



**Koira Limited v Abbas Soud Ali El-Busaidy, Ilham Mohamed Said, Albusaidi
Abdulla Saud Albusaidi & Soud Salim Soud (Administrator of the Estate
of Sir Ali Bin Salim El Busaidi) & another (Environment & Land Case
288 of 2012) [2023] KEELC 22149 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 288 OF 2012**

SM KIBUNJA, J

DECEMBER 13, 2023

BETWEEN

KOIRA LIMITED PLAINTIFF

AND

**ABBAS SOUD ALI EL-BUSAIDY, ILHAM MOHAMED SAID, ALBUSAI
ABDULLA SAUD ALBUSAI & SOUD SALIM SOUD (ADMINISTRATOR OF
THE ESTATE OF SIR ALI BIN SALIM EL BUSAI) 1ST DEFENDANT**

MJAD INVESTMENTS 2ND DEFENDANT

RULING

1. The plaintiff filed the notice of motion under certificate of urgency dated 15th November 2023 seeking for the following prayers:
 1. Spent.
 2. Spent.
 3. Spent.
 4. That the orders issued by the Chief Magistrate's Court on 24th October 2023 to Joel Titus Mutisya T/a Makuri Auctioneers in Mombasa CMCC MCC MISC. E389 OF 2023- Makuri Auctioneers vs Koira Limited on 24th October 2023 be set aside.
 5. That there be an order of permanent injunction to restrain the First Defendant and or their agents, servants or auctioneers from interfering with the Plaintiff's quiet possession of the suit premises namely Mombasa/Block XX/151, Mombasa/ Block XX/152, Mombasa/ Block XX/498 and or that of all the Plaintiff's tenants' as well as the removal of any of the Plaintiff's



tenants' goods or possession from the aforesaid premises and or from evicting the Plaintiff's Tenants as above from the suit premises pending hearing and determination of the ground rent payable by this Honourable Court.

6. That any orders of execution issued herein be set aside.

The application is premised on ten (10) grounds on its face, and supported by the affidavits of Masud Rana, director of the plaintiff Company, sworn on the 15th November 2023, 17th November 2023 and 24th November 2023. It is the plaintiff's case inter alia that the court in its judgement of 22nd March 2019 dismissed the plaintiff's case against the 1st defendant; that the plaintiff filed an appeal that was allowed by the Court of Appeal in its judgement of 14th April 2023; that the Court of Appeal decreed that the 1st defendant be compelled to renew the leasehold interest over Mombasa/Block XX/151, and 498 for further 99 years on the same terms in the indenture dated 20th January 2014 save as regards to ground rent that was to be agreed between the parties; that the 1st defendant refused to comply with the Court of Appeal order through unreasonable demand for commercial rent and instead instructed auctioneers through letter dated 20th September 2023 to demolish the buildings and evict the plaintiff's tenants from the said premises through Joel Titus Musya t/a Makori Auctioneers; that the said auctioneers had obtained a break-in order from the Chief Magistrate's Court through deceit, without material disclosure and without serving the plaintiff.

2. The application is opposed by the 1st defendant through the grounds of preliminary objection dated the 22nd November 2023, raising four (4) grounds that after this court rendered its judgement on the 22nd March 2019, it became functus officio and without jurisdiction to entertain the application; that this court has no jurisdiction to determine or punish defiance or contempt of the Court of Appeal orders; that as the Court of Appeal ordered that rent payable for renewal of the lease is for the plaintiff and 1st defendant to determine, this court cannot sit on appeal on that Court of Appeal decision and determine the rent payable; that the application is not an appeal against the orders of 24th October 2023 in Mombasa CMCC Misc. No. E289 of 2023. The 1st defendant also filed the replying affidavit of Soud Salim Soud, one of the Administrators of the Estate of Sir Ali Bin Salim El Busaidi, the 1st defendant, sworn on 21st November 2023, among others deposing to the facts in the preliminary objection. He also an abuse of the court process because the plaintiff had simultaneously filed another application before the lower court thereby playing russian roulette on the court system; that the plaintiff has rejected the 1st defendant offer for rent and has not made any payment for rent for the expired period of 1977 to 31st December 2012 and for the new term from 1st January 2013 to date; that the plaintiff has not filed an appeal on the Court of Appeal judgement; that the suit properties are private properties as opposed to public or community land and the subject lease and Court of Appeal judgement shows what is payable is rent and the issue of ground rent is a creation of the plaintiff; the subject lease allows the 1st defendant re-entry on the properties in the event the terms of the rent payable are not agreed and or fully paid and that is an issue that the court cannot determine in this suit.
3. Mr. Kagram and Mr. Sagana, learned counsel for the plaintiff and 1st defendant respectively, made the oral submissions for and against the application on the 29th November 2023, which the court has considered.
4. The issues for the determinations by the court are as follows:
 - a. Whether this court is functus official in the instant application.
 - b. Whether the court has jurisdiction in the application before it.
 - c. Whether the plaintiff is entitled to any of the prayers sought.



