



**Bromine Investments Limited v Mbitha & another (Environment & Land  
Case 606 of 2001) [2025] KEELC 1177 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1177 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 606 OF 2001**

**YM ANGIMA, J  
MARCH 6, 2025**

**BETWEEN**

**BROMINE INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**KALUME KARISA MBITHA ..... 1<sup>ST</sup> DEFENDANT**

**NANCY KHANJI KALUME ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. By a notice of motion dated 21.11.2022 filed pursuant to Sections 1A, 1B, 3A of the *Civil Procedure Act* (Cap.21), Order 42 rule 6, Order 50 rule 6, Order 5, rule 1 of the *Civil Procedure Rules, (the Rules)* and all other enabling provisions of the law, the plaintiff sought an order for the OCS Kilifi Police Station to provide security or assistance for execution of the decree passed in its favour on 11.12.22. It was contended that the defendants had failed to vacate the suit property in spite of the decree.

**B. Defendants' response**

2. The defendants filed a notice of preliminary objection dated 16.07.2024 on the grounds, inter alia, that the court had no jurisdiction to entertain the application and that the application was sub judice since there was an appeal pending before the Court of Appeal being Malindi Civil Appeal No. E002 of 2022 over the same subject matter.
3. The defendants also filed a lengthy replying affidavit sworn by the 1<sup>st</sup> defendant giving a detailed history of the dispute which culminated in the matter ending up before the Court of Appeal at Malindi. It was contended that even though their appeal against the decree of 11.12.2012 was dismissed by the Court of Appeal in 2014 they still had another pending appeal being No. E002 of 2022 hence the instant application was premature and untenable.



4. The 1<sup>st</sup> defendant further contended that there was a mix up of parcel numbers on the ground that he recently discovered that the plot he was occupying was in fact Kilifi/Mtondia/48 and not Kilifi/Mtondia/61 which was the subject of the decree. The 1<sup>st</sup> defendant further stated that that he had since formally acquired parcel 48 from the Agricultural Settlement Fund and obtained a title deed a copy whereof was annexed to the affidavit.

### **C. Directions on submissions**

5. When the matter came up for inter partes hearing it was directed that the application shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions on both the preliminary objection and the application. The record shows that the defendants' submissions were filed on 14.02.2025 but the plaintiff's submissions were not on record by the time of preparation of the ruling.

### **D. Issues for determination**

6. The court has perused the plaintiff's application dated 21.11.2022, the defendants' notice of preliminary objection and replying affidavit in response thereto as well as the material on record. The court is of the view that the following are the main issues for determination herein;
  - a. Whether the defendants' preliminary objection should be upheld.
  - b. Whether the plaintiff is entitled to the orders sought in the application.
  - c. Who shall bear costs of the application.

### **E. Analysis and determination**

#### **a. Whether the defendants' preliminary objection should be upheld**

7. The gist of the defendants' preliminary objection was that the court had no jurisdiction to entertain the motion dated 21.11.2022 because it was an abuse of the court process. It was contended that there was a pending appeal before the Court of Appeal being Malindi Civil Appeal No. E022 of 2022 over the subject matter hence the application for enforcement of the decree were sub judice.
8. As was held in the case *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors [1969] EA 696* a preliminary objection must consist of a pure point of law which if argued may dispose of the suit. It cannot be raised if any fact has to be ascertained or investigated. In the said case of Sir Charles Newbold P. stated that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

9. The court is not satisfied that the points raised by the defendants are pure points of law which can be argued and determined without the ascertainment of the facts upon which they are based. A factual basis has to be laid and demonstrated to support the allegation that the application is an abuse of



the court process. Similarly, factual evidence would be required to demonstrate whether or not the application is sub judice as known to law. The court is thus of the opinion that the points raised by the defendants are not suitable for determination as preliminary points. However, the court may consider them as points in opposition to the application in the normal manner.

#### **b. Whether the plaintiff is entitled to the orders sought in the application**

10. The court has considered the material and submissions on record on this issue. It is evident that the plaintiff was not so clear on exactly what kind of assistance it wanted. It was vaguely stated that the plaintiff required “police security and/or assistance for the successful execution of the decree”. There was no indication that any court bailiff had been entrusted with the process of execution. This being a civil suit the police service has no mandate to directly enforce or execute the decree. However, in appropriate cases a decree holder may request for an order for the police to provide security to a named court bailiff to execute a warrant of eviction if the bailiff is reasonably apprehensive that a breach of peace might occur in the process.
11. In the instant case, the court finds no application for warrant of eviction on record. The court has not entrusted any auctioneer or court bailiff with the process of execution of the decree passed on 11.12.2012. There is even no notice to show cause under Order 22 rule 18 for the defendants to show cause why the decree, which is clearly more than 12 months old, should not be executed. The court finds the instant application to be premature in that regard.
12. There is, however, a greater reason why the application should not be allowed. There is some material on record to demonstrate that defendants have obtained title documents for the plot which they occupy on the ground. The parcel number appears to be 48 and not 61 which the plaintiff has been pursuing and which was the subject of the decree passed on 11.12.2012. The court is unable to tell whether or not the two plots are one and the same on the ground or whether there is any overlap between them. There is no further affidavit by the plaintiff in response to the issue. The court finds that it might be futile to grant the application when there is uncertainty as to who is actually occupying parcel 61 on the ground.
13. In view of the foregoing, the court does not find it necessary to determine whether or not the instant application is sub judice or an abuse of the court process. The plaintiff’s application has failed on merit.

#### **c. Who shall bear costs of the application**

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the [Civil Procedure Act](#) (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court has considered the lengthy and chequered history of the litigation among the parties. The record shows that there has been a mix up of the parcel numbers in Mtondia Settlement Scheme which the concerned government officials were unable to satisfactorily explain at the trial. In the circumstances, the court is of the opinion that the appropriate order to make is for each side to bear its own costs of both the application and preliminary objection.
15. The upshot of the foregoing is that the court finds no merit in both the plaintiff’s application and the defendants’ preliminary objection. As a consequence, the court makes the following orders for disposal of the matter;
  - a. The defendants’ notice of preliminary objection dated 16.7.2024 is hereby overruled.



b. The plaintiff's notice of motion dated 21.11.2022 is hereby dismissed.

c. Each party shall bear its own costs.

It is so ordered.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM THIS 6<sup>TH</sup> DAY OF MARCH, 2025.**

In the presence of:

Court assistant Kalekye

Mr. Mkan for the plaintiff

Ms. Rose Ngina for the defendants

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**Y. M. ANGIMA**

**JUDGE**

