



**Kenya Bowling Centres Limited v Kahuthu t/a Kahuthu &
Kahuthu Adv & another (Environment & Land Miscellaneous Case
E193 of 2024) [2025] KEELC 393 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E193 OF 2024
AA OMOLLO, J
FEBRUARY 6, 2025**

BETWEEN

KENYA BOWLING CENTRES LIMITED APPLICANT

AND

JAMES KAHUTHU T/A KAHUTHU & KAHUTHU ADV 1ST RESPONDENT

JOSEPH NDIRITU T/A JOGANDRIES AUCTIONEERS 2ND RESPONDENT

RULING

1. The Plaintiff filed a notice of motion dated 19th September 2024 supported by an affidavit and further affidavit sworn by Julius Waweru Mungai, the Applicant's director on 19th September 2024 and October 4, 2024 respectively the same date seeking for the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That an order of injunction do issue restraining the Respondents, their servants and/or agents and/or assigns from entering, using, collecting rent from, occupying, constructing, developing or in any other manner whatsoever interfering with the parcel of land known as LR No. 209/405/9 situated along Ngong Road in Nairobi within the Republic of Kenya.
 - e. That an order of injunction does issue compelling the Respondents, their servants and/or agents and/or assigns to forthwith vacate and/or deliver up possession and/or grant immediate vacant possession, to the Applicant, of the Applicant's property known as LR No. 209/405/9 situated along Ngong Road in Nairobi within the Republic of Kenya.



- f. Spent
 - g. That the costs of this application be awarded to the Applicant.
2. The motion was on the grounds that the Applicant is the registered owner of the parcel of land known as LR No. 209/405/9 situated along Ngong Road in Nairobi within the Republic of Kenya herein referred to as “the suit property” and instructed the 1st Respondent sometime in 2013 to evict and secure vacant possession of the same from the then tenant, Uchumi Supermarket Limited herein referred to as “Uchumi”.
 3. Further, that the 1st Respondent similarly represented the Applicant in various transactions and court cases on diverse dates between 2013 to 2024 and obtained Court Orders on 19th May 2022 in Insolvency Petition No. 25 of 2018 requiring the eviction of Uchumi from the suit premises and re-entry by the Applicant.
 4. That the 1st Respondent instructed the 2nd Respondent to effect the eviction of Uchumi in compliance with the Order aforesaid and upon eviction, the Respondents jointly and severally took over the suit premises and all amenities thereon together with the parking space in which they are currently operating and collecting rent from tenants in the estimated sum of KES 1,000,000 per month without the permission of the Applicant and have not accounted for the rent collected from the premises.
 5. The Applicant further stated that it is in the process of selling and therefore negotiating with potential buyers for the property, which transactions are at risk of falling through in light of the continued illegal occupation of the suit property by the Respondents. The Applicant states that the professional fees submitted by the Respondents are under discussion and that they have no right to a professional lien over the suit property.
 6. That the Respondents are yet to tax their Bill of Costs (if any) and the parties are yet to agree on the said fees. Thus, there is no basis for the Respondents to continue being in occupation of the suit property without a certificate of costs for their fees or an agreement on the same. The Applicant contended that a board resolution is not a mandatory requirement before filing a suit and a director is duly authorized to appear on behalf of the Applicant in these proceedings.
 7. The Applicant argued that it is simply seeking an order restraining the Respondents from illegally occupying the suit property and no substantive orders are sought.

Respondents’ Preliminary Objection and Grounds of opposition

8. The Respondents filed notice of preliminary objection and grounds of opposition, both dated 26th September 2024. They state that the Applicant has improperly invoked the jurisdiction of this court by approaching it through a Miscellaneous Application, whilst seeking substantive reliefs. That the same has been brought under Order 40 of the Civil Procedure Rules, which governs the issuance of temporary injunctive reliefs pending the disposal of a main suit, when no such main suit has been filed in this case.
9. Further, that the person purporting to swear the affidavit in support of the application does not have the requisite authority to do so because there is no evidence of a board resolution or authorization provided and the deponent of the affidavit does not even hold any shares in the Applicant/company. The Respondent also stated that the application does not disclose any reasonable cause of action against the Respondents as to justify the expenditure of judicial time.



