



Milly Glass Works Limited v Kenya Railways Corporation (Environment & Land Case E105 of 2024) [2025] KEELC 5069 (KLR) (4 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E105 OF 2024**

JO OLOLA, J

JULY 4, 2025

BETWEEN

MILLY GLASS WORKS LIMITED PLAINTIFF

AND

KENYA RAILWAYS CORPORATION DEFENDANT

RULING

1. By a plaint dated 9th December, 2024, Milly Glass Works Limited (the plaintiff) prays for judgment against Kenya Railways Corporation (the Defendant) for:
 - i. A declaration that having paid Kshs 10,200,000/= yearly from 2012 to 2022, the Plaintiff is not in any rent arrears as alleged in the defendant's Letter dated 28th November, 2024 or at all; and
 - ii. A permanent injunction restraining the Defendant, its agents, servants or employees from levying any distress for rent against the Plaintiff or taking any action towards recovery of the purported outstanding rent demanded vide the defendant's letter dated 28th November, 2024.
2. Those prayers arise from the Plaintiff's contention that it holds a lease from the Defendant for the parcel of land known as Mombasa/Block XLVIII/134. The said lease contains a rent review clause which the Defendant purported to exercise in the year 2012. The Plaintiff challenged the purported exercise of that right in a dispute that is currently pending determination by the Supreme Court.
3. The Plaintiff avers that the Defendant has now served it with the letter dated 28th November, 2024 demanding rent arrears in the sum of Kshs. 62,293,000/= which sum combines undisputed rent of Kshs. 146,000/= together with disputed rent of Kshs. 10,200,000/= and it is the Plaintiff's case that the demand is patently inaccurate. The Plaintiff accuses the Defendant of threatening to distress for rent that is the subject of on-going legal proceedings and asserts that if the distress proceeds, it stands to suffer irreparable injury.



4. But in its statement of Defence and Counterclaim dated 21st January, 2025, the Defendant avers that it lawfully exercised its right to review the rent under the lease agreement. The Defendant denies that the demanded rent arrears combines both the undisputed and the disputed rent. It is the Defendant's case that it did not admit to receive Kshs. 10,200,000/= as rent for the years 2012 to 2022 as alleged by the Plaintiff.
5. The Defendant further avers that this court has no jurisdiction to entertain this suit as the same is res judicata to the decision in Civil Appeal No. E038 of 2022 and sub-judice to the two (2) matters pending before the Court of Appeal and the Supreme Court.
6. BY way of its Counterclaim, the Defendant prays for judgment against the Plaintiff for:
 1. An order that the Defendant in the Counterclaim, Milly Glassworks Limited do compensate the Plaintiff in the Counterclaim, Kenya Railways Corporation an amount of Kshs 62,293,000/= being the amount owed as rent arrears under the lease agreement of 16th January, 1980;
 2. Interest on (a) above at Court rates from the date of Judgment until payment in full; and
 3. Costs of the suit and Counterclaim.
7. Filed contemporaneously with the suit was a Notice of Motion dated the same 9th day of December, 2024 wherein the Plaintiff prays for orders that:
 1. Spent;
 2. Spent;
 3. Pending the hearing and determination of this suit, there be a temporary injunction restraining the Defendant, its agent, servants or employees, from levying any distress for rent against the Plaintiff or taking any action towards recovery of the purported outstanding rent demanded vide the Defendant's Letter dated 28th November, 2024;
 4. In the alternative to (3) above, pending the hearing and determination of Supreme Court Petition No. E041 of 2024 and upon certification, any other appeal from the Judgment in Mombasa Court of Appeal Civil Appeal No. E083 of 2022 consolidated with Civil Appeal No. E035 of 2023, there be a temporary injunction restraining the Defendant, its agent, servants or employees from levying any distress for rent against the Plaintiff or taking any action towards recovery of the purported outstanding rent demanded vide the Defendant's Letter dated 28th November, 2024; and
 5. The cost of this application be awarded to the Plaintiff in any event.
8. The application is supported by an affidavit sworn on 9th December, 2024 by the Plaintiff's Managing Director Mohamed Rashid and is premised on the grounds that:
 - i. The Plaintiff has been served with a letter dated 28th November, 2024 demanding alleged rent arrears of Kshs 62,293,000/=;
 - ii. The letter on its face combines both the Kshs 146,000/= that was the undisputed rent and Kshs 10,200,000/= that is the disputed rent. The demand is therefore patently inaccurate;
 - iii. The Defendant's allegation that the Plaintiff has not been paying the disputed rent is without basis because;



