



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitu t/a Aqua Gardens v Kinuthia; Kinuthia & 3 others (Interested Parties) (Civil Appeal E739 of 2022) [2023] KEHC 2923 (KLR) (Civ) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2923 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E739 OF 2022**

**JK SERGON, J**

**MARCH 31, 2023**

**BETWEEN**

**GEORGE NDUNGU GITU T/A AQUA GARDENS ..... APPELLANT**

**AND**

**CLAIRE WAMBUI KINUTHIA ..... RESPONDENT**

**AND**

**JOSHUA KINUTHIA ..... INTERESTED PARTY**

**ROSE MIHANO ..... INTERESTED PARTY**

**VICTOR WAHOME KINUTHIA ..... INTERESTED PARTY**

**DENNIS NGARI KINUTHIA ..... INTERESTED PARTY**

**RULING**

1. This ruling is premised on the Notice of Motion dated September 21, 2022
2. To oppose the said Motion, the respondent and the interested parties herein put in the Grounds of Opposition dated February 24, 2023 containing the following grounds:
  - i. The said Application is predicated upon section 15 of the Landlord and Tenant Act. Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* prescribes the Appeal process to be followed by any person aggrieved by an Order of the Business Premises and Rent Tribunal (BPRT). The said section bestows upon the Environment and Land Court with exclusive jurisdiction to entertain such appeals and thus this Court has no jurisdiction to hear and determine this matter and must down its tools.



- ii. The Applicant has been before the Environment and Land Court over the same matter and the same parties in ELCA/E036/2022. The Application was dismissed by Justice Oguttu Mboya on June 8, 2022.
  - iii. The Applicant has also been before this Civil division on an identical application in HCCA/E064/2022. The Application was dismissed with costs by Lady Justice Dorah Chepkwony on March 22, 2022.
  - iv. The Applicant has also been before the Commercial Division in HCCOMMA/E013/2022 over the same subject matter and same parties and on July 29, 2022, the Application was dismissed with costs.
  - v. The doctrine of *Res Judicata* bars multiplicity of suits and guarantees the finality of litigation.
  - vi. In brazen contempt of this Court and abuse of court process, the Applicant filed the instant Application. As at the day and date this Application was filed by one Alex Kibunja, as is the case with all the other cases filed in 2022, he was not licensed to practice law and had not taken out a practicing certificate for the year 2022 as confirmed by the Law Society of Kenya.
  - vii. The Respondent/Interested Parties have suffered tremendous loss and prejudice occasioned by the Applicant and continue to suffer immense loss and prejudice with each passing day having cases hovering over their heads.
  - viii. This application bad in law and incurably defective.
3. The respondent and the interested parties also put in the replying affidavit sworn by advocate Ndungo James Gachiri on like date and echoing the Grounds of Opposition.
  4. At the interparties hearing of the Motion, the parties' advocates relied on the respective documents filed.
  5. I have considered the grounds laid out on the body of the Motion; the facts deponed to in the affidavits supporting and opposing the Motion; and the Grounds of Opposition.
  6. Before I consider the merits of the instant Motion, I observed that the respondent and the interested parties raised some pertinent preliminary issues in their Grounds of Opposition which require my attention and determination first.
  7. The foremost preliminary issue is whether this court has jurisdiction to entertain the Motion.
  8. The respondent and the interested parties argue that this court has no jurisdiction to handle the matter presently before it for the reason that appeals against the decisions made by the BPRT lie with the Environment and Land Court.
  9. The applicant did not offer any response to the above assertions.
  10. Upon my study of the record, it is apparent that the applicant has brought the instant Motion inter alia, under the provisions of Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* Cap. 301 Laws of Kenya.
  11. The above provision expressly states that:

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- “(1) Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the Environment and Land Court:  
Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
- (2) In hearing appeals under subsection (1) of this section the Court shall have all the powers conferred on a Tribunal by or under this Act, in addition to any other powers conferred on it by or under any written law.
- (3) Deleted by Act No 2 of 1970, s 13.
- (4) The procedure in and relating to appeals in civil matters from subordinate courts to the Environment and Land Court shall govern appeals under this Act:  
Provided that the decision of the Environment and Land Court on any appeal under this Act shall be final and shall not be subject to further appeal.”

12. It is apparent from the record that the order/ruling sought to be challenged on appeal derives from the BPRT.
13. In view of all the foregoing circumstances and upon my reading and consideration of the above proviso, I concur with the sentiments raised in the Grounds of Opposition and I find that this court has no jurisdiction to entertain the instant Motion.
14. The second preliminary issue for determination is whether the instant Motion is res judicata.
15. Here, the respondent and the interested parties have stated and argued that prior to bringing the instant Motion, the applicant filed similar applications/appeals before the Environment and Land Court (ELC) and the Commercial and Civil Divisions of the High Court respectively (namely ELCA/E036/2022, HCCOMMA/E013/2022 and HCCA/E064/2022), relating to the same subject matter and involving the same parties; all of which were dismissed by the respective courts.
16. Again, the applicant did not comment on this issue.
17. Suffice it to say that from my perusal of the record, I note that save for annexing screenshots of the case activities from the Judiciary e-filing platform (CTS), the respondent and the interested parties did not avail any other credible evidence before this court to assist it in making a determination as to whether the instant Motion is res judicata.
18. The third and final preliminary issue for determination touches on whether the instant Motion is incurably defective and an abuse of the court process for having been filed by an advocate who was not licensed to practice law as at the time of its drafting.
19. It is the averment by the respondent and the interested parties that advocate Alex Kibunja was not licensed to practice law and had not taken out a practicing certificate for the year 2022. No comment was offered by the applicant in response.
20. Upon my study of the record, I observed that the respondent and the interested parties annexed a copy of the letter dated October 3, 2022 to support their averments above.



- 21. Upon my further study of the record, I observed that while the instant Motion was filed by the firm of Alex Kibunja & Co Advocates, the supporting affidavit was sworn by the applicant. It is also apparent from the court proceedings that the aforementioned advocate did not personally attend court but had an advocate holding his brief.
- 22. In the absence of any credible evidence therefore, I am not inclined to find that the Motion is an abuse of the court process on those grounds.
- 23. That notwithstanding, upon my finding that this court lacks jurisdiction in the matter, I must down my tools at this stage. Consequently, the Notice of Motion dated September 21, 2022 is hereby dismissed with no order on costs.

**Dated, Signed and Delivered online via Microsoft Teams this 31<sup>st</sup> day of March, 2023.**

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**J.K. SERGON**

**JUDGE**

**In the presence of:**

..... for the Appellant/Applicant

.....for the Respondent and the 1<sup>st</sup> to 4<sup>th</sup> Interested Parties

