



**Sarah v Multiple Hauliers (E.A.) Limited & another (Environment & Land
Case 12 of 2021) [2022] KEELC 3807 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3807 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 12 OF 2021
EK WABWOTO, J
JULY 28, 2022**

BETWEEN

HALIMA HAJI SARAH PLAINTIFF

AND

MULTIPLE HAULIERS (E.A.) LIMITED 1ST DEFENDANT

AJMAL COMPANY LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect to the plaintiff's application dated April 26, 2022 and the 2nd defendant's preliminary objection dated 1May 8, 2022.
2. In the application dated April 26, 2022, the plaintiff moved this court seeking for the following orders: -
 - a) Spent
 - b) That pending Inter parties hearing of this application, the 2nd defendant herein, Moran Auctioneers and or any other agents for that matter be directed to return all household goods both distrainable and non-distrainable back to the plaintiff.
 - c) That pending the full hearing and determination of the suit herein the 2nd defendant be stopped from making any development on the suit land.
 - d) The 2nd defendant be condemned to pay costs of this application before the next hearing.



3. The grounds upon which the motion is predicted are that: -
 1. The plaintiff herein filed the suit herein under certificate of urgency in December 2021.
 2. In the suit the plaintiff is challenging sale of the suit land to the 2nd defendant by the 1st defendant.
 3. The court gave interim orders in favour of the plaintiff to the effect that she will reside in the suit property until full determination of the suit as long as she pays rent for the premises.
 4. The 2nd defendant refused to accept the plaintiff's rent and instead it instructed hooligans who invaded the suit land, took away all household goods of the Plaintiff and demolished all houses occupied by her and family.
 5. The 2nd defendant refused invaded the premises while the plaintiff was away in hospital.
 6. It is only fair and just that all the plaintiff's goods be returned to her.
 7. The suit land ought to be reserved otherwise this suit will be rendered nugatory.
 8. The 2nd defendant ought to be punished and stopped from taking the law into their own hands.
4. The motion is supported by an affidavit sworn by Asli Issa Haji on April 26, 2022 reiterating the grounds in support of the application.
5. The application is opposed by the defendants/respondents. The 1st defendant in opposing the application filed a replying affidavit sworn by Rajinder Singh Baryan on May 17, 2022 while the 2nd defendant filed a replying affidavit sworn by Bashir Abdi Mohamed on 18th May 2022 and a Preliminary objection dated the same date.
6. Pursuant to the directions that were given by this court on May 27, 2022, this court directed both the plaintiff's application and the preliminary objection filed by the 2nd defendant be heard simultaneously. I propose to start with the 2nd defendant's preliminary objection dated May 18, 2022 as the same touches on the validity of the application filed by the plaintiff.
7. The 2nd defendant's preliminary objection was raised on the following terms: -
 1. That the application herein offends mandatory provisions of order 9 rule 1 and 2(a) of the [Civil Procedure Rules](#) 2010. The person portending to have the plaintiff's authority to swear the supporting affidavit has not and served that authority.
 2. That the application is therefore incompetent and the same ought to be struck out dismissed with costs.
8. In its written submissions dated June 29, 2022, counsel for the 2nd defendant submitted that the preliminary objection raises a pure point of law as it is based on the fact that the application offends mandatory provisions of order 9 rule 1 and 2(a) of [Civil Procedure Rules](#) 2010 as the person portending to have the Plaintiff's authority to swear the supporting affidavit had not filed and served that authority.



9. Counsel for the 2nd defendant also submitted that the plaintiff had only sought to cure the issue of the deponent lacking authority to act on behalf of the plaintiff upon being served with the preliminary objection which authority was dated April 22, 2022. He further submitted that the court should consider the circumstances which the authority to act was filed and allow the preliminary objection with costs to the 2nd defendant.
10. Counsel for the plaintiff filed his written submissions dated June 20, 2022 through Khaminwa and Khaminwa Advocates. Counsel argued that the plaintiff had through a letter of authority dated 2 April 2, 2022 given authority to her sister in law Asli Issa Haji to swear the affidavit on her behalf in respect to this case. It was further submitted that the delay in filing the authority was curable and not fatal.
11. Counsel relied in the case of *Gilbert Mayieka Ogato –vs- Rayman Kiplagat* Nakuru Civil Case No. 29 of 2009 in which the case of [*Luke Cheruiyot & 37 others –vs- National Oil Corporation of Kenya*](#) (2015) eKLR was cited and where the court held that: -

“Order 9 rule 2(a) of the [*Civil Procedure rules*](#) as amended by Legal Notice No. 22 of 2020 citing the decision of the Court of Appeal in *Luke Cheruiyot & 37 others Vs National Oil corporation of Kenya* (2015) eKLR, the court has discretion to order filing of a complaint affidavit as opposed to striking the suit and that striking out is contrary to this overriding objective as provided under section 1 A and 1B of the [*Civil Procedure Act*](#) and article 159 of [*the Constitution*](#) and that the defendants will not suffer any injustice if in the event the court finds that there is no valid verifying affidavit on record, the Plaintiff is allowed to comply”

The plaintiff urged the court to dismiss the said preliminary objection since she had already filed the requisite Authorities.