- a. The Defendant's right to demand the rent of Kshs 10,200,000/= per annum was challenged in Msa. ELC Case No. 135 of 2012.
 - b. When testifying both the Plaintiff's and Defendant's witness confirmed that the Defendant had continued to demand and the Plaintiff had continued to pay the disputed rent of Kshs 10,200,000/= even though there was an order for injunction in place;
 - c. In the Judgment delivered on 4th November, 2021, Sila Munyao J. found as a fact that the Defendant and the Plaintiff had paid the disputed rent despite the Court order. The Learned Judge ordered the Defendant to refund the rent unlawfully collected calculated at Kshs 126,464,047.67;
 - d. The demand for alleged outstanding rent is therefore contrary to the findings of this Court, the subject of the further appellate proceedings.
- iv. Even though the Judgment of the ELC ordering a refund was overturned in Msa. Court of Appeal Civil Appeal No. E083 of 2022 consolidated with Civil Appeal No. E035 of 2023, the fact that rent had been paid is indisputable and was admitted by the Defendant's own witness;
 - v. The Judgment in Msa Court of Appeal Civil Appeal No. E083 of 2022 consolidated with Civil Appeal No. E035 of 2023 is itself the subject of an Appeal in Supreme Court Petition No. E041 of 2024;
 - vi. There is every chance that either the Court of Appeal or the Supreme Court may grant certification to the Plaintiff and that the Supreme Court may ultimately allow the Appeal against the Court of Appeal judgment;
 - vii. If that happens, the tables would turn and it would in fact, be the Plaintiff demanding a refund of overpaid rent from the Defendant;
 - viii. If the distress proceeds, the Plaintiff is likely to suffer irreparable injury because:
 - a. It will be forced to pay at once the colossal sum of Kshs 62,293,000/= which may gravely disrupt its ability to remain as a going concern especially in these tough economic times;
 - b. It will have been forced to pay the disputed rent for the second time given the finding that the disputed rent was already paid; and
 - c. It will face considerable difficulty recovering the sums in the event of a successful appeal noting the Defendant's stance, supported by the Court of Appeal, that no execution can issue against the Defendant.
 - ix. It is therefore necessary that the Application be heard expeditiously and the orders sought granted.
9. In opposition to the application, the Kenya Railways Corporation (the Defendant) has filed a Notice of Preliminary Objection, a Supplementary Notice of Preliminary Objection and a Replying Affidavit sworn by its Acting General Manager, Legal Services and Corporation Secretary Stanley Gitari.
 10. In its Replying Affidavit sworn on 17th January, 2025, the Defendant avers that this court lack jurisdiction to hear and determine the application and the suit on the grounds that the same is res judicata to the decision of the Court of Appeal in Civil Appeal No. E038 of 2022.