1st Respondent's Replying Affidavit

10. The 1st Respondent filed a replying affidavit sworn on 27th September 2024 by G. J Kahuthu. He deposed that the 1st Respondent had been retained by the Applicant to handle various legal matters for them from 2003 to 2024, including matters relating to the eviction of Uchumi from the suit property.
11. That over the years, the 1st Respondent has handled more than ten (10) court cases on behalf of the Applicant, and has rendered diverse legal services ranging from litigation, to negotiation of leases, management of property, instruction of auctioneers, and even negotiations with potential buyers for the sale of the suit property. He continued to state that with each new legal service rendered to the Applicant, and particularly starting from 2014, their unpaid legal fees have accumulated to an amount exceeding Thirty Million Shillings (Ksh.30,000,000) in unpaid legal fees.
12. The 1st Respondent avers that the Applicant is aware of its indebtedness to them and on 26th August 2024, through the firm of Kaplan & Stratton Advocates requested for comprehensive fee note to enable them pay or give a specific undertaking to pay and which fee note was forwarded on the 16th September 2024 together with the auctioneer's fee note. After they acknowledged receipt, no response has been given.
13. They contended that they are not in trespass or unlawful occupation of the suit property because it is sanctioned by the law, and the circumstances under which they are in occupation are well known to the Applicant. It is their contention that before Uchumi lease with the Applicant lapsed on 31st December 2018, an Insolvency Petition No. IP 25 of 2018 was instituted against Uchumi for non-payment of debt. Uchumi subsequently filed an application seeking orders to stay all legal proceedings against it and further sought an order of temporary injunction against any eviction or the interference of its quiet possession in any of the premises that it occupied pursuant to a lease, tenancy agreement, and/or controlled tenancy pending the hearing and determination of the Insolvency Petition.
14. That Uchumi obtained stay orders which directly impacted the Applicant's interests of securing vacant possession of the suit property and to safeguard the applicants interests in the Insolvency Petition, the 1st Respondent entered appearance and represented the Applicant including in the appeal to the Court of Appeal. It is in the course of of the Insolvency Petition that the 1st Respondent filed an application dated 27th April 2021 on behalf of the Applicant seeking orders for vacant possession of the suit property, orders to allow them to distress for rent, and orders to allow them evict Uchumi together with its illegal subtenants.
15. On 19th May 2022, this court granted them orders for distress for rent and eviction of Uchumi. Following these orders and acting on the applicant's behalf, they engaged a duly licensed auctioneer - Jogandries Auctioneers, (the 2nd Respondent), to carry out the eviction in accordance with the Applicant's instructions and in compliance with the court orders.
16. That the 2nd Defendant entered the suit property for the purposes of enforcing the eviction and evicted Uchumi Supermarkets together with about six (6) illegal subtenants including Ecobank, Huitas Saloon, Macrene Company Ltd, the barbershop that was on 1st Floor, two Mpesa operators, and an Electronics and Accessories store among others.
17. The 1st Respondent stated that there are only two (2) parties who are yet to be evicted and in fact, one of which is Postbank Limited a Quasi-Judicial body and are licensees in the property and do not pay any rent and Easy Coach on the other hand have a temporary structure outside the suit property. The Respondent stated that the Applicants directed that they were no longer renting out the suit property anymore and that they were looking for a buyer to purchase it, thus there is no tenant in the property.