- d. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, grounds on the preliminary objection, learned counsel's oral submissions, the record and come to the following determinations:
- a. The record confirms that the plaintiff's suit was heard and dismissed by this court on 22nd March 2019. The plaintiff filed an appeal before the Court of Appeal which delivered its judgment on 14th April 2023, setting aside the judgement of this court and entering judgement in favour of the plaintiff on terms that the 1st defendant "be and is hereby compelled to renew the appellant's leasehold interest in the properties known as title numbers Mombasa/Block XX1/151, 152 and 498 for a further period of 99 years, on the same terms contained in the indenture dated 20th January 1914, save for the term as regards the amount payable as rent which has since been overtaken by events and the 1st respondent and appellant shall agree upon on the new rent payable." It appears the plaintiff and the 1st defendant have failed to agree on the amount of rent payable under the lease to be renewed in accordance with the Court of Appeal order. The Plaintiff contention is that the 1st defendant demanded an unreasonable amount for rent which was not disclosed or stated, while the 1st defendant contends that the plaintiff has refused to accept the offer of the rent he made to him. It is upon the disagreement on the rent amount to be paid that the 1st defendant instructed Joel Titus Mutisya t/a Makuri Auctioneers, hereafter referred to as the Auctioneers, who in turn filed CMCC MISC. No. E389 of 2023 seeking break-in order that was issued on 24th October 2023 that among others prompted the filing of the instant application.
- b. Counsel for the Plaintiff, divided their arguments under two issues of discussion, that is the court is not functus officio as alleged by the 1st defendant and that the instant application is not an abuse of process. In the first issue, the plaintiff quoted section 34 (1) of the [Civil Procedure Act](#) which states as follows:
- “ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
- Counsel argued that the court executing a decree must determine issues relating to a decree as provided in section 34 (1) above. He added that the Court of Appeal decision replaced the decree issued by this Court and relied on cases such as Samuel Kamau Macharia v Ali Khan Muses & 2 others ELC No. 30 of 2014. Further, Counsel submitted that the break-in orders should only have been applied for from this Court since it is the trial Court that issued the alleged decree..
- c. On the issue of abuse of court process, Counsel argued that it is the 1st defendant who is abusing this Court as they are purporting to execute a non-existent decree, and without following due process such as obtaining warrants of execution. They submitted that based on the various documents they provided their intention was not only to obtain vacant possession but also to demolish the building thereby circumventing the decision of the Court of Appeal.



- d. Where the issue of jurisdiction arises for determination, it is to be determined first before moving to any other matter. In the locus classicus case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) eKLR, the court held as follows:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

The 1st defendant has in his preliminary objection argued that this court does not have jurisdiction on the grounds that it is functus officio; cannot punish defiance or contempt of orders by Court of Appeal; cannot sit on an appeal to the Court of Appeal decision on the issue of rent payable, and lastly that the CMCC E389 of 2023 has not been appealed or rather the appellate jurisdiction of this court has not been invoked.

- e. On what constitutes a preliminary objection, I am guided by the decision in the case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 where the court observed thus:

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

As already observed above, this court delivered its on 22nd March 2019 which decision was set aside on appeal by the Court of Appeal on the 14th April 2023. In allowing the renewal of the plaintiff leaseholds over the suit properties, the Court of Appeal required the plaintiff and 1st defendant to agree on the amount of the applicable rent. In the instant application, the plaintiff is seeking for inter alia a permanent injunction pending determination by this court of ground rent payable. This Court, being of equal status to the High Court, has powers to execute the Court of Appeal orders and or decrees. Section 4 of the [Appellate Jurisdiction Act](#) chapter 9 of 2012 that provides that;

“4. Any judgement of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgement of the High Court.”