11. The Defendant further avers that the Plaintiff had made a formal application dated 28th April, 2022 in ELC. 135 of 2020 to amend the Plaintiff in the former suit to plead the issue of the alleged demanding and receiving payments contrary to Court orders and to seek a refund. The said application was dismissed.
12. The Defendant refutes the allegations that it admitted in proceedings in ELC. No. 135 of 2012 that the Plaintiff continued to pay rent in the sum of Kshs. 10,200,000/= from 2012 to 2022. It is the Defendant's case that the Plaintiff has admitted that it has not paid rent for the years 2023 and 2024 amounting to over Kshs. 20,400,000/=. It avers that the Plaintiff was irregular in paying rent for the period before 2022 thereby accumulating arrears in the tune of Kshs. 41,893,000/=.
13. The Defendant avers that it will be counterclaiming for the arrears of Kshs. 62,293,000/- and asserts that the dispute as to the amount payable is not a ground for injunction since the excess if proven is liquidated and can be compensated adequately by an award of damages.
14. By its Notice of Preliminary Objection, the Defendant has listed three (3) grounds of objection as follows:
 1. This Honourable Court does not have jurisdiction to determine the question whether the Defendant herein is entitled to demand Kshs 10, 200,000/= from the Plaintiff as rent payment arising from the lease of 1/6/1980 as from 1/1/2012 since;
 - a. The said issue is res-judicata since it has already been determined conclusively and appealed by the Court of Appeal in Appeal Number E083 of 2022 as admitted by the Plaintiff at paragraph 8 of the Plaintiff and paragraph 4 of the application for injunction;
 - b. Further, the said issue is sub-judice to Civil Application No E131 of 2024 as the Applicant has filed an Application in the Court of Appeal for leave to appeal against the Judgment of the Court of Appeal in Civil Appeal E083 of 2022 to the Supreme Court. The Plaintiff/ Applicant admits the same at paragraph 11 of the Plaintiff and paragraph 6 of the Application for injunction; and
 - c. This Honourable Court does not have jurisdiction to interfere with the execution of the Judgment of the Court of Appeal by prohibiting, by way of the injunction sought for the Plaintiff both in the Plaintiff and in the Application, the Defendant from demanding monies which the Court of Appeal vide Judgment dated 25/10/ 2024 determined are due to the Defendant.
 2. The Right of the Defendant to demand for the rent was affirmed by the Court of Appeal in the Judgment of 25th October, 2024; and
 3. The Plaintiff/Applicant is estopped from enforcing the lease agreement dated 16/1/1980 by way of an injunction whereas the Plaintiff/Applicant is in breach of the said lease agreement.
15. As was stated in *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Limited (1969) EA 696*:

“... a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a Plea of Limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.



16. Considering the same matter in the said Mukisa Biscuits Case (Supra), Sir Charles Newbold, JA stated as follows:

“ A Preliminary Objection is in the nature of what used to be a 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

17. In the matter before me, the Defendant asserts that this court has no jurisdiction to determine the question of whether the Defendant is entitled to demand Kshs. 10,200,000/= from the Plaintiff as from the year 2012 as the issue is res judicata, the same having been conclusively determined by the Court of Appeal in Civil Appeal No. E038 of 2022. In addition, the Defendant asserts that the issue is sub-judice as the same issue is pending before the Court of Appeal in Civil Application No. E131 of 2024 which has been filed by the Plaintiff.

18. The doctrine of res judicata is captured under the provisions of Section 7 of the *Civil Procedure Act* which provides as follows:

“ No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

19. From the material placed before the Court, it was apparent that the parties herein have been tussling over the issue of rent payable for the premises leased out to the Plaintiff by the Defendant over a long period of time. In the year 2012, the Plaintiff instituted Mombasa HCCC No. 135 of 2012 seeking for an order that the revision of the annual rent for the suit property (Mombasa/Block XLVIII/134) from Kshs. 146,000/= to Kshs. 10,200,000/= was unlawful, null and void.

20. While indeed aspects of that dispute remain pending both in the Court of Appeal and in the Supreme Court, it was difficult to agree with the Defendant that the subject matter therein is the same one as the one herein. A perusal of the record herein reveals that this present dispute was precipitated by a letter dated 28th November, 2024 wherein the Defendant’s Managing Director wrote to the Plaintiff’s General Manager stating as follows:-

“ Re: Demand For Outstanding Rent Arrears

We refer to the above matter and various engagements on this matter.

As you are aware you are indebted to the Corporation in the sum of Kshs. 62,293,000/= being the outstanding rent. Full particulars of which are well within your knowledge (statement is attached).

You are hereby put on NOTICE that unless you pay the said outstanding sum of Kshs. 62,293,000.00/= plus the applicable interest for every month overdue, within the next seven (7) days from the date hereof, we shall take legal action.

