



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 246 OF 2018

SERE TECHNOLOGIES LIMITED.....1ST PLAINTIFF/APPLICANT

DR. DAVY KIPROTICH KOECH.....2ND PLAINTIFF/APPLICANT

-VERSUS-

FORWARD CARS LIMITED.....1ST DEFENDANT/RESPONDENT

WALTER KIPROP CHUMO.....2ND DEFENDANT/RESPONDENT

HFC LIMITED.....3RD DEFENDANT/RESPONDENT

MIRIAM JEPKOSGEI MAINA.....4TH DEFENDANT/RESPONDENT

JUMA WAHAGA MAULIDI.....5TH DEFENDANT/RESPONDENT

THE CHIEF LANDS REGISTRAR.....6TH DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL....7TH DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion dated the **11th of November 2021**, the Plaintiffs/Applicants herein have sought for the following Reliefs;

- i.(Spent)
- ii. Pending the hearing and determination of this Application, the honourable court be pleased to issue an order restoring the 1st Plaintiff/Applicant to all that property known as **L.R No. 3734/710 9Original number 3734/23/268**) situate at Lavington Estate, Nairobi County.
- iii. The 4th and 5th Defendants/Respondents to be ordered to pay to the Plaintiffs/Applicants the cost of such restoration.
- iv. Pending the hearing and determination of this application, the Honourable court be pleased to issue an order restraining the Defendants/Respondents from selling, leasing out, entering or in any way dealing in all that property known as **L.R No. 3734/710 (Original Number 3734/3/268)** situate at Lavington Estate, Nairobi County.
- v. The honourable court be pleased to strike out the **ELC Case Number E270 of 2021 Miriam Jepkosgei Maina & Juma Wahaga Mauldi -versus- Davy Koech** defiantly filed by the 4th and 5th Defendants/Respondents in the subordinate court which has no jurisdiction to hear the matter hence pertaining to the suit property hence a gross abuse of the court process.
- vi. The OCS, Muthangari Police Station to ensure compliance of this order.
- vii. Such other orders as the justices of this case permits in the circumstances;

viii. Costs of this application be awarded to the Plaintiffs/Applicants.

ix. Pending the hearing and determination of this Application, this honourable court be pleased to issue an order of temporary injunction restraining the Defendant, their agents, servants, employees or any other person claiming through him from selling off, charging, alienating or disposing off in any manner all that parcel of land known as **L.R No. 209/3428/3428 (I.R No. 8235)** (hereinafter referred to as the suit parcel).

x. Pending the hearing and determination of this Application, this honourable court be pleased to issue an order of temporary injunction restraining the Defendant, their agents, servants, employees or any other person claiming through him from selling off, charging, alienating or disposing off in any manner all that parcel of land known as **L.R No. 209/3428/3428 (I.R No. 8235)** (hereinafter referred to as the suit parcel).

xi. Upon hearing of this Application inter-parties and pending the hearing and determination of the suit, this honourable court be pleased to issue an order of Mandatory injunction directing that all rent accrued/collected from **SMART AUTOS LTD** being tenants in the suit property be shared equally between the Plaintiff and the 1st Defendant and/or be deposited in a joint interest earning account in the names of the counsel of both parties.

xii. Cost of this Application be provided for.

2. Upon being served with the subject Application, the 1st and 2nd Defendants/Respondents filed Grounds of opposition dated the **8th December 2021**, whereas the 4th and 5th Defendants/Respondents filed a Notice of Preliminary objection dated the **23rd of November 2021**.

3. On the other hand, the rest of the Defendants/Respondents, did not file any response to the subject Application.

DEPOSITIONS BY THE PARTIES:

PLAINTIFFS'/APPLICANTS' CASE:

4. Vide Supporting affidavit sworn by the 2nd Plaintiff/Applicant herein, namely Dr. Davy Kiprotich Koech, same has deponed as hereunder;

5. The Plaintiffs/Applicants herein are the lawful owners and/or proprietors of all that property known as **L.R No. 3734/710 (original number 3734/3/268)**, which is situated at Lavington Estate, within the City of Nairobi.

6. It is further averred that the said property, is where the 2nd Plaintiff/Applicant and his family have been residing and therefore same is the 2nd Plaintiffs/Applicants matrimonial home.

7. Be that as it may, the deponent has further averred that the suit property herein, was fraudulently and illegally transferred to and registered in the names of the 1st and 2nd Defendants/Respondents, who thereafter caused same to be charged to and/or in favor of the 3rd Defendant/Respondent.

