



**Salima Enterprises Limited v Nairobi City County (Environment & Land
Case 351 of 2019) [2022] KEELC 14421 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 14421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 351 OF 2019**

**JO MBOYA, J
SEPTEMBER 22, 2022**

BETWEEN

SALIMA ENTERPRISES LIMITED PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

RULING

Background

1. Vide the Complaint dated the November 11, 2019, the Plaintiff herein has approached the court seeking for the following Reliefs;
 - a. An Order directed to the Defendant, their agents, servants, employees, and persons acting on its authority and direction and including its Governor and Accounting officers declaring that the premises known as Westland's Market situate on the Plaintiff's parcel of land being LR No 1870/IX/170, Westland's Nairobi shall not be opened for operation and/or utilization by the public until the Defendant has paid the Applicant in full the compensation as ordered by the court in NRB ELCNo1144 OF 2013 and NRB JR No 309 of 2015 (Salima Enterprises Limited versus Nairobi City County).
 - b. An Order that upon receiving Full compensation the Plaintiff does handover the Title document and execute all requisite documents to transfer and surrender LR No 1870/IX/170, Westland's Nairobi to the Defendant at their own costs.
 - c. Cost of the suit plus Interest.
 - d. Any other or further relief as this court may deem fit and just to grant.
2. Following the service of the Complaint and Summons to Enter Appearance herein, the Defendant duly entered appearance. For clarity, the memorandum of appearance was filed on the January 16, 2020.



3. However, despite the entry and/or filing of appearance, the Defendant herein did not file any Statement of Defense or at all.
4. Subsequently, the matter herein was fixed and/or listed for hearing. Nevertheless, before the hearing could take off, the Honourable court invited the Parties to address and/or ventilate the issue of the Jurisdiction of the court to hear and entertain the subject dispute.
5. On the other hand, after the directions by and/or on behalf of the Honourable court, the Defendant proceeded to and filed a Notice of Preliminary Objection dated the February 21, 2022 and in respect of which the Defendant raised the following grounds;
 - i. That the Suit herein is barred and/or prohibited by dint of the provisions of Section 34 of the *Civil Procedure Act* Chapter 21 Laws of Kenya.
 - ii. The Honourable court is devoid of Jurisdiction to entertain and/or adjudicate upon the subject matter insofar as same relates to and/or concerns execution, satisfaction or discharge of the Judgment and decree issued in previous suit, namely Nairobi HCC Misc No 309 of 2015 (JR) and Nairobi ELC No 1144 of 2013, respectively.
6. Premised on the Notice of Preliminary Objection and coupled with the directions of the court, the Parties herein agreed to have the preliminary objection heard and disposed of vide written submissions.
7. Consequently, the Parties herein proceeded to and filed their respective written submissions touching on and/or concerning the twin issues, details whereof have been alluded to in the preceding paragraphs.

Submissions by the Parties:

a. Defendant's Submissions:

8. The Defendant herein filed written submissions dated the March 28, 2022 and in respect of which the Defendant raised and addressed two (2) salient issues, for consideration by the Honourable Court.
9. Firstly, it was the Defendant's submissions that the gist and/or crux of the subject suit touches on and/or concerns the issue of execution, satisfaction or discharge of the Judgment and decrees that were issued in favor of the Plaintiff herein vide two (2) previous suits, namely, HCC Misc No 309 of 2015 (JR) and Nairobi ELC No 1144 of 2013.
10. According to the Defendants, the Judgment and decrees issued in the 2 previous suits can only be enforced and/or realized by way of execution carried out in the said suits and not by filing a separate and distinct suit, in the manner done by the Plaintiff herein.
11. Further, counsel for the Defendant also submitted that the filing of the current suit, whose effect and tenor is to achieve the payment decreed in the previous suit constitutes and or amounts to an abuse of the Due Process of the court.
12. Secondly, Learned Counsel for the Defendant submitted that by dint of the provisions of Section 34 (1) of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, this court is divested of Jurisdiction to entertain a separate and fresh suit, whose import is execution of previous Judgment and decree.
13. Premised on the twin issues canvassed and alluded to, counsel for the Defendant submitted that the current suit is therefore misconceived and legally untenable. In this regard, counsel for the Defendant implored the Honourable court to strike out or dismiss the suit for want of jurisdiction.