18. Further, it is deposed that the Auctioneer fee which amount to over Kshs.11,000,000 and the 1st Respondent Fee note remain unpaid and their presence in the suit property is in line with their professional lien over the property. That they will have no problem relinquishing the premises to the Applicant upon the settlement of the outstanding fees. They argue that the 2nd Respondent's presence in the suit property has safeguarded the Applicant's interests because since the eviction of Uchumi, the Applicant has never taken any steps to secure the suit property against for example vandalism or general deterioration.
19. That the rent collected from the remaining illegal subtenant has been applied to offset the costs of security and maintenance of the property pending their ultimate eviction immediately after the Applicant finances the eviction process and settles the outstanding fees. The 1st Respondent argued that the Applicants claim of a potential sale of the suit property is unsubstantiated and even if it were true, they are not claiming ownership of the suit property and as such, the allegation that the transaction is at a risk of falling through because of their presence in the property is baseless.
20. That the Applicant's Board of Directors has never explained to them on how the Applicant intends to settle their fees and from an analysis of the applicant's shareholding structure between 2018 and 2024, a lot has changed in the company and they have chosen to hand over matters relating to settlement of Respondent's fees to people who were not part of the company when instructions were issued.
21. The Respondent contended that the motion is fatally defective on the grounds raised in their filed PO.

2nd Respondent's Replying Affidavit

22. The 2nd Respondent filed an affidavit sworn by Joseph Nderitu on 27th September 2024 stating that their relationship with the 1st Respondent as their auctioneer dates back to 23rd March 2012, when the Applicant instructed them to levy distress against Uchumi for rent arrears amounting to Ksh.10,370,208.25, which instructions they successfully carried out.
23. That the Applicant again instructed them on 29th May 2013 to levy distress on the same tenant, Uchumi, for further rent arrears which instructions were temporarily disrupted by a Miscellaneous Application No. 540 of 2013, where the 1st Respondent represented the Applicant and a ruling was delivered on 15th November 2013 stating that the court had no jurisdiction, after which the 1st Respondent instructed them to proceed with the attachment of goods as per the Applicant's instructions of 29th May 2013.
24. The deponent stated the Applicants had a problem with settling their fees but due to their friendship, after instruction by the 1st Respondent vide letter dated May 2022 agreed to assist the Applicant in evicting Uchumi from the suit property without any assistance from them Applicants.
25. That they entered the suit property and executed the - eviction of Uchumi Supermarkets together with several illegal subtenants, with two remaining but due to financial constraints on the part of the Applicant, the eviction process for the remaining subtenants has delayed.
26. That also the eviction was carried out with the 2nd Respondent's own resources and with the financial support from the 1st Respondent.
27. The 2nd Respondent stated that their fee remains unpaid and so they are in occupation of the suit property not claiming ownership but waiting to be paid.



Submissions

28. The 1st and 2nd Respondents filed submissions dated 12th November 2024 stating that this court has no jurisdiction to grant the reliefs that the Applicant is seeking in its miscellaneous application because there is no statute or constitutional provision that confers jurisdiction on this Honourable Court to determine substantive issues without going to full trial, nor is there any law that empowers this court to grant interim orders in the absence of a main suit. That in support, they cited the case of *Orange Democratic Movement vs Yusuf Ali Mohamed & 5 others* [2018] eKLR and *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR which state that jurisdiction flows from law.
29. The Respondents submitted that the Applicants sought among other things, eviction of the Respondents from the suit property and a grant of vacant possession of the same. That these are prayers anchored in substantive property rights provided for under Article 40 of the *Constitution* 2010, which makes the Applicant's Miscellaneous Application a case that was meant to enforce, redress, or protect a private or civil right.
30. They argued that the purported civil action was commenced in an unprocedural manner and in disregard of the Civil Procedure Rules, making the Applicants case fatally defective. That the Applicant did not commence the matter by way of a Complaint or a Petition or an Originating Summons but ambushed the Respondents with a Miscellaneous Application with insufficient information for the Respondents to find any reasonable cause of action.
31. The Respondents submitted that the Applicant did not file any suit before this e court and consequently, they pray that this court dismisses the application with costs as was the case in *Norah Ndunge Henry & another v Abednego Mutisya & another* [2022] eKLR where the court in dismissed a suit improperly initiated via a Miscellaneous Notice of Motion.
32. They further submitted that the suit is fatally defective for the reason that the Application seeks temporary injunctive reliefs under Order 40 of the Civil Procedure Rules in the absence of a main suit and in support cited the case of was noted by Justice Mabeya in *KalyOng'e v Karanja (Miscellaneous Application E070 of 2021)* [2022] KEHC 16174 (KLR) (Commercial and Tax) (9 December 2022) (Ruling).
33. I have not seen Applicant's submissions.