8. It also averred that upon the suit property being charged to and/or in favor of the 3rd Defendant/Respondent, same caused the suit property to be sold and/or be disposed of by way of exercised statutory sale, culminating into the transfer and registration in favor of the 4th and 5th Defendant/Respondent.

9. Be that as it may, the deponent has further averred that having discovered the fraudulent actions, leading to the dealings over the suit property, same filed the subject suit, with a view to reversing the illegal and fraudulent transactions.

10. Nevertheless, the 2nd Plaintiff/Applicant has averred that during the pendency of the suit, the 4th and 5th Defendant/Respondents proceeded to and filed another suit namely **Milimani CMCL & E CASE NO. E270 OF 2021**, and thereby sought for and obtained eviction orders against the 2nd Plaintiff/Applicant.

11. It is the deponent's further averments that the actions by and/or on behalf of the 4th & 5th Defendants/Respondents, were unlawful and illegal. In this regard, the deponent further avers that the 4th & 5th defendants/Respondent has therefore abused the due process of the court.

12. On the other hand, the deponent has further averred that having been evicted from the suit property, the 4th and 5th Defendants/Respondents, are now likely to dispose of and/or alienate the suit property and thereby subject the Plaintiffs/Applicants to undue prejudice and/or loss.

13. Based on the foregoing, the deponent has therefore prayed for the orders sought vide the subject application.

1ST & 2ND DEFENDANTS'/RESPONDENTS' RESPONSE:

14. The 1st & 2nd Defendants/Respondents herein filed grounds of opposition dated **8th December 2021**, and in respect of which, same have stated as hereunder;

- a. The Application does not meet the condition precedent for the grant of the orders sought.
- b. The Application is fatally defective as it offends the sub-judice rule in that there is in existent before a court of competent jurisdiction being **Milimani ELC N. E270 of 2021**, an application filed by the Plaintiffs seeking largely similar orders and Reliefs.
- c. The Plaintiffs are guilty of material non-disclosure and consequently are not deserving of the orders sought.

RESPONSE BY THE 4TH AND 5TH DEFENDANTS/RESPONDENTS:

15. Vide Notice of Preliminary Objection dated the **23rd November 2021**, the 4th & 5th Defendants/Respondents have averred as hereunder;
 - i. The subject Application is sub-judice, insofar as same replicates, both in form and content, an application that was filed before the lower court and which is pending for ruling.
 - ii. The Application offend **Section 6 of the Civil Procedure Act Chapter 21 Laws of Kenya**.
 - iii. The Application is incompetent and same ought to be strike out in limine.
 - iv. This court can only be approached by way of an appeal from the outcome of the application pending for a ruling before the lower court and not by a parallel application

SUBMISSIONS BY THE PARTIES:

16. The subject Application came up for directions on the **16th November 2021**, wherein the parties, were ordered and/or directed to file and exchange their respective responses to the application, as well as submissions.
17. On the other hand, the court further directed that the responses and submissions were to be filed and/or exchanged on or before the **16th December 2021**, on which date the court was to issue further directions and in particular, fix a date for ruling, where appropriate.
18. Pursuant to the orders and/or directions of the court, the Plaintiffs/Applicants proceeded to and indeed filed their written submissions on the **15th December 2021**. However, the Defendants/respondents herein and particularly the 1st, 2nd, 4th and 5th Defendants/Respondents chose to rely upon the responses filed and therefore opted not to file submissions.

ISSUES FOR DETERMINATION:

19. Having reviewed the Notice of motion Application dated the **11th November 2021**, the Supporting affidavit, as well as the written submissions filed by the Plaintiffs/Applicants and having similarly, considered the Grounds of opposition and the Notice of preliminary objection, filed on behalf of the designated Defendants/Respondents, the following issues are germane for determination;
 - i. Whether the subject Application amounts to and/or constitutes an abuse of the due process of the court.
 - ii. Whether the honourable court is possessed of the requisite jurisdiction to entertain the subject application on the face of the previous orders issued by the same court on the **21st July 2021**.
 - iii. Whether the Plaintiffs/Applicant have met and/or established the requisite condition for the grant of temporary and mandatory injunction, either in the manner sought or at all.

ANNALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the subject Application amounts to and/or constitutes an abuse of the due process of the court.