14. In support of the foregoing submissions, counsel for the Defendant relied on various decisions, inter-alia, *Richard Boke Chacha & 3 Others versus Linus Kakai & Another (2021)eKLR*, *Executive Committee Kisii County Government versus Masosa Construction Company Ltd & Another (2020)eKLR* and *Owners of Motor Vessel Lilian S versus Caltex Oil (K) Ltd (1999)eKLR*.

b. Plaintiff's Submissions:

15. The Plaintiff on her part filed written submissions dated the June 16, 2022, and same raised, highlighted and addressed three (3) pertinent issues for consideration by the Honourable Court.
16. First and foremost, counsel for the Plaintiff submitted that the issue raised by the Defendant being a preliminary objection, same ought to have been raised at the earliest opportunity. For clarity, it was pointed out that the Defendant ought not to have waited until the subject matter was fixed for hearing before springing up with a purported preliminary objection.
17. In the premises, it was the Plaintiff's submissions that the preliminary objection having been made with delay, this court ought to disregard the preliminary objection and venture to address the suit on merits.
18. Secondly, it was submitted on behalf of the Plaintiff that the issues raised vide the subject suit are not straight forward, such that same can be addressed and/or disposed of vide a Preliminary Objection
19. According to the Plaintiff, there are Factual issues, which are complex and which can only be addressed and dealt with through a Plenary hearing and not by a summary process, in the manner proposed by the Defendant.
20. Additionally, Counsel for the Plaintiff submitted that the subject suit raises and seeks very unique orders in the nature of mandatory injunction. For clarity, it was pointed out that the Plaintiff is seeking to have the market not opened, or for the closure of the market to compel the Defendant to compensate the Plaintiff as previously ordered by the court.
21. In any event, it was further submitted that the Defendant herein has completely refused to pay the compensation as ordered by the Honourable court in the two previous suits and hence this court should not allow the Defendant to defeat the Due process of the court, by raising the subject preliminary objection.
22. Based on the foregoing submissions, the Plaintiff submitted that the current suit is not a suitable suit, capable of being disposed of vide a preliminary objection or at all. Consequently, the Plaintiff implored the court to dismiss the preliminary objection raised by the Defendant.
23. Other than the foregoing, the Plaintiff also submitted that the court should proceed and direct the Defendant to file her statement of defense and thereby pave way for the hearing and determination of the subject suit on merits.
24. In support of the foregoing submissions, counsel for the Plaintiff cited and relied on various decisions, inter-alia, *Owners of Motor vessel Lilian S versus Caltex Oil (k) Ltd (1989)eKLR*, *Mukisa Bescuit Manufacturing Company Ltd versus Westend Distributors Ltd (1969) EA 696* and *Samuel Juma Keya versus Luke Omulo Omolo (2015)eKLR*.

Issues for Determination:

25. Having reviewed the Notice of Preliminary Objection dated the February 21, 2022 and the written submissions filed by and/or on behalf of the Plaintiff and Defendant, respectively; the following issues do arise and are therefore pertinent for determination;



- i. Whether the subject suit touches on and/or concerns the Execution, Enforcement and or Satisfaction of the decrees issued vide previous suits, which are separate and distinct for the current suit.
- ii. Whether this Honourable court is seized and/or possessed of the requisite Jurisdiction to entertain and or adjudicate upon the subject suit on the face of the Provisions of Section 34(1) of the Civil Procedure Act, Chapter 21, Laws of Kenya.

Analysis and Determination

Issue Number 1 Whether the subject suit touches on and/or concerns the Execution, Enforcement and or Satisfaction of the decrees issued vide previous suits, which are separate and distinct for the current suit.