However, the Court of Appeal decreed in its judgement of the 14th April 2023, that the responsibility of determining the rent payable under the renewed leases was upon the plaintiff and 1st defendant. They have not given any details of the steps and actions taken towards that direction. In case of any deadlock, the court has no doubt they will take legal advice from their respective counsel on how to move the Court of Appeal as appropriate. There is therefore no basis of issuing injunction as the court is not the one determining the rent payable under the Court of Appeal order.



- f. The 1st defendant's objection to the court's jurisdiction on the ground of being functus officio if upheld, can dispose of the plaintiff's application at this stage. The issue of whether or not the court is functus officio would not require evidence outside the pleadings to be presented and or considered, and it is therefore a pure point of law. In expounding on the doctrine of functus officio in the case of Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others vs. IEBC & Others [2013] eKLR, the Supreme Court of Kenya cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832 that:

"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

The court also cited the holding in the case of Jersey Evening Post Limited vs Al Thani [2002] JLR 542 at 550 to the effect that:

"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

In the suit before this court, the plaintiff had sought for inter alia specific performance by the 1st Defendant to renew the lease; permanent injunction to stop the 1st defendant from interfering, selling leasing, charging to any third party; permanent injunction to stop the 1st defendant from interfering with the Plaintiff's tenants' peaceful possession and the 1st defendant to register the lease as an encumbrance in the freehold titles of the suit properties.

This court dismissed the suit, but on appeal the Court of Appeal set aside that judgment in its entirety and instead entered judgment for the plaintiff compelling renewal of lease by 1st defendant and awarded costs. This court is the trial court in the suit, which has been determined in accordance with the Court of Appeal judgement of 14th April 2023. It is also the court through which the Court of Appeal decree arising out the judgement delivered on the 14th April 2023 may be executed under section 4 of the *Appellate Jurisdiction Act* chapter 9 of Laws of Kenya. The court therefore has jurisdiction to deal with execution proceedings post the Court of Appeal judgement of 14th April 2023.

- g. The instant application by the plaintiff is not in the nature of contempt proceedings, or an appeal on the Court of Appeal decision. Of course, it goes without saying, that it is not the space of this court to entertain an appeal on a judgement of the Court of Appeal, whose decisions are binding on the court. The procedures for filing and instituting appeals from the Court of Appeal to the Supreme Court are clear. The instant application is not an appeal of



the Court of Appeal decision to this court. The application is also not for contempt of the Court of Appeal orders, and in raising the grounds 2 and 3 in the preliminary objection, it is my view that the 1st defendant is trying to pool wool over the court's eyes by introducing non-existent issues with the hope that one of them will hit the nail on the head. I therefore find grounds 2 and 3 of the preliminary objection to be misplaced and without merit. The court is obligated to deal with the real issues at hand as provided by section 1A as read with section 3A of the Civil Procedure Act chapter 21 of Laws of Kenya. What the plaintiff is simply asking for in the application is challenging the lower court order of 24th October 2023 and an injunction pending the determination by the court of the rent payable