20. Before attempting to address the first issue herein, it is appropriate to observe that the suit herein was filed on the **25th May 2018**, and simultaneously with the filing of the suit, the Plaintiffs/Applicants herein also filed and/or lodged an Application dated the **25th May 2018**.
21. Suffice it to say, that vide the said Application, the Plaintiffs/Applicants herein sought for orders of temporary injunction to restrain the Defendants/Respondents from trespassing onto, selling, entering and/or remaining, and/or erecting structures on the suit property known as **L.R No. 3734/710 (Original Number 3734/3/268)**.
22. Upon the filing of the said Application, same was placed before the court on the **30th May 2018**, whereupon the court certified the application as urgent and thereafter granted the orders of status quo, in respect of the suit property. For clarity, the court further ordered that the subject Application was to be heard on the **26th June 2018**.
23. Other than the said application, the Plaintiffs/applicants herein also filed another Application dated the **25th June 2018**, whereby same

now sought to bar and/or disqualify the various advocates who had been appointed by the 3rd, 4th & 5th Defendants, from participating in the subject proceedings, on the basis that the said advocates, were potential witness.

24. It is imperative to note, that the latter Application was filed on the face of and during the pendency of the initial Application, whereby the Plaintiffs/Applicants, had sought for orders of temporary injunction.

25. Other than the foregoing, it is also worthy to point out that the Plaintiffs/Applicants pushed for the hearing of the 2nd Application and same was indeed heard and disposed of vide ruling rendered on the **30th of October 2019**.

26. Nevertheless, as pertains to the Application dated the **25th May 2018**, same has remained pending and unprosecuted from the date it was filed and/or lodged by and/or on behalf of the Plaintiffs/Applicants herein.

27. Notwithstanding the foregoing, it is also on record that after the delivery of the ruling by the court on the **30th October 2019**, the parties herein and the Plaintiffs in particular, appeared to have abandoned the application dated the **25th May 2018**, and thereafter proceeded to participate in the fixing of the subject matter for hearing of the main suit.

28. For completeness, it is also imperative to mention that the matter herein came up for hearing of the main suit on various dates, including the **18th November 2020**, **12th May 2021**, **21st July 2021** and finally on the **16th July 2021**, on which days the hearing could not proceed for one reason or another, propagated by and/or on behalf of the Plaintiffs/Applicants.

29. Be that as it may, the point that I am making is that the Plaintiff/Applicants herein, had previously filed and/or lodged an application for temporary injunction, which replicates the subject application, but which application, for reasons only known to the Plaintiffs/applicants was neither prosecuted nor disposed of.

30. For clarity, the Plaintiffs/Applicants herein are aware and/or knowledgeable of the pending Application, but same do not appear to be keen and/or be desirous to deal with and/or attend to same.

31. Owing to the foregoing, it is evident that the subject Application seeking for orders of temporary and mandatory injunction, duplicates the existing Application, which continues to color the record of the court, even though the originator thereof are not keen about same.

32. In my humble view, the Plaintiffs/Applicants herein cannot be allowed to file a similar or near similar Application, in the same matter while the previous Application remains pending and/or hanging.

33. For the avoidance of doubt, the filing of a multiplicity of Applications, seeking similar orders, in the same file, merely operates to compound the issues in controversy and thereby defeat the ability of the court to deal with and/or dispose of a matter expeditiously.

34. On the other hand, the filing of a multiplicity of suits or applications, concerning the same subject matter also constitute and/or amounts to an abuse of the due process of the court.

35. Based on the foregoing, I must point out that the filing of the subject application, which essentially seeks orders of injunction, albeit, differently worded, amounts to an abuse of the court process and same must be frowned by the court. For coherence, it is an act that must be dis-encouraged, nay punished, so as to safeguard the integrity of the court.

36. In support of the foregoing observation, I beg to adopt and restate the position as enumerated vide the decision in the case of ***KARIBU-WHYTIE J Sc in SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)*** the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) “Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.”

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.

(d) (sic meaning not clear))

(e) Where there is no loti of law supporting a Court process or where it is premised on frivolity or recklessness.”

We are of the view that the circumstances of the case before us, falls squarely in illustration (e) above, in that there was no valid law supporting the process followed by the respondent.

37. In respect of the subject matter the Plaintiffs/Applicants herein, cannot be allowed to lodge and/or file another application for injunction, during the life of the Application dated **25th May 2018**, which same has shown little or no interest at all, to attend to.

ISSUE NUMBER 2:

Whether the Honourable court is possessed of the requisite jurisdiction to entertain the subject application on the face of the previous orders issued by the same court on the 21st July 2021.

38. Other than the fact, that the Plaintiff/Applicants Application dated the **25th May 2018**, has not been heard and/or disposed of, it is also worthy to note that upon the filing of the said application, the honourable court proceeded to and granted interim orders of status quo.

39. Besides, upon the grant of the orders of status quo, which were granted on the **30th May 2018**, the said Application was directed to be heard inter partes on the **25th June 2018**.