12. I have carefully considered the preliminary objection and the submissions filed by counsel for the parties in respect to the same. The issue for determination is whether the application should be struck out having been filed with a supporting affidavit which according to the 2nd defendant was sworn without the authority of the plaintiff.
13. In the instant suit, the 2nd defendant conceded that they had been served with an authority to act in the matter which was dated April 22, 2022, however according to them, the only contention was that it was filed after the preliminary objection had been filed. Counsel for the plaintiff argued that the defect is curable and the court should exercise its discretion by not striking out the application.
14. It is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he or she is authorized to do so in writing and the authority is filed in such a proceeding. Such authority, properly signed by the party giving authority must be filed in the proceeding. In the present case, it is not in dispute that there exists an authority to act that was filed. The same is dated April 22, 2022. The only issue in content is whether the court should exercise its discretion and consider the same or alternatively still strike out the application as submitted by the 2nd defendant.
15. In the submission, the plaintiff relied on the Court of Appeal Case of [*Luke Cheruiyot & 37 others – Vs- National Oil Corporation of Kenya*](#) (2015) eKLR where the Court of Appeal held that the court has discretion to order filing of a compliant affidavit as opposed to striking out the suit since striking out is contrary to the overriding objective of the Court provided under sections 1A and 1B of the [*Civil Procedure Act*](#) and article 159 of [*the Constitution*](#).



16. Being guided by the above decision of the Court of Appeal, the filing late of the authority to act is not fatal and since the court can exercise its discretion and not to strike out the application in view of the fact that the Authority is already on record.
17. The next issue for determination is whether the plaintiff's application dated April 26, 2022 is merited and that the plaintiff is entitled to the orders sought.
18. Counsel for the plaintiff through their written submissions dated June 20, 2022 submitted that the orders issued by this court on March 15, 2022 had directed the plaintiff to continue staying on the suit property until the final determination of the suit, and despite the existence of the said order, the 2nd defendant in utter breach of the same had demolished the suit property, evicted the plaintiff and carried away her household goods.
19. The 2nd defendant submitted that as per the orders issued on March 15, 2022, the plaintiff was directed to pay rent to the 2nd defendant pending the hearing and determination of the suit. However, the 2nd defendant's interpretation was that the plaintiff was expected to start paying rent from when the 2nd defendant became the owner and not as from April 2022 as was interpreted by the plaintiff.
20. It was further submitted by the 2nd defendant that based on the valuation report conducted on January 25, 2022, the rent payable was set at kshs 250,000/= and that the plaintiff had arbitrarily decided to pay only Kshs 150,000/- per month.
21. According to the 2nd defendant, the Plaintiff defaulted in paying the said rent and the 2nd defendant instructed Moran Auctioneers who followed due process before breaking into the plaintiff's premises in levying distress for rent.
22. In the current suit, it is clear that on March 15, 2022, this court directed the plaintiff to pay the monthly rent of the suit property to the 2nd defendant as and when it falls due pending the hearing and determination of the suit. It is also clear from the application dated April 26, 2022, a fact which is also admitted by the 2nd defendant that before the final determination of this suit, the suit property was demolished and the plaintiff evicted from the same and further her household goods were taken away in what the 2nd defendant referred to as levying of distress for rent.
23. The plaintiff in the affidavit dated 26th April 2022 sworn by Asli Issa Haji had averred that she had never agreed to pay monthly rent of Kshs 250,000/- since the applicable rent was Kshs 150,000/- and there was no way the 2nd defendant's actions were justified.
24. The orders issued on March 15, 2022 were clear to the effect that the plaintiff was to continue to paying the monthly rent as and when it fell due pending the determination of the suit. The 2nd defendant had no basis to evict the plaintiff be it on levying distress or for whatever reason. Worse off the 2nd defendant even demolished the suit property in a clear attempt of undermining the proceedings of this court. Since the court was seized with the matter the proper action for the 2nd defendant would have to move the court appropriately and seek for any relevant orders and or directions to this court. The 2nd defendant's action had no basis and were clearly meant to defeat the course of justice. It is therefore not clear to this court the basis upon which the 2nd defendant demolished the suit property and evicted the plaintiff.
25. Courts do not issue orders in vain and in party who feels aggrieved by the same the best option is to move the court appropriately for any redress. In the present case, a wrong was committed and where there is a wrong, there is a remedy. No wrong can be allowed to go without a remedy.
26. Accordingly, I find the application dated April 26, 2022 merited and I allow the same as follows: -



- i. An order be and is hereby issued directing the 2nd defendant and its agents to return the plaintiffs distrainable and non -distrainable goods back to the plaintiff.
- ii. The 2nd defendant is stopped from making further developments on the suit property pending the hearing and determination of this suit.
- iii. The 2nd defendant to pay the costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF JULY 2022

E.K. WABWOTO

JUDGE

In the presence of: -

Mr. Nyakundi and Mr. Munyambu also holding brief for Dr. Khaminwa for the Plaintiff.

Ms. Sirawa holding brief for Mr. Mwiruri for the 1st Defendant.

N/A for the 2nd Defendant.

E.K. WABWOTO

JUDGE