Analysis and Determination

34. I have read the Applicant's motion, supporting affidavit and further affidavit together with the annexures thereof. I have also read the preliminary objection, grounds of objection raised by the Respondents, their replying affidavits and annexures thereof and also considered their submissions.
35. The Preliminary Objection is based on the grounds that the Applicant has improperly invoked the jurisdiction of this court by approaching it through a Miscellaneous Application, whilst seeking substantive reliefs and the same has been brought under Order 40 of the Civil Procedure Rules, which governs the issuance of temporary injunctive reliefs pending the disposal of a main suit, when no such main suit has been filed in this case. Secondly, that there is no evidence of a board resolution or authorization to file the suit which also does not disclose any reasonable cause of action against the Respondents.
36. The Notice of motion was premised on Article 40 of *the Constitution* of Kenya, Sections IA, 1B and 3A of the *Civil Procedure Act*, Order 40 Rules 1, 2, 3, 4 and 9 and Order 51 Rule [1] of the Civil Procedure



Rules and all other enabling provisions of the law. Order 40 of the Civil Procedure Rules is on issuance of temporary injunctions and interlocutory orders stating that,

“ 1. Cases in which temporary injunction may be granted [Order 40, rule 1]

1. Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

37. It is therefore obvious that an injunction sought under order 40 of the Civil Procedure Rules ought to be within an instituted suit.

38. In the case of Joseph Kibowen Chemior V William C Kiseru [2013] eKLR the court extensively discussed filing of suits. It held that “under Section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by rules. It will be observed that Section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits should be instituted. It provides that suits may be instituted in the manner prescribed by rules. There could be rules in other statutes on how Proceedings may be commenced. For example, the Probate & Administration Rules under the Succession Act, (14) prescribe how matters touching on succession of estates of deceased persons need to be instituted.”

39. Order 3 Rule (1) of the Civil Procedure Rules, provides that every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. Order 37 allow for commencement of suits by way of Originating Summons in claims for adverse possession. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons and it is only in Judicial Review proceedings that provides filing of suits seeking substantive orders through a Notice of Motion vide a miscellaneous application. None of the provisions of the law under which the present suit is listed allow for granting orders of a permanent nature in an application not premised on a suit.

40. The Court of Appeal in the case of Scope Telematics Sales International versus Stoi Ltd and another (2017) eKLR while handling an application seeking orders and not anchored on a suit held thus:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was



not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.”

41. As regards the necessity for a company/board resolution or authority to institute a suit, Odunga J. (as he then was) in his Judgement in the case of *Leo Investments Ltd v Trident Insurance Company Ltd* (2014) eKLR he referred to the holding of Hewett, J. in *Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd* HCCC No. 391 of 2000 as follows:

“It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect.... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.”

42. In reliance to the above persuasive precedent, it is my view that a suit or affidavit sworn on behalf of a company without resolution or authority does not render the suit or affidavit thereof fatally defective. It is an error that can be rectified.
43. Therefore, the preliminary grounds raised by the Respondents succeed in part that the failure by the applicant to follow the laid down procedures in bring a suit was fatal. The Applicant ought to have first filed a suit then sought for injunctive orders pending the determination of the suit and or applied for summary judgement if they felt there is no valid defence to their claim. For now, the Notice of Motion application is struck out for being incompetent and fatally defective. The costs of the application to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2025.

A. OMOLLO

JUDGE