40. Nevertheless, despite the fact that the said Application was certified urgent and initially listed for hearing on the **25th June 2018**, it is important to note that the said Application has remained un heard and un determine for more than four years.

41. However, the critical aspect to observe is that the order of status quo which had hitherto been granted by the court was vacated and/or discharged vide the orders of the court made on **21st July 2021**, for reasons, which the court noted and recorded.

42. Nevertheless, and without sounding repetitive it is appropriate to note that the orders of status quo were vacated and/or discharged because the Plaintiffs herein were seating on same, while on the other hand, frustrating the expeditious hearing and determination of the subject suit.

43. Be that as it may, the point for determination is whether this court can now grant the orders of injunction, which are similar and/or synonymous with the orders of status quo, that were discharged.

44. In my humble view, the grant of the orders of injunction, which are now sought at the foot of the subject Application, would be tantamount to superseding and/or otherwise siting on appeal on the decision of a judge with concurrent jurisdiction.

45. I am afraid, that such kind of an action is inimical to the established rules of procedure and shall occasion a travesty of justice.

46. Suffice it to say, if the Plaintiff's/Applicant's were still keen to pursue and/or enjoy orders of injunction or better still status quo, same were obliged to file an Appeal against the Decision of the court that vacated the orders of Status quo.

47. Owing to the foregoing, it is my finding and holding that this court has no jurisdiction to grant the orders of injunction, sought vide the subject Application and that to do so would amount to defrauding the Cause of Justice.

48. In support of the position that this court cannot grant an order that supersedes and/or attempts to seat on appeal the decision of a court of concurrent jurisdiction, it is worthy to take cognizance of the decision in the case **CIVICON LIMITED vs. KENYA REVENUE AUTHORITY & ANOTHER [2014] eKLR**, Muriithi, J., after examining various decisions on the subject, expressed himself quite strongly on the impropriety of parties attempting to reopen and relitigate decided issues in original form through the subterfuge of clothing them in constitutional garb;

“I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-Peter Ng’ang’a Muiruri v Credit Bank Ltd & Anor, Court of Appeal Civil Appeal No. 203 of 2006 and Ventaglio International SA and Anor v. The Registrar of Companies and Anor, Nairobi HC Constitutional Petition No. 410 of 2012 (per Lenaola, J) that the High Court’s Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the Constitution. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See Beta Healthcare International Ltd v Commissioner of Customs, and 2 Others. Nairobi HC Petition No. 125 of 2010 (per Majanja, J.)”

I am in agreement with that analysis which I approve of. It is not difficult to see that the petition filed by the appellant against the Judges fell in the category of proceedings castigated and the learned Judge was well-entitled to uphold the objection against it.

49. Other than the issue of grant of injunction, the Plaintiffs/Applicants herein have also sought for an order that the court herein be pleased to strike out **ELC CASE NO. E270 OF 2021**, which is said to be pending before the Chief Magistrate’s Courts at Milimani.

50. However, the critical question to address and/or to answer, is whether this court can strike out a suit that it is not pending before itself and whether such kind of an action, would amount to usurpation of the mandate of the trial court, before which the said suit is pending.

51. In my humble view, this court would be over reaching itself, if the court were to attempt to and/or deal with a suit which is not before

itself. For clarity, the only Court that can deal with or handle the Application for Striking of the Suit is the Trial Court before whom the Suit is pending and not otherwise.

52. Besides, I am alive to the fact that the Decision of the Trial Court, one way or the other is likely to come to this Court in exercise of the Courts Appellate Jurisdiction. Consequently, this Court must exercise deference and allow the Trial Court to appropriate her/ his mandate in accordance the Constitutive Act of Parliament.

53. At any rate, the procedure for striking out only envisages the court before which the suit is filed to consider the competence or otherwise of the suit and to deal with any application for striking out. **See Order 2 Rule 16 of the Civil Procedure Rules 2010.**

54. Owing to the foregoing, it is also important to observe that if the Plaintiffs/Applicants herein, are aggrieved by the filing of the suit before the Chief Magistrate's Court, it behooves the Plaintiffs/Applicants to file an application therein and thereafter prosecute same.

55. In respect of the foregoing position, I am similarly constrained to find and hold that I similarly do not have jurisdiction to entertain the subject Application.

ISSUE NUMBER 3:

Whether the Plaintiffs/Applicant have met and/or established the requisite condition for the grant of temporary and mandatory injunction, either in the manner sought or at all.