26. Before venturing to address and resolve the first issue herein, it is appropriate to ascertain the true scope and tenor of the claim by and or on behalf of the Plaintiff.
27. To be able to ascertain and or understand the gist of the subject suit, one only needs to take cognizance of the reliefs sought at the foot of the Plaintiff filed the 11th November 201
28. For coherence, the most important relief that has been sought by the Plaintiff provides as hereunder;
 - a. An Order directed to the Defendant, their agents, servants, employees, and persons acting on its authority and direction and including its Governor and accounting officers declaring that the premises known as Westland's Market situate on the Plaintiff's parcel of land being LR No 1870/IX/170, Westland's Nairobi shall not be opened for operation and/or utilization by the public until the Defendant has paid the Applicant in full the compensation as ordered by the court in NRB ELC no1144 of2013 and NRB JR No 309 of2015 (Salima Enterprises Limited vs Nairobi City County).
29. From the foregoing prayer, there is no gainsaying that what the plaintiff is seeking for and or pursuing is the realization and/or payments of the compensation, which was awarded to and in favor of the Plaintiff vide NRB ELCNo 1144 of2013.
30. On the other hand, the Plaintiff has also conceded that subsequent to the rendition of the Judgment by ELC vide NRB ELC No1144 of2013, same also commenced and took out judicial review proceedings vide NRB JR NO 309 OF 2015 (Salima Enterprises Limited vs Nairobi City County), with a view to actualizing the payment of the decretal sum which had been awarded in her favor.
31. Even though neither of the Parties herein have addressed the status of NRB JRNo309 of2015 (Salima Enterprises Limited vs Nairobi City County), into details and particularly, the nature of reliefs sought therein and the orders if any, granted in respect of same, this Honourable Court has been able to peruse some of the Pleadings and Documents annexed.
32. For completeness, the court was able to examine the entire record in respect of the subject matter and the totality of the documents filed by the Plaintiff and forming part of the documents to be relied upon.
33. In the course of perusing the bundle forming part of the documents to be relied upon, it became apparent that indeed the Plaintiff herein filed the subject judicial review proceedings and same was heard and determined vide Judgment of the court render on the June 7, 2016.



34. On the other hand, it was also evident that the Plaintiff's claim was allowed and an order of Mandamus was duly issued to compel the Defendant to comply with the terms of the Judgment issued vide Nairobi ELC No 1144 of 2013.
35. It is also appropriate to mention that upon the delivery of the Judgment vide Judicial Review No 309 of 2015, the Defendant herein failed to comply with and abide by the writ of mandamus. Consequently, the Plaintiff proceeded to and took out contempt proceedings against the Governor, Nairobi County, The Minister for Finance and Economic Planning and the Chief Accounting officer, Nairobi City County Government, respectively.
36. Similarly, the Contempt's proceedings vide the Notice of Motion Application dated the February 17, 2017, was heard and disposed of in terms of the ruling rendered on the July 12, 2017. For clarity, the contempt application was allowed.
37. Additionally, it is important to point out that upon the hearing and determination of the Contempt Application, it is apparent that the Advocates for the Parties herein entered into a Consent dated the January 9, 2019, whereby same agreed on the terms and essentially, a Scheme of payments of the Decretal sum.
38. Nevertheless, having agreed on the terms and/or scheme of payments, the Advocates for the respective Parties also provided for a default clause, which stated as hereunder;

' In default of the above payment, execution shall ensue by way of warrant of arrest against the Respondents pursuant to the application dated the October 16, 2020'
39. Suffice it to note that on the February 23, 2018, Counsel for the Plaintiff herein indeed proceeded to and extracted Warrants of arrest in line with the orders of the Honourable court made on the February 21, 2018. For the avoidance of doubt, the Warrants were addressed against the Governor, Nairobi City County and the Minister of Nairobi city County.
40. Be that as it may, it is not clear whether the warrant of arrest alluded to herein before, were executed and if so, the outcome therefor. Simply put, it is not clear whether any amounts of monies were recovered and if so, how much.
41. Notwithstanding the foregoing, it is also worthy to recall that other than the warrant of arrest, which were issued in execution of the contempt proceedings, the Plaintiff herein also commenced Garnishee proceedings against M/s Co-operative Bank K Ltd., who were duly joined in the Judicial Review Proceedings as an Interested Party.
42. Similarly, despite the commencement of the Garnishee Proceeding against the consequential Interested Party in the Judicial Review proceedings, it is not clear what became of the Garnishee proceedings and in particular, whether an Order absolute was ever issued.
43. Be that as it may, I have endeavoured to and pointed out the foregoing issues, because it is apparent that subsequent to the issuance of the judgment and decree vide the Primary suit vide ELC 114 of 2013, the Plaintiff herein has indeed endeavored to execute and or enforce the terms of the said decree, in accordance with the provisions of the law.
44. Nevertheless, the Plaintiff herein for some reason, which has not been disclosed, has chosen and indeed taken a 360 Degree turn and has thereby filed the subject suit, essentially, to compel the Defendant to comply with and satisfy the terms of the Decree that was issued in the Primary suit.



