the respondents.
  - b. Call for the record of the court file in CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, for the purpose of discharging and or vacating the orders issued on 10<sup>th</sup> December 2024 by Hon. D. Nyambu.
  - c. Temporary injunction be issued, restraining the defendants from interfering with the plaintiffs' possession, use and occupation of the stalls on plot L.R. No. MN/1/12056. Which is owned and managed by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, under the name Beachlands Developers, pending the hearing and determination of this suit.
  - d. Costs be provided for.

The application is premised on the eight (8) grounds on its face and supported by the supporting and supplementary affidavits of Jabess Oduor and Varun Gupta, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, sworn on the 10<sup>th</sup> January 2025 and 29<sup>th</sup> January 2025, respectively, among others deposing that on 7<sup>th</sup> January 2024, they entered into an agreement with Sammy Sailas Mwaita, director Madin Clearing and Forwarding Company Limited authoring them to let, manage and undertake agency dealings over the suit property, and to correct rent, deduct their commission and pay 2<sup>nd</sup> defendant ground rent; that they jointly built stalls on the suit property and thereafter, they entered into five year tenancy agreements with the other plaintiffs over shops on the suit property with rental values of between Kshs.25,000 to 40,000; that on 4<sup>th</sup> January 2024, they were served with court order issued by Hon. D. Nyambu in CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, inter alia directing OCS Nyali Police Station to provide escort and assistance to applicant in executing the order of vacant possession the suit property against the respondent; that on further enquiries they established the exparte order was mischievous and illegal since their shops shall be demolished on execution of a decree emanating from High Court Civil Suit No. 246 of 2012, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, which judgement was delivered on 22<sup>nd</sup> April 2016 and the plaintiffs were not parties; that the magistrate's court was without jurisdiction to purport to execute a decree emanating from the High Court since section 30 of the *Civil Procedure Act*, provides for the decree to be executed by the court that issued it or one of equal jurisdiction; that as the miscellaneous application was closed after the exparte order was issued, the plaintiffs who were not parties and who would be adversely affected if it was executed were condemned unheard; that the 1<sup>st</sup> defendant and the advocate who filed the miscellaneous application and obtained the drastic orders had not been authorised to act for the 2<sup>nd</sup> defendant; that injunction order be granted as prayed against the 1<sup>st</sup> to 3<sup>rd</sup> defendants restraining them from from executing the eviction decree emanating from ELC Case No. 227 of 2013, Madin Clearing and Forwarding Ltd, and OCS Nyali Police Station be restrained from enforcing the illegal orders obtained from the Magistrate's court until the hearing and determination of this suit; that



the 2<sup>nd</sup> plaintiff and 3<sup>rd</sup> defendant are two separate legal entities; that as the decree sought to be executed is dated 18<sup>th</sup> July 2016, and more than an year old, then under Order 22 Rule 18 of Civil Procedure Rules, a notice to show cause ought to have been filed instead of a miscellaneous application before the lower court; that each of the eight directors of 3<sup>rd</sup> defendants and each of the plaintiffs are separate entities from the 3<sup>rd</sup> defendant; that the right to enforce the decree in the Mombasa ELCC No. 227 of 2012 was waived by the Decree Holders when they resolved to allow the 1<sup>st</sup> and 2<sup>nd</sup> defendants to construct the stalls, and thereby compromised the suit, which action binds the new directors.

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the application through the replying and further affidavits of Stella Wandoe, the 1<sup>st</sup> defendant, sworn on the 20<sup>th</sup> January 2025 and 3<sup>rd</sup> February 2025 respectively, inter alia deposing that she is a director of the 2<sup>nd</sup> defendant and competent to swear the affidavit; that the application is bad in law, defective and an abuse of court process; that the 2<sup>nd</sup> defendant is the registered proprietor of the suit property, and had sued the 4<sup>th</sup> defendant in 2013 seeking vacant possession; that the judgement was delivered on 22<sup>nd</sup> April 2016 declaring the 4<sup>th</sup> defendant trespasser, but it refused to vacate, purporting to trade as Beachland Developers; that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs have been collecting rent on the suit premises claiming they were authorised by the 2<sup>nd</sup> defendant to do so on 7<sup>th</sup> January 2024, which cannot be true as the agreements they relied on show they have been collecting rent from 2019; that Sammy Silas Mwaita is not a director of the 2<sup>nd</sup> defendant, and has no instructions to act for it in respect of the suit property; that the document relied on by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff dated 10<sup>th</sup> January 2020, as a resolution of 2<sup>nd</sup> defendant in favour of Beachlands Developers, is a fake as the 2<sup>nd</sup> defendant did not pass such a resolution; that the same document has been attached to the plaintiffs supplementary affidavit but is backdated 18<sup>th</sup> March 2020.
3. Pursuant to the directions of 23<sup>rd</sup> January 2025, the learned counsel for the learned counsel for the plaintiffs and 1<sup>st</sup> & 2<sup>nd</sup> defendants filed their submissions dated “31<sup>st</sup> July 2025” and 11<sup>th</sup> February 2025, which the court has considered.
4. The issues for considerations by the court are as follows:
  - a. Whether the plaintiffs have met the threshold for stay, and or review and or injunction orders sought to issue at this stage.
  - b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions by the learned counsel, superior courts decisions cited, pleadings and come to the following determinations:
  - a. That the plaintiffs commenced this suit through the plaint dated 10<sup>th</sup> January 2025, seeking for inter alia a declaration that the orders issued on 11<sup>th</sup> December 2024 by Hon. D. Nyambu, in Misc. Appl. No. E010 of 2024, touching on the suit property was made without jurisdiction; permanent injunction restraining the defendants from interfering with the plaintiffs possession, use and occupation of the stalls on the suit property that are owned and managed by 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs under the name of Beachlands Developers, and costs. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants have opposed the plaintiffs’ claim through their statement of defence and counterclaim dated the 11<sup>th</sup> February 2025, praying inter alia for damages for trespass; refund of all rent collected by 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs; mesne profits, and interests on the above at court’s rates.
  - b. The court proposes to start its analysis with the plaintiffs’ second prayer, which is for the court to call for the record of the court file in CMC Misc. Appl. No. E010 of 2024, Madin



Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, for the purpose of discharging and or vacating the orders issued on 10<sup>th</sup> December 2024 by Hon. D. Nyambu. The learned counsel has faulted the 1<sup>st</sup> defendant for filing execution proceedings of a decree issued by the High Court before the subordinate court. The counsel submitted inter alia that the execution proceedings should have taken place through the High Court proceeding and the subordinate court had no jurisdiction and therefore, this court should in exercise of its supervisory jurisdiction under Article 165 of *the Constitution*, and call for the lower court record and vacate the order issued on 10<sup>th</sup> December 2024. The counsel cited the decision in the case of Peter Kariuki Karuguchu versus Stephen Waithaka Mwangi Muranga HCC Misc. Appl. No. 7 of 2023. On their part, the learned counsel for the 1<sup>st</sup> & 2<sup>nd</sup> defendant inter alia submitted that this court has no supervisory jurisdiction over the subordinate courts and is without jurisdiction to call for the lower court file to vacate the order. The counsel relied on the Articles 162 & 165(7) of *the Constitution*, section 13 of the *Environment and Land Court Act*, and the decision in the Supreme Court of Kenya case of Republic versus Chengo & 2 Others (Petition 5 of 2015) [2017] KESC 15 [KLR] (26 May 2017) (Judgement).

- c. In case of Peter Kariuki Karuguchu versus Stephen Waithaka Mwangi Muranga [supra], cited by counsel for the plaintiffs, he referred to the court's observation as follows:

“As correctly stated by Mativo J (as he then was) in Republic versus Chief Magistrate's Court at Milimani Law Courts : Director of Public Prosecutions & 2 Others ( Interested Parties) Exparte Pravin Galot (2020) eKLR, which has also been cited by the respondent, the general supervisory jurisdiction of the High Court under Article 165(6) of *the Constitution* should be used sparingly in appropriate cases in order to keep subordinate courts and tribunals within the bounds of their authority and to ensure that they perform their duties in a legal manner. In the words of Mativo J, which I entirely agree with “ ....this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the court or tribunal. It must be restricted to cases of grave derelictions made within the limits of jurisdiction of the court or tribunal. It must be restricted to cases of grave dereliction of duty and fragrant abuse of fundamental principles of law or justice where grave injustice would be done unless the High Court interferes....”

I am in agreement with the observations on the limited scope of the supervisory power application of the court under Article 165(6) of *the Constitution*.

