



**Five Eleven Traders and Auctioneers, through its owners, Crispus Waithaka  
v Muses & 2 others (Environment and Land Miscellaneous Application  
E006 of 2022) [2022] KEELC 15229 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15229 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2022  
SM KIBUNJA, J  
DECEMBER 7, 2022**

**BETWEEN**

**FIVE ELEVEN TRADERS AND AUCTIONEERS, THROUGH ITS OWNERS,  
CRISPUS WAITHAKA ..... APPLICANT**

**AND**

**ALI KHAN ALI MUSES ..... 1<sup>ST</sup> RESPONDENT**

**ESTATE SONRISA LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**THE OCPD/OCS DIANI POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The trial court, ELC 3, while delivering the ruling on the October 19, 2022 on the notice of motion under certificate of urgency dated the February 21, 2022, directed at page 52 *inter alia*;

- “a) That the notice of motion application dated February 21, 2022 be and is hereby allowed as with the passage of time, with an exception to prayers Nos 9, 10 & 11 which are deferred to be heard and determined by ELC No 1, Mombasa, .....
- b) .....
- c) .....
- d) .....
- e) That in order to keep close track of any pending matter herein, this matter to be mentioned in the physical presence of all parties before ELC Mombasa



No 1 Justice SM Kibunja (presiding judge) on November 2, 2022 for further directions with regards to:-

- I. Prayers No 9, 10, and 11 of the notice of motion application dated February 21, 2022;
- II. Preparation of a final legal opinion on the Court of Appeal as per the orders granted by the said court on April 24, 2014; and/or
- III. Any other direction it may deem fit and suitable to grant in the given circumstance whatsoever thereof.

..... “

That pursuant to the said directions, the learned counsel for the applicant and the 2<sup>nd</sup> respondent appeared before me on the November 2, 2022 and made their submissions.

2. The learned counsel for the applicant submitted that the application in which prayers 9 to 11 are ceased to exist when Naikuni J, in his ruling of October 19, 2022, ruled that this miscellaneous application is spent. That as this court, and the trial court are of concurrent jurisdiction, then this court has no jurisdiction, and the applicant has no cause of action. The counsel further opined that ELC No 30 of 2014 is finalized notwithstanding the directions by Munyao and Dena JJ, as the issue surrounding the surveyor's report is a matter for the Court of Appeal. The learned counsel completed his submissions by seeking for directions.
3. In her submissions the learned counsel for the 2<sup>nd</sup> respondent referred the court to the earlier directions of July 20, 2022, by Munyao J, in Kwale ELC E001 of 2022 challenging the Land Registrar's report, in which it was directed that the parties move the court through Mombasa ELC No 30 of 2014, that was for hearing before Matheka J, of ELC 2, the following day, and where the directions that the application in ELC E006 OF 2022 had been ordered to be heard to finality. The Counsel submitted that Naikuni J, had however left out prayers 9 to 11 undetermined, and counsel submitted that this court should therefore, give directions on the three prayers.
4. I have perused the application dated the February 21, 2022, the ruling of October 19, 2022 and other related records and noted;
  - a. That prayers 9 to 11 in the notice of motion dated the February 21, 2022 reads as follows;
    9. This honourable court direct that Crispus Waithaka, Samuel Kamau Macharia and Ndegwa Marclus Njiru, Advocate and Damaris Nzuve be investigated for criminal intent.
    10. This honourable court be pleased to issue an order restoring the status quo ante immediately prior to the grant of the said order issued on February 17, 2022 to wit the applicant through its owner Crispus Waithaka, Samuel Kamau Macharia, Ndegwa Marclus Njiru and the current Officer Commanding Station, Damaris Nzuve create in facsimile the villas as they stood and build them back brick by brick immediately prior to their demolition.
    11. In the alternative, this honourable court be pleased to issue an order for security to the 2<sup>nd</sup> respondent as shall be adequate and sufficient for the due performance of order 11[sic] above and to compensate for the loss and damages of other immovable properties as shall be proved by the 2<sup>nd</sup> respondent.”



That this court, had issued directions on the July 20, 2022 in which Munyao J among others directed as follows at paragraph 12;

*What we still have is Miscellaneous Application No E006 of 2022 and the original Mombasa ELC No 30 of 2014. Orders of police protection to execute the decree appear to have been made ex parte in Miscellaneous Application No E006 of 2022. I already stated that using the said orders there was demolition, of the property of Sonrisa. There was an application for recusal of Naikuni J which was dismissed. Since this file is still live, I will refer it back to Naikuni J, to deal with it to its logical conclusion but I will reiterate that any future applications touching on execution of the decree must be filed in the substantive suit. ... “ [emphasis added].*

In my view, the orders or directions of October 19, 2022 referring prayers 9 to 11 of the application dated the February 21, 2022 for determination to this court runs contrary to the otherwise clear guidance in the ruling of July 20, 2022 that “ .. *Naikuni J, to deal with it to its logical conclusion ...* “. It is my view that all issues to do with the application dated the February 21, 2022 should continue being handled by ELC 3, Naikuni J, unless otherwise directed by the appellate court.