45. Clearly, the import, tenor and implication of the subject suit is the realization, enforcement and execution of the terms of the Judgment which was issued vide Nairobi ELC 1144 of 2013.
46. To my mind, it cannot be lost on the Honourable court that the subject suit is primarily and essentially, calculated to achieve execution of the Judgment and decree that was issued in the previous suit.
47. Based on the foregoing, it cannot be said that the issues raised herein and by extension, the Cause of action in respect of the subject suit, is so detached and distinct from the Previous suits.
48. Even though the Plaintiff's counsel has submitted that the subject suit raises unique issues for determination, including mandatory injunction, such a contention flies on the face of the reliefs sought at the foot of the operative Plaintiff.
49. In any event, whereas the Plaintiff's counsel appears not to have correctly appreciated the gist and tenor of the subject suit, there is no gainsaying that the suit herein is effectively an Execution proceedings, aimed at enforcing the Judgment and decrees issued vide Nairobi ELC 1144 of 2013 and Nairobi HCC Misc No 309 of 2015, respectively.
50. In the premises, it is my finding and holding that the suit herein is clearly an Execution suit, whose primary purpose and/or intent is meant to achieve the sole purpose of enforcing the decrees of the court, albeit issued in separate and distinct cases.
51. In a nutshell, my answer to issue number one is in the affirmative.
52. Succinctly put, the current suit is geared towards executing, enforcing and or implementing the decrees which were issued in favor of the Plaintiff, vide the previous proceedings.

Issue Number 2 Whether this Honourable court is seized and/or possessed of the requisite Jurisdiction to entertain and or adjudicate upon the subject suit on the face of the provisions of Section 34(1) of the *Civil Procedure Act*.

53. Having found and held that the suit herein is intended to pursue and/or enforce the Judgment and decrees that were issued vide the previous suits, the question that remains outstanding is whether the filing of the subject suit is in tandem with the provisions of the law.
54. On the flip side, the other question that arises is whether the court herein is seized and/or possessed of the requisite Jurisdiction to entertain and/or adjudicate upon the subject suit, whose import is to execute lawful decrees, albeit issued elsewhere vide separate and distinct suits.
55. To my mind, where the Jurisdiction of a court is impugned and/or challenged, as in the instant case, it behoves the Honourable court to address the Jurisdictional question and to determine same at the onset.
56. Additionally, Jurisdiction is threshold question and when same is raised, the court has no business postponing the determination of such a question, to await production of further evidence or as the Plaintiff herein contended, the amendment of the pleadings.
57. To underscore the place and importance of determining Jurisdiction as a threshold question, it is appropriate to take cognizance of the dictum in the case of the Owners of Motor Vehicles Lilian S versus Caltex Oil (K) Ltd (1989)eKLR, where the Court of Appeal per Nyarangi, JA, stated and observed as hereunder;

' I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue



right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

58. Jurisdiction is so central and critical to the extent that where a court is not seized of jurisdiction, any orders made or proceedings taken by the court, albeit without Jurisdiction would be null and void.

59. To fortify the foregoing observation, it is appropriate to refer to the holding of the Court of Appeal in the case of [*Phoenix of EA Assurance Company Limited versus SM Thiga t/a Newspaper Service \[2019\] eKLR*](#), where the Court stated and observed as hereunder;

- ' 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.'

60. Armed with the foregoing knowledge, it is now appropriate to interrogate whether this court has jurisdiction to entertain and/or adjudicate upon proceedings relating to execution, satisfaction and/or reinforcement of decrees issued vide separate and distinct suits.

61. To this end, the provision of Section 34 of the [*Civil Procedure Act*](#), Chapter 21 Laws of Kenya are apt and provide an explicit answer.

62. For completeness and to be able to appreciate the explicit answer that emanates from the foregoing provisions, it is appropriate to reproduce the provisions of Section 34 (supra).

63. For convenience, same is reproduced as hereunder;

34. Questions to be determined by court executing decree

- (1) 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.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.
Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.



64. My reading of the foregoing provision makes it explicit and unequivocal that matters pertaining to execution, satisfaction, enforcement or discharge of decrees, can only be taken and or dealt with in the suits where the impugned decrees were issued, but not vide a Separate and distinct suit.
65. In any Event, the provisions of Section 34(supra) proceeds to underscore that no fresh suit shall be filed for purposes of execution.
66. Premised on the foregoing position, where a Party proceeds and files a fresh suit, whose purport and tenor is to execute or enforce the decree issued elsewhere, such a suit is invalid and contrary to the clear tenets of the law and essentially, the provisions of Section 34(supra).
67. In such a scenario, the Honourable court confronted with such a case is divested of the requisite jurisdiction and hence the court cannot entertain and/or adjudicate upon such a matter.
68. Suffice it to observe that the Jurisdiction of the court must exist from the onset, before the court commences the hearing or the taking of any Evidence in a matter and not otherwise.
69. On the other hand, it is trite and established that whatever proceedings and/or evidence taken by a court without jurisdiction, would be an act of futility and hence a nullity ab initio.
70. Premised on the foregoing discourse, I come to the conclusion that this Honourable court is divested of the requisite jurisdiction to entertain and/or adjudicate upon the subject matter by dint of the plain and unequivocal language contained in Section 34(1) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.
71. Despite the clear language of the forecited provisions of the law, it may still be necessary to put the issue beyond peradventure. In this regard, it is appropriate to take cognizance of the dictum in the case of *South Nyanza Sugar Co Ltd =vs= Alfred Sagwa Mdeizi t/a Pave Auctioneers (2010) EKLR*, where the court stated and observed as hereunder;

' Section 34 of the *Civil Procedure Act* strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law, the learned magistrate held that the appellant, if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of the clear provisions of Section 34 of the *Civil Procedure Act*, this conclusion was clearly erroneous.'

72. In the premises, I come to the conclusion that the issues raised vide the subject suit, which essentially touch on and/or concern execution, enforcement and realization of the decrees issued vide the previous suits, separate and distinct from the subject suit, falls outside the Jurisdiction of this Honourable court.
73. Respectfully, this Honourable court is bereft of the requisite Jurisdiction to entertain the subject suit.

Final Disposition:

74. To my mind, the Plaintiff herein ought and should pursue the issue of execution and satisfaction of the decrees issued vide Nairobi ELC 1144 of 2013 and Nairobi HCC Misc No 309 of 2015, in the manner prescribed under the law.
75. However, to the extent that the Plaintiff has chosen a wrong avenue and or mechanism to pursue the execution of the said decrees, the wrong avenue herein cannot be sanctioned and/or countenanced by the Honourable court.



76. Consequently and on the basis of the reasons advanced in the body of the subject ruling, I come to the conclusion that this Honourable court is devoid and bereft of the requisite Jurisdiction. In this regard, same cannot entertain and adjudicate upon the merits of the subject suit.
77. In a nutshell, the suit by and/or on behalf of the Plaintiff mounted vide Plaint dated the November 11, 2019, be and is hereby struck out with cost to the Defendant. However, the Costs shall be taxed and certified on a lower scale, given that the Defendant did not file any Statement of Defense.
78. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Kiriimi for the Plaintiff

Ms. Shikali h/b for Mr. Kiprop for the Defendant