- d. The learned counsel for the 1<sup>st</sup> & 2<sup>nd</sup> defendants has submitted that this court does not have supervisory powers like that of the High Court over the subordinate courts under Article 165(6) of *the Constitution*, and relied on the Supreme Court of Kenya case of Republic versus Chengo & 2 Others [supra], in which the apex court pronounced itself on inter alia, the jurisdictions of the three superior courts of equal status to wit, ELRC, High Court and ELC. I am aware of the different positions taken by superior courts on this question, but suffice it to say the following; firstly, the Supreme Court of Kenya case of Republic versus Chengo & 2 Others, emanated from the criminal appeal decision of the superior court by a bench that included a judge from this court. If the 1<sup>st</sup> & 2<sup>nd</sup> defendants' counsel's position that this court is without powers to supervise the lower courts and by implication tribunals, the question that then arises is whether the High Court would be with jurisdiction to supervise the tribunals that deal exclusively with environment and land matters, and I dare ask, subordinate courts' magistrates who are gazetted by the Hon. Chief Justice, to handle environment and land court



matters?. Flowing from decision in the case of Republic versus Chengo & 2 Others [supra], the answer is in the negative. Then would the law have envisaged a situation where such tribunals and or subordinate courts are outside the supervisory powers of the superior courts? Definitely not. I find and hold that the subordinate courts manned by magistrates gazetted by the Hon. Chief Justice to handle environment and land disputes, tribunals, and bodies, persons or authorities handling such matters are amenable to this court’s supervisory jurisdiction.

- e. The parties herein have not disputed that the issues raised and decided in CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, were matters falling under the jurisdiction of this court, and it is a fact that Hon. D. Nyambu CM, is gazetted to handle environment and land matters, and this court is with supervisory powers over that court. the question that begs to be answered is whether the plaintiffs have met the test in the case of Peter Kariuki Karuguchu versus Stephen Waithaka Mwangi, [supra] by showing that the lower court decision was grave dereliction of duty, and fragrant abuse of fundamental principles of law or justice, and that grave injustice would be done unless the court interferes. The plaintiffs have alleged and deposed that they were not parties in the subordinate court miscellaneous application where the impugned order was made or the High Court matter where the decree was issued in 2016. They filed the instant suit and sought at prayer (a) on the plaint and prayer (3) in the notice of motion challenged the order issued on 10<sup>th</sup> December 2024.
- f. However, the plaintiffs have not explained or attempted to explain why they did not consider moving the subordinate court for joinder in the miscellaneous application followed with a prayer for review and or setting aside the order of 10<sup>th</sup> December 2024. They have also not tendered any explanation why they did not consider moving the High Court, which issued the decree in 2016, for joinder and review, instead of filing an entirely fresh suit, leading to multiplicity of litigations. I do not see any evidence of grave injustice that is likely to be visited upon the plaintiffs or anyone of them if the court declined to call for the subordinate court’s record and review the order of 10<sup>th</sup> December 2024, as there are other efficacious remedies available to the parties through the already existing suits.
- g. Going back to the prayer for stay of execution of exparte orders made on 10<sup>th</sup> December 2024 by Hon. D. Nyambu, CM in Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, compelling OCS Nyali Police Station to provide the escort and provide assistance to the execution of the orders for vacant possession on plot L.R.No. MN/1/12056 against the respondents, it is apparent this suit is not an appeal on the decision of the subordinate court case, and in view of the finding in (f) above, I find no merit in the prayer.
- h. The learned counsel for the plaintiffs has at length submitted that the subordinate court was without jurisdiction to purport to execute the decree from the High Court. Section 30 of [Civil Procedure Act](#) chapter 21 of Laws of Kenya provides that:

“A decree may be executed either by the court which passed it or by the court to which it is sent for execution.”

Section 31 of the said Act provides for transfer of decree from the court that made it to another court on application of the decree holder, or on its own motion. There is no evidence presented before the court by the 1<sup>st</sup> and 2<sup>nd</sup> defendants that the court had transferred the decree arising out of the judgement delivered on 22<sup>nd</sup> April 2016 in Madin Clearing and Forwarding Company Limited versus Bamburi Supermarket



Limited High Court Civil Suit No. 246 of 2012 [annexed judgement has the reference of ELC 227 of 2013, which I take to be the number the suit was given on being transferred from the High Court to this court] to the Mombasa Chief Magistrate's court for execution either on application by the decree holder or on its own motion. Considering both the Mombasa Chief Magistrate's court and this court are housed in the same building, it defeats logic why the 2<sup>nd</sup> defendant herein as the decree holder in Madin Clearing and Forwarding Company Limited versus Bamburi Supermarket Limited [supra] found it fair and just to move the magistrates court for execution instead of initiating the execution proceedings through the court record that is with this court's registry.