- h. Ground 4 of the said preliminary objection is in my view spot on, as it is apparent the instant application is indeed not an appeal on the lower court orders of 24th October 2023. From the lower court pleadings annexed to the plaintiff's supplementary affidavit sworn on 17th November 2023 and marked "MR-4", the auctioneer had sought for police to provide security while he "will be physically entering/gaining access to the Applicant's properties known as Plot Number MOMBASA/BLOCK XX/151, MOMBASA/BLOCK/152 and MOMBASA/BLOCK XX1/498 along the junction of Moi avenue and Nyerere avenue to remove the Respondent's movable goods and give vacant possession." The grounds upon which the application is predicated and the depositions in the supporting affidavit are inter alia that the respondent has not been paying rent despite several demands; that the respondent's claim in "MSA ELC NO. 299 OF 2012 KOIRA VS SALIM SOD ALI EL BUSAIDY & OTHERS" was dismissed on 22nd March 2019. It is apparent from the above that the applicant did not mention in that application that after the suit was dismissed by this court, an appeal was filed in the Court of Appeal, which set aside this court's judgement and in its place entered judgement for the plaintiff for renewal of the leases and costs.
- i. The plaintiff has deposed at paragraph 7 of the supporting affidavit that the application filed in the lower court was not served upon him and that he only learnt of the orders issued thereof from his tenants who had received warnings to vacate. That while the judgement and or decree that is capable to be executed in this proceeding is that issued by or arising from the Court of Appeal judgement of 14th April 2023, the action of the 1st defendant approaching the lower court through Mombasa CMCC MCC MISC. E389 OF 2023- Makuri Auctioneers vs Koira Limited without full disclosure and serving the plaintiff is not something to be applauded. Had the fact that the Court of Appeal had in its judgement of 14th April 2023 been disclosed in the application filed in the lower court, the order issued on the 24th October 2023 would most probably not have been issued without giving the plaintiff a hearing, if at all.
- j. Even though it is clear the instant application is not intended to be an appeal on the lower court order of the 24th October 2023, it is important to establish whether having established that it was obtained without full disclosure that the judgement and decree capable of being executed in this proceeding is that of the Court of Appeal, is the plaintiff without recourse through this court? The court in the case of Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others (Interested Parties); Ex-parte Applicant: Pravin Galot, Milimani HC Civil Misc. Appl. No. 622 of 2018 stated as follows about the court's supervisory jurisdiction:

"59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over



all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue the necessary and appropriate writs. (see, *Gallagher v Gallagher* 212 So. 2d 281,283(La. Ct.App.1968)).

- k. I am aware of superior courts decisions taking the position that the Environment and Land Court, being a Court of equal status to the High Court, has supervisory jurisdiction and others that supervisory powers rests only to the High Court. In the case of *Sabina Moraa Swanya v Everly Kemunto Ontiri & Another* [2021] eKLR, the court held as follows:

“In the case of *Patrick Musimba vs. National Land Commission & 4 Others* (2016) eKLR the court observed that:

“By the Amendments in 2012 Parliament took away the supervisory jurisdiction of the ELC over subordinate judicial and quasi-judicial tribunals under Article 165 (6).

What this means is that unlike the High Court, the Environment and Land Court has no supervisory jurisdiction over subordinate courts and can only deal with appeals arising from decisions of the subordinate courts.”

And in the case of *National Social Security Fund v Sokomania Ltd & Another* [2021] eKLR the court took the position that the ELC has supervisory jurisdiction and stated as follows:

“ 151. Where, or if, it is intended to exercise Supervisory Jurisdiction under *the Constitution*, I think the following safeguards should be observed:

- i. A balance has to be struck in the exercise of constitutional Supervisory Jurisdiction to ensure there is no appearance that its object is to micro- manage the trial court’s independence in the conduct and management of its proceedings
- ii. Ideally, constitutional Supervisory Jurisdiction should be exercised only after the parties are heard on the subject matter in question
- iii. Supervisory Jurisdiction should not be used where the option of revision is appropriate or applicable;
- v. Supervisory Jurisdiction should not be used as a shortcut for an appeal where circumstances for appeal clearly pertain and are more appropriate;
- v. Supervisory Jurisdiction should be exercised to achieve the promotion of the public interest and public confidence in the administration of justice;

152. The above situations are not exhaustive neither are they unique to only the exercise of Supervisory Jurisdiction.”



The above cases that were cited by the 1st Respondent give some guidance on the exercise of the court's supervisory powers under Article 165(6) of *the Constitution*. I am in agreement with the 1st Respondent that the supervisory power should be exercised sparingly and only in exceptional circumstances. It is also clear that the power should not be exercised where there is an appropriate alternative remedy. As I have stated earlier, the Applicant had a right of appeal against the orders of the 2nd Respondent sought to be reviewed. There is however some aspect of the Applicant's application that gives me some discomfort as far as the alternative remedy of appeal is concerned. The Applicant's complaint does not concern only the orders that were issued by the 2nd Respondent but also the proceedings before the 2nd Respondent as a whole. Whereas, the orders that were issued by the 2nd Respondent could be appealed or reviewed as I have held, I have doubts with regard to the appealability of the entire proceedings before the 2nd Respondent which the Applicant has termed an abuse of the process of the court since the same is challenging the decision of the tribunal. I am persuaded that the Applicant has made out a case for the exercise of this court's supervisory jurisdiction with respect to the proceedings before the 2nd Respondent."