56. As pertains to the third issue herein, it is worthy to note that the Plaintiffs/Applicants herein have conceded that the suit property, was sold vide public auction in exercise of the 3rd Defendants/Respondents statutory powers of sale and thereafter same was transferred to and registered in the names of the 4th & 5th Defendants/Respondents.

57. Though the circumstances leading to the transfer of the suit property from the Plaintiffs/Applicants to the 1st and 2nd Defendants/Respondents and thereafter the charge in favor of the 3rd Defendant/Respondent, is still pending for determination, it is however common ground that the suit property is currently registered in the names of 4th & 5th Defendants/Respondents.

58. Contrarily, it is evident that the suit property is no longer registered in the names of the Plaintiffs/Applicants and hence the primary considerations, in ascertaining whether or not to grant the orders of injunction sought, would be to authenticate not only proof existence of a prima facie case, but the incidence of Irreparable laws.

59. In my humble view, the suit property having been sold to and transferred in favor of the 4th & 5th Defendant/Respondents, pursuant to exercise of statutory powers of sale, the said Defendants/Respondents, ex facie appear to have a valid title.

60. In any event, the transaction at the foot of exercise of statutory powers of sale, appear to be clothed with some degree of protection in favor of the purchasers of the subject property. For clarity. **See Section 99 of the Land Act 2012 (2016).**

61. I am alive to the fact that this is an interlocutory application and therefore I am not called upon to determine with finality the issues of evidence and facts, but nevertheless, I must calibrate the position on behalf of various parties, with a view to establishing existence of a prima facie case.

62. In support of the foregoing observation, I invoke and rely on the decision in the case of **Mbuthia v Jimba Credit Finance Cooperation & Another (1988) eKLR**, where the honourable court of appeal observed as hereunder;

“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”

63. Having weighed the positions taken by the respective parties, I am not persuaded that the Plaintiffs/Applicants herein have met and/or satisfied the threshold of a prima facie case.

64. On the other hand, it is also common ground that the suit property is currently registered in the names of both the 4th & 5th Defendant. Consequently, same appear on the face of it, to be entitled to the benefit of the law as pertains to ownership of the suit property. **See Sections 24 and 25 of the Lands Registration Act.**

65. To the extent that the 4th and 5th Defendants/Respondents are the registered proprietor of the suit property despite the challenges, it is imperative to note that an order of temporary injunction can only issue against the registered owners, in very rare albeit exceptional circumstances.

66. In support of the foregoing observation, I am obliged to quote and refer to the decision in the case of **Nguruman Ltd v Jan Bonde Nielsen & Others (2014) eKLR**, where the honourable Court of appeal observed as hereunder;

“ It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so”.

67. As concerns the issuance of an order for Mandatory injunction, I must point out that same ordinarily issues in rare, albeit exceptional circumstances, which must be proven and/or established by the claimant.

68. In support of the foregoing observation, I can do no better than to quote the Decision in the case of **Nation Media Group & 2 Others v John Harun Mwau (2014) eKLR**, where the honourable court stated as hereunder;

“A different and higher standard than that in prohibitory injunctions is required before an interlocutory mandatory injunction is granted. Besides, existence of exceptional and special circumstances must be demonstrated as we have stated, a temporary mandatory injunction can only be granted in exceptional and in the clearest of cases.”

69. As pertains to the averments by the Plaintiffs/Applicants herein, I must point out that no exceptional and/or special circumstances have been supplied and/or demarcated.

70. In any event, the orders of Status quo, which hitherto protected the Plaintiff/Applicant occupation and use of the suit property, having been vacated, the Plaintiffs/Applicants were thus unprotected and therefore had no basis to hold on to the occupation of the suit property.

71. Notwithstanding the foregoing, it is also my opinion that to grant orders of Mandatory injunction and thereby restore the 2nd Plaintiff/Applicant into the suit property, would also amount to reinstating and/or restoring the orders of Status quo ante, which were discharged by the court.

72. In a nutshell, the subject Application by the Plaintiffs/Applicants, is geared towards defeating the orders made by this Honourable court, though differently constituted on the **21st July 2021**.

FINAL DISPOSITION:

73. Having addressed the issues itemized for determination, I now come to the conclusion as hereunder;

- i. The Notice of Motion dated the **11th November 2021**, constitutes and/or amount to an abuse of the Due process of the court.
- ii. The Honourable court is devoid of jurisdiction to entertain the subject Application.
- iii. In any event, the Plaintiffs/Applicants have NOT met the threshold for the grant for the orders of temporary and mandatory injunction in the manner sought.
- iv. In the premises, the Notice of Motion Application dated the **11th November 2021**, is hereby Dismissed with costs to the Defendants/Respondents.

74. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant