



Koira Limited v El-Busaidy & 2 others Administrators of the Estate of Sir Ali Salim El Busaidi & another (Environment & Land Case 288 of 2012) [2025] KEELC 346 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELC 346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 288 OF 2012
SM KIBUNJA, J
FEBRUARY 5, 2025**

BETWEEN

KOIRA LIMITED PLAINTIFF

AND

ABBAS SOUD ALI EL-BUSAIDY, ILAHAM MOHAMED SAID AL BUSAIDI, SAUD ABDULLAH SOUD AL BUSAID (ADMINISTRATORS OF THE ESTATE OF SIR ALI SALIM EL BUSAIDI) 1ST DEFENDANT

MJAD INVESTEMENTS LIMITED 2ND DEFENDANT

RULING

[NOTICE OF MOTION DATED 24TH JULY 2024]

1. The Plaintiff filed the notice of motion dated 24th July 2024 brought under sections 1A, 1B and 3 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, seeking for:
 - a. “Spent.
 - b. That the funds jointly held between the plaintiff’s and the 1st defendant’s advocates, Messers A.B. Patel & Patel LLP Advocates and Sagana, Biriq & Company Advocates in account number 325xxxxx28 held at the NCBA Bank Bank PLC’s Nkrumah Road Branch at Mombasa be released to the plaintiff’s advocate’s client account number 22xxxxx800 held at Bank of India, Treasury Square, Nkrumah Road Mombasa.
 - c. That costs of this application be borne by the first defendant.”



The application is based on six (6) grounds on its face and supported by the affidavit of Masud Rana, a director of the plaintiff, in which he inter alia deposed that on 28th February 2014, this court ordered that the net monthly rent collected from Title Numbers Mombasa/Block XXI/151, 152 and 498, the Suit Property, be deposited in a joint account of the Plaintiff and the First Defendant's advocates, until further orders or the final determination of this case; that an appeal was filed and the Court of Appeal finally determined this matter by its Judgment delivered on 14th April 2023, and ordered inter-alia that the First Defendant be compelled to renew the Plaintiff's leasehold interest in the Suit Property for a further period of 99 years from 1st January 2013; that the Plaintiff is thus entitled to the joint account funds and there is no valid reason for those funds to continue to remain in the joint account, as those funds now ought to be released to the Plaintiff's advocate on behalf of the Plaintiff; that vide a letter dated 17th November 2023, their counsel requested the First Defendant's advocate to sign a joint consent and instruction letter for the release of the funds deposited in the joint account, but the First Defendant's advocates have refused and/or neglected to sign the letter of joint instruction; that it was unreasonable and highly unjust for the joint account funds of the Suit Property to remain unavailable to the Plaintiff.

2. The application is opposed by the 1st defendant through the four (4) grounds of opposition dated 18th September 2024, stating that the plaintiff is guilty of non-disclosure of material facts for failing to disclose that this court dismissed the Plaintiff's claim against the 1 Defendant and ordered vacant possession of the premises in Mombasa/Block XXI 151 and Mombasa/Block/XXI/498 to the 1st Defendant; that on appeal, the Court of Appeal allowed the appeal, but did not dispense with the Plaintiff's obligation to pay rent; that the Court of Appeal ordered that the Plaintiff and 1st defendant to agree on the new rent payable upon the renewal of the lease; that Plaintiff is still the 1st Defendant's lessee, but is in rent arrears for several years, and has not paid rent to the said account for the expired term from 1977 to 31st December 2012 to date; that the plaintiff was also in rent arrears for the new term beginning 1st January 2013 to date, the rent payment to the said joint account has been sporadic, and no accounts of the monies paid into the said account as rent has been availed o enable the court to grant the orders sought; that the plaintiff is deliberately concealing facts to enable them to escape its continued default and unjust enrichment; that the court should find the plaintiff's deliberate non-disclosure as an automatic disentitlement of the discretionary orders sought and the application be dismissed with costs.
3. The court gave directions on filing and exchanging replying and further affidavits plus submissions on 19th September 2024. The record confirms that no replying affidavit was filed but the learned counsel for the plaintiff filed their submissions dated 25th October 2024. During the mention of 6th November 2024, the learned counsel for the 1st defendant informed the court that they will be relying on the filed grounds of opposition.
4. The issues for the court's determinations are as follows:
 - a. Whether the plaintiff is entitled to the release of funds held in the joint account.
 - b. Who pays the cost?
5. I have carefully considered the grounds on the notice of motion dated 24th July 2024, the grounds of opposition dated 18th September 2024, submissions by the learned counsel, the record and come to the following determinations:
 - a. The record confirms that on 28th February 2014, the court delivered its ruling on two applications dated 7th December 2012 and 16th January 2013 and ordered inter alia that:



- a. A prohibitory order shall issue against Mombasa/Block XXI/151 and Mombasa/Block XXI/152 and Mombasa/Block/498 to prevent any of the parties from selling, subdividing, charging, disposing or in any other way dealing with the same until further orders of the court or until the final determination of this case.
- b. The net monthly rent of the said properties shall be deposited in an interest-earning account to be opened in the next 30 days from the date hereof by the applicant and the 1st respondent in their joint names and the said monthly rent shall be deposited therein until further orders of the court or until the final determination of this case.
- c. The land rates and land rent management and/or maintenance costs of the said properties (if any) shall be deducted and paid from the gross rent accruing from the same properties.
- d. The interim injunctive orders granted to the applicants are hereby vacated and
- e. Costs of this application shall abide in the suit.

Then, on 22nd March 2019 the court delivered its judgement in the matter in favour of the 1st defendant, and at paragraph 50 ordered the plaintiff “to surrender vacant possession of the suit premises to the 1st defendant within six (6) months from the date of this judgment. In default, the 1st defendant is at liberty to follow the laid down procedures in obtaining vacant possession.”

The plaintiff, was dissatisfied with the judgement, and appealed against it before the Court of Appeal in CACA 98 of 2019, *Koira Limited versus Salim Soud Ali El Busaidy and Another*. On 14th April 2023, the Court of Appeal found the appeal merited and issued the following orders:

1. The judgement of ELC Court delivered by A. Omollo J on 22nd March 2019 in ELC Civil Suit No. 288 of 2012 be and is hereby set aside.
 2. Judgment be and is hereby entered in favour of the Appellant on the terms that the 1st Respondent be and is hereby compelled to renew the Appellant’s leasehold interest in the properties known as Title numbers Mombasa/Block XXI/151, 152 and 498 for a further period of 99 years, on the same terms contained in the Indenture dated 20th January 1914, save for the term as regards the amount payable as rent which has since been overtaken by events and the 1st Respondent and Appellant shall agree upon on the new rent payable.
 3. The 1st Respondent will meet the Appellant’s costs of this appeal and the suit before the ELC.
- b. The orders of 28th February 2014 directed among others that the net monthly rent of the suit premises would be deposited in an interest-earning account until the final determination of the case. In my view, the lifespan of the order for deposit of rent was tied to the determination of this suit, which has since taken place as well, upon the court delivering its judgement on 22nd March 2019, and the Court of Appeal rendering its decision on 14th April 2023, overturning it. The orders being sought herein are therefore consequential orders, which flow from the decision of this court upon the determination of the suit. The injunctive orders that was issued during the lifetime of a suit, lapsed upon the delivery of judgment. In this case, the order directing the plaintiff to deposit the monthly rent in the interest-earning account ought to have



lapsed once the judgement was delivered by this court. The Court of Appeal in the case of *Eastland Hotel Limited versus Wafula Simiyu & Co Advocates* [2015] KECA 495 (KLR) held;

“It is explicit from the Ruling of this Court dated 24th March 2014 that the sum of Kshs. 5,000,000/= was deposited subject to the condition that the sum was to be held pending the hearing and determination of the intended appeal or until further orders. We now ask ourselves if this condition has been fulfilled. The answer is in the affirmative. The intended appeal was filed as Civil Appeal No. 105 of 2014; the said appeal was heard and determined by this Court and a judgment dated 24th October 2014 delivered. The condition upon which the deposit of Kshs.5,000,000/= was made has been fulfilled. Civil Appeal No. 105 of 2014 having been heard and determined, it follows that the deposit of Kshs.5,000,000/= cannot continue to be held. Further, Civil Appeal No. 105 of 2014 having been finalized, there is no pending appeal before this Court and no further orders that have been made in the substantive appeal which has been determined. It is our considered view that when an appeal is heard and determined, the effect of the judgment is to lapse any interlocutory orders that were made prior to the delivery of the final judgment. We find that the conditional stay of execution and the order directing the deposit of Kshs.5,000,000/= in a joint account lapsed with the delivery of the judgment of this Court on 24th October 2014; a conditional deposit is discharged and becomes due and repayable upon fulfilment of the condition.”

The potent question that comes to the mind of this court is whether the monies that are in the interest-earning account should be released to the plaintiff.

- c. The plaintiff argues that since the Court of Appeal rendered its judgment in their favour, and ordered the 1st defendant to renew the lease, it is entitled to the funds as there is no valid reason for the funds to remain in the joint account. The 1st defendant position is that the plaintiff has remained in occupation of the suit premises throughout the litigation period, and since they are in rent arrears, the funds should be used to defray part of the same thereof. It is clear that despite the litigation between the parties herein, there still existed the landlord-tenant relationship between the plaintiff and 1st defendant. It is clear to the court that at no time was the responsibility of the plaintiff to pay rent lifted off its shoulders. Section 66 (1)(a) of the *Land Act* No. 6 of 2012 provides for the implied condition for payment of the rent reserved by the lease which is binding on the lessee. Since the plaintiff retained physical occupation of the suit premises, it was still required to meet its rent obligations arising from the lease agreement. The plaintiff cannot then turn around and ask for the release of monies deposited in the joint account that was for the accrued rent to it, unless it first shows or establishes before the court it is not in any rent arrears. The upshot of the foregoing is that the plaintiff's application dated 24th July 2024 is not merited, and is for dismissal.
 - d. That as under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the events unless where for good cause otherwise ordered, the court awards the 1st defendant the costs.
6. In view of the foregoing determinations, the court finds and orders as follows:
- a. That the plaintiff's application dated the 24th July 2024 has no merits and is dismissed.
 - b. The 1st defendant's costs to be paid by the plaintiff.

It is so ordered.



DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : M/s Essajee For Khagram

Defendants : Mrs Kinyua for Otieno

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

