



**Haji v Mwangi & 2 others (Environment & Land Case
E091 of 2023) [2023] KEELC 17698 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17698 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E091 OF 2023
EK WABWOTO, J
MAY 25, 2023**

BETWEEN

FATUMA MOHAMED HAJI PLAINTIFF

AND

EJIDIO MWANGI 1ST DEFENDANT

KORE NASIRI JILLO 2ND DEFENDANT

AFRICAN BANKING CORPORATION LIMITED 3RD DEFENDANT

RULING

1. On March 8, 2023 this court upon considering the application filed by the plaintiff herein which was filed under certificate of urgency dated March 3, 2023 granted interim reliefs restraining the defendants herein from selling, transferring, disposing or undertaking any activity that may interfere with the plaintiff's occupation of property known as LR No 36/11/48 Eastleigh, Second Avenue Nairobi.
2. The 2nd defendant upon being served with the said orders, was aggrieved by the same and filed an application dated March 23, 2023 seeking to have the orders issued on March 8, 2023 be set aside unconditionally. In support of the said application the 2nd defendant averred that the plaintiff did not disclose that there is a pending matter for determination in BPRT case 811 and 911 to wit Sahra Khalif Yusuf & another v Fatuma Mohamed Haj & Kore Nasiri Jillo which they sought an order of setting aside and review of terms of a tenancy as determined at the tribunal which application was filed on February 23, 2023 and is still pending. It was also averred that the current proceedings are a nullity in the absence of an appeal against the decision of the BPRT made on February 2, 2023 and that an appeal cannot be filed in vacuum.
3. It was also contended that the questions of the legality of the sale by the 3rd defendant is res subjudice High Court Commercial Case No 327/2017 Fatuma Mohammed Haji v Abc Bank & 5 others. The 2nd defendant prayed for the suit to be struck off in its entirety with costs.



4. During the plenary hearing of the said application, the 3rd defendant supported the 2nd defendant's application to have the orders discharged. It was submitted that the plaintiff's application dated March 3, 2023 was an abuse of the court process since a similar application seeking conservatory orders had been filed and dismissed in High Court Commercial Case No 327 of 2017. It was further submitted that the 3rd defendant had properly exercised its statutory power of sale and transfer was registered in favour of another party and according to them if the plaintiff was aggrieved by the said action, she ought to have challenged the said actions in the same matter but not by filing a separate suit.
5. The application was opposed by the plaintiff who argued that the current suit had a different cause of action with the pending case at the commercial division together with the other matter at the Business Premises and Rent Restriction Tribunal.
6. It was also argued that only the Environment and Land Court has the jurisdiction to grant the reliefs sought in the current suit. It was also submitted that the tribunal was yet to pronounce itself on the application for review which was pending.
7. Counsel for the applicant reiterated that the matter was not subjudice with the existing case at the commercial division and BPRT. The court was requested to dismiss the 2nd defendant's application and grant the injunctive orders that had been sought by the plaintiff.
8. I have considered the application filed by the 2nd defendant herein, the rival affidavits filed together with the oral submissions made by counsel for the parties. In my humble view, the main issue for determination is whether this court should proceed to set aside and or vacate its orders issued on March 8, 2023.
9. The jurisdiction of the court to set aside an order of injunction is set outlined under order 40 rule 7 [*Civil Procedure Rules*](#), 2010 which provides as follows:

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”
10. I have no doubt in mind that the court has the discretion to either discharge, set aside or vary interim injunctive orders as requested by the 2nd and 3rd defendants. Discretion however, as has repeatedly been said, must at all times be exercised judiciously.
11. Mativo J (as he then was) in the case [*Republic v Public Administrative Review Board & Another*](#) (2019) eKLR, stated that it is well settled that whenever the court is invested with the discretion to do a certain act (as mandated by the statute), the same has to be exercised judiciously and not in an arbitrary and capricious manner.
12. The classic definition of discretion by Lord Mansfield in [*R v Wilkers*](#)(1770)4 Burr 2527,2539:98ER was that ‘discretion when applied to courts of justice, means sound discretion guided by law.’ It must be governed by rule, not by humor: it must not be arbitrary, vague, and fanciful but legal and regular.
13. In the case of [*St. Patrick's Hill School Ltd v Bank of Africa \(K\) ltd*](#) (2018) eKLR, it was held that the court has an unfettered discretion to discharge, or vary or even set aside an injunction order where the ends of justice so demand. In making such a decision the court is obligated to consider whether it is unjust to maintain the injunction in force or it is otherwise unjust and inequitable to let the order remain.
14. Similarly, in the case of [*Bent Development Ltd v 1st Community Bank Ltd*](#) (2021) eKLR the court arrived at a similar conclusion that a court has an unfettered discretion to discharge or vary an injunction where the ends of justice so demand.



15. In the instant case, the interim orders were issued on March 8, 2023 basing on the material facts that were placed before court at that time. The pleadings as filed did not disclose the existence of the pending proceedings before the commercial division nor the Business Premises Tribunal involving the same suit property. The court record shows that the plaintiff after she had been granted the said orders filed an amended plaint dated March 14, 2023 when she disclosed the existence of Nairobi Commercial Suit No 327 of 2017 (Fatuma Mohamed Haji & another v African Banking Corporation Limited & 5 others). This disclosure ostensibly was made after the event.
16. Had this court had sight of the said information, it would have definitely not granted the said interim orders. The action of the plaintiff is clearly an abuse of the court process.
17. 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 unnecessary backlog of cases and a waste of the precious judicial time.
18. 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’.
19. In view of the foregoing analysis, I must stay that even though a court of law should try as much as possible to allow a suit to be determined on its merits, the court should not shy off from acting to rid the court process of proceedings that are clearly an abuse of court process. As I have held in other several cases, I have proceeded to strike out suit falling under such abuse of the court process.
20. On the issue of costs, I have considered that the other matters are still pending and are yet to be determined, it worth noting that the suit filed earlier could be determined in favour of either party and in view of the foregoing, I will direct each party to bear own costs of herein.
21. In the end, the proper order that commends itself and which I will proceed to grant is to struck out the suit for being an abuse of the court process. In conclusion the suit is struck out with no orders as to costs. Any orders previously issued are automatically discharged.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 25TH MAY 2023.

E.K. WABWOTO

JUDGE

In the presence of:

Mr. Mutunga or Plaintiff.

N/A for the 1st Plaintiff.

Mr. Ochieng for 2nd Defendant.

Mr. Gakunga for 3rd Defendant.

Court Assistant – Caroline Nafuna.