- b. On prayer 9 to 12 of the application dated the February 21, 2022, ELC 3 at page 42 of the ruling of the October 19, 2022, Naikuni J, pronounced himself as follows;

*The prayer No 9 is for this court to direct the owners of Five Eleven Auctioneers and OCS be investigated for criminal intent. It is impossible to issue this prayer as granted. This is a civil matter. The applicant is requesting the court to cross over to the criminal jurisdiction. If the applicant is of the view that the owners of Five Eleven Auctioneers have committed a crime, then she is at liberty to report the matter to the police station as a way of instituting criminal proceedings.*

The prayers 10, 11 and 12 of the application is for this court to issue an order of sought the orders of ‘**restitution integrum**’ (restoration of the original position) and an order restoring the status quo ante immediately prior to the grant of the said order issued on the February 17, 2022 *and recreate in facsimile the property as it stood and build them back brick by brick immediately prior to their demolition.*

While I fully concur with the learned counsel for the applicant that this relief may not be fathomable and rather difficult to grant vide an application notwithstanding the provisions of order 3 rule 1 of the Civil Procedure Rules, 2010, I discern that it is one of the reliefs that I have referred to ELC No 1 where ELC No 30 of 2014 is being handled. ...”

In view of the above pronouncements, is there anything remaining to be determined in respect of prayers 9 to 11? I need not say much, other than point out that as ELC 3, is the trial court in this matter, and Naikuni J, is still at the station, it is the right, and I dare say, appropriate court to deal with any outstanding determinations and directions relating to prayers 9 to 11, or any other prayer in the application dated the February 21, 2022, as it was the court that is to deal with that notice of motion to its logical conclusions. That it is a fact that ELC 3, has not recused itself from this matter, and there is no such prayer in the application dated the February 21, 2022.



- c. For record purposes, I wish to clarify that Mombasa ELC No 30 of 2014 is not being handled by ELC 1, but ELC 2, as correctly observed in the submissions by counsel for the 2<sup>nd</sup> respondent.
- d. On the invitation that this court issues directions on the preparation of a final legal opinion to the Court of Appeal pursuant to the orders of the court of April 24, 2012, I am unable to assume that duty as it appears not to be related in any way to the issues for determination in the application dated the February 21, 2022. Furthermore, this court, Munyao J, had at paragraph 13 of the ruling of July 20, 2022 directed on the surveyor's report as follows;

*I direct that if Sonarisa is of opinion that there is an issue regarding the surveyor's report, then Sonarisa is at liberty to make an application to this court within the file Mombasa ELC No 30 of 2014. Similarly, if SK Macharia is of the view that he wants an order to affirm the decision of the surveyor, then he needs to seek those orders from this court through the file Mombasa ELC No 30 of 2014. ...”*

That as no application on the surveyor's report is pending in this file, I say no more, other than to reproduce the relevant part of the Court of Appeal ruling on the same issue, verbatim here below;

*... We set aside the order and instead direct the Land Registrar Kwale, together with the Government Surveyor, Kwale County to determine whether Kwale/Galu Kinondo/48 has encroached upon the suit land”*

- e. That in view of the above observations, I decline to pronounce myself as invited by counsel on whether or not there is anything pending determination in the application dated the February 21, 2022, specifically in relation to prayers 9 to 11 thereof, for reasons that I am not the trial judge in the matter. I am aware that decisions by the judges of this court are not binding on a judge of the same court, but for proper functioning of the court in the station, it is a mark of good order and responsibility to allow a judge who is seized of a matter to continue hearing it to conclusion, so long as such judge is in that station, and has not for good reasons recused himself/herself. As the trial judge is still in the station, this matter is therefore referred back to ELC 3 to continue handling it as appropriate.

5 It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 7<sup>th</sup> DAY OF DECEMBER 2022.**

**S M KIBUNJA, J**

ELC MOMBASA

IN THE PRESENCE OF;

applicant: Absent

respondentS: Absent

COUNSEL : Mr Mwangi Ndegwa for Ndegwa Njiru for applicant

M/s Lilian Olouch for Khan for 2<sup>nd</sup> respondent.

WILSON .. COURT ASSISTANT.

S M Kibunja, J