In- the case of Sammy Alex Musyemi & 3 others v Masha Mramba Mwarogo & 3 others [2021] eKLR the court held that the ELC court has supervisory jurisdiction and stated as follows:

"These are extremely serious and weighty issues on the process and this court has the supervising jurisdiction to deal with them. Under the Provisions of Article 165 (6) of the Laws of Kenya holds as follows:

"The High Court has supervisory Jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court"

I respectively wish to associate myself with the school of thought that the ELC court has supervisory jurisdiction over the subordinate courts, tribunals and quasi-judicial agencies or administrative state organs dealing with matters falling under the jurisdiction of the court in accordance with *the Constitution* of Kenya 2010 and the statutes.

1. That as pointed out above, the proceedings in Mombasa CMCC MCC MISC. E389 OF 2023- Makuri Auctioneers vs Koira Limited was based on non-existent judgement and decree of this court. The judgement of this court had been set aside by the Court of Appeal in its judgment of 14th April 2023. The lower court miscellaneous application having been based on a judgement that had been set aside was based on deception and therefore a nullity. It follows that the lower court orders of 24th October 2023 issued in Mombasa CMCC MCC MISC. E389 OF 2023, Makuri Auctioneers vs Koira Limited should be set aside ex debito justitiae.



- m. After finding that this court is not functus officio on execution proceedings emanating from the Court of Appeal judgement of 14th April 2023, the next issue to determine is whether the plaintiff has established the threshold required before an order of injunction can be issued in his favour. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. Establish his case only at a prima facie level,
- b. Demonstrate irreparable injury if a temporary injunction is not granted, and
- c. Allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”

While the plaintiff has satisfied the three ingredients of an order of injunction to be issued, I find there is nothing pending before in this court between the parties after this application is determined. Had this court’s execution powers under section 4 of the *Appellate Jurisdiction Act* chapter 9 of Laws of Kenya been invoked by either of the parties, the court would have considered issuing the injunction orders pending the completion of execution proceedings.

- n. As regards the determination of the rent payable, the 1st defendant has reminded the court that the suit properties are private properties and the rent payable is the surmise of only the plaintiff and himself. The court agrees wholly with him as that is the essence and edict of the Court of Appeal in its judgement of 14th April 2023. I therefore, refuse the plaintiff’s invite for the court to descend into the rent determination and throw the ball back to the parties’ arena to do what the Court of Appeal obligated them to do. I however wish to mention that based on the instruction apparently given to the auctioneers, and the subsequent court orders obtained on the 24th October 2023 in Mombasa CMCC MCC MISC. E389 OF 2023- Makuri Auctioneers vs Koira Limited, the conduct of the 1st defendant was very wanting in my opinion. He was hell bent to steal a match against the plaintiff without regard to what the Court of Appeal had directed in its judgement of 14th April 2023. The court wishes to remind the parties herein, especially the 1st defendant, that the Court of Appeal orders of 14th April 2023 must and should be complied with to the letter unless or until set aside.
- o. That having found merit on the main prayer in the plaintiff’s application, then under section 27 of the *Civil Procedure Act* chapter 21 that directs that costs follow the events, the 1st defendant will pay the plaintiff’s costs in the application.

6. Flowing from the foregoing determinations, the court finds and orders as follows:

- a. That the orders issued by the Chief Magistrate’s Court on 24th October 2023 in Mombasa CMCC MCC MISC. E389 OF 2023, Makuri Auctioneers vs Koira Limited, is hereby set aside



for it was issued without full disclosure of the Court of Appeal judgement delivered on the 14th April 2023 that was between the parties herein.

b. That the 1st defendant to pay the plaintiff's costs in the application.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 13TH DAY OF DECEMBER 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Plaintiff: Mr. Kagram for Mwachofi.

1st Defendant: Mr. Sagana.

2nd Defendant: Mr. Oloo

Wilson – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