- i. Execution proceedings of decrees and orders issued by the court is provided for under Order 22 of the Civil Procedure Rules, and should be undertaken through the court's Deputy Registrar, who exercises the special powers conferred by Order 49 Rule 7(1)(b)(x) of the Civil Procedure Rules. That law does not confer jurisdiction upon the subordinate courts to execute the decrees and or orders of this court unless where the magistrate is the Deputy Registrar or acting as such, or where the decree/order has been transferred to the lower court for execution under section 31 of the *Civil Procedure Act*. Where the decree/order has been transferred to another court for execution, then that court is required by section 32 of the Act to certify to the court that passed the decree/order that it has executed it or where it was unable, the circumstances of such failure. The filing of CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, to execute the decree of this court without the same having been transferred to that court was to say the least irregular and an abuse of the court process. The court has the inherent powers under section 3A of *Civil Procedure Act* to make orders that promotes justice and prevent the abuse of its process. The court also has a duty under sections 1A and 1B of the said Act to ensure expeditious resolutions of civil disputes before it in an efficient and timely manner. Article 159(2)(d) of *the Constitution* and section 19(1) of the *Environment and Land Court Act* No. 19 of 2011 obligates the court to act expeditiously and without undue regard to technicalities, and in considerations of the above provisions, I find it appropriate and just to declare the filing of CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, as irregular and unlawful, and the orders issued thereof as null and void ab initio.
- j. It is important to understand the legal and or beneficial interests of the contesting parties over the suit property so as to determine the prayer for temporary injunction restraining the defendants from interfering with the plaintiffs' possession, use and occupation of the stalls on plot L.R. No. MN/1/12056, which is owned and managed by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs, under the name Beachlands Developers, pending the hearing and determination of this suit. The court has perused paragraphs 2 to 4 of the plaint and gathers that their claim to the suit property originates from an agreement of 7<sup>th</sup> January 2024, between one Sammy Sailas Mwaita, director, Madin Clearing and Forwarding Company Limited and the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs authorizing them to let, manage and undertake agency dealings over the suit property; and tenancy agreements between the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs and 3<sup>rd</sup> to 11<sup>th</sup> plaintiffs on premises "next to plot No. 12056/1/12056 for a period of 5years wherein the monthly rental payments varied from Kshs.25,000/= to Kshs.40,000/= which consisted of shops." On their part, the 1<sup>st</sup> & 2<sup>nd</sup> defendants have in their defence and counterclaim and 1<sup>st</sup> defendant's deposition stated that the 2<sup>nd</sup> defendant is the registered proprietor of the suit property. It has also not been disputed that in the 2<sup>nd</sup> defendant's title to the suit property was affirmed in the 2016 High Court decision, that was sought to be executed through the loer court proceeding culminating to the



impugned order of 10<sup>th</sup> December 2024. The 1<sup>st</sup> & 2<sup>nd</sup> defendants have also denied that the said Sammy Silas Mwaita is a director of the 2<sup>nd</sup> defendant or had authority to bid the 2<sup>nd</sup> defendant as alleged by the plaintiff. The 1<sup>st</sup> defendant's deposition that the directors of the 2<sup>nd</sup> defendant are only Japheth Eyama and herself and the contents of the 2<sup>nd</sup> defendant's CR12 has not been challenged or rebutted. It therefore follows therefore, that as it is doubtful whether the person through whom the 1<sup>st</sup> & 2<sup>nd</sup> plaintiffs claimed rights or interests over the suit property had any lawful authority to act for the 2<sup>nd</sup> defendant in respect of the suit property, then the plaintiffs have failed in the first test of establishing a prima facie case with a probability of success under *Giella versus Cassman Brown Company Ltd* [1973]EA 358. It is also evident that should the plaintiffs finally succeed, any damages they may suffer will easily be computed from the tenancy agreements and appropriate orders issued. On the question of balance of convenience, the fact that there already exists other litigations in which the decisions or part of the decisions being raised herein were dealt with means it tilts against issuing the temporary injunction order.

- k. That under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where the court direct otherwise for good cause. Even though the plaintiffs have failed in their application, it is through it that the court's attention to the existence of CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd has been brought. It is therefore fair and just for each party to bear their own costs.

6. In view of the above determinations, the court finds and orders as follows:

- a. That the plaintiffs' notice of motion dated the January 10, 2025, is without merit and is hereby dismissed.
- b. The court on its own motion orders that the filing of CMC Misc. Appl. No. E010 of 2024, Madin Clearing and Forwarding Ltd versus Bamburi Supermarket Ltd, was irregular and unlawful, and the orders issued thereof on December 10, 2024 were null and void ab initio.
- c. Parties to bear their own costs.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26<sup>TH</sup> DAY OF MARCH 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

IN The Presence Of:

Plaintiffs : Mr. Tindi

Defendants : Mr. Paul Magolo For 1<sup>st</sup> And 2<sup>nd</sup> Defendants

Mr Birir For 2<sup>nd</sup> Defendant

Shitemi – Court Assistant.