We reserve the right to commence legal proceedings against you without any further reference to you at your own risk as to costs, interests and expenses that will be incurred.

Please note no further notices will be sent to you.”



21. It was clear to me from the tone of that letter that the Defendant itself did not consider that the sums being demanded had been the subject of the previous disputes and that the same had been determined. That much is clear from a perusal of their Statement of Defence and Counterclaim dated 21st January 2025 wherein they demand the said sum of Kshs. 62,293,000/= from the Plaintiff.
22. That Defence and Counterclaim is supported by a Verifying Affidavit sworn by the Defendant's Ag. G.M., Legal Services and Corporation Secretary one Stanley Gitari. At paragraph 3 of the said Affidavit, the deponent avers as follows:
- “3. That there is no other suit pending, and that there has been no previous proceedings, in any court between the Plaintiff in the Counterclaim and the Defendant in the Counterclaim over the same subject matter and the cause of action relates to the Defendant in the Counterclaim named in the counterclaim.”
23. Having made that averment, I was unable to see how the Defendant could again raise a Preliminary Objection to the Plaintiff's claim which is based on the same subject purporting the same to be res judicata and/or sub-judice to other suits. The Preliminary Objection is therefore without basis and I hereby dismiss the same.
24. Turning to the Plaintiff's Notice of Motion application dated 9th December, 2024, it is their prayer that this court be pleased to issue an order of injunction restraining the Defendant from levying any distress for rent against itself or taking any action towards the recovery of the purported outstanding rent demanded vide the letter dated 28th November, 2024. It is the Plaintiff's case that the allegation by the Defendant that it has not been paying rent is without basis as there was indeed a finding made in the previous suit that it had been paying rent.
25. In response to the application, the Defendant filed a Replying Affidavit disputing the Plaintiff's contention that the Plaintiff had been paying rent and/or that the Defendant had admitted those payments in previous proceedings with the Plaintiff.
26. In their submissions before the court, the Plaintiffs have asserted that there is no proper Replying Affidavit responding to the issues raised by themselves and that the one on record should be struck out on the basis that it offends section 4 of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya and that the application be treated as unopposed.
27. The Replying Affidavit on record has been sworn by the Defendant's Ag. General Manager, Legal Services and Corporation Secretary one Stanley Gitari. It is evident that the same was commissioned on 20th January, 2025 before Wamuti Ndegwa Advocate & Commissioners for Oaths of P.O. Box 87171-80100 Mombasa. The said Replying Affidavit is indicated to have been Drawn and filed by the Law Firm named therein as:
- Ndegwa Sitonik & Karina Advocates
Zulfat Hatimy Complex, 2nd Floor
Box 87171-80100
Mombasa.
28. From the foregoing, it was apparent that the Advocate who bears the name Wamuti Ndegwa, who commissioned the Affidavit is the one practicing under the said name and style of Ndegwa Sitonik & Karina Advocates. That position is underscored by the fact that Dr. Wamuti Ndegwa represents the



Defendant in these proceedings and the postal address alluded to in the rubber stamp affixed at the foot of the Replying Affidavit corresponds with that of the said Law Firm.

29. In the premises, I had no doubt that the Replying Affidavit upon which the Defendant relies to oppose the Plaintiff's application was indeed sworn and/or commissioned before the Advocate who is acting for the Defendant in these proceedings.
30. The question which then arises is whether an Advocate who is acting for a party in respect of a particular matter, can commission and/or administer oath in respect of any affidavit to be used in the matter. The answer to that question is to be found in the provisions of Section 4 of the [Oaths and Statutory Declarations Act](#) Cap 15 of the Laws of Kenya which states as follows:

“ 4. Powers of Commissioner for Oaths

1. A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.”

31. That being the case, it was clear to me that an Advocate and/or partner in a law firm that is acting for any of the parties and in a particular matter, cannot administer oath to any litigant and/or witness in the subject matter in which the same is retained and/or engaged as such Advocate. That bar is absolute and any breach thereof goes to the root of the impugned affidavit and/or statutory declaration.
32. Dealing with a similar matter in *Caltex Oil (K) Ltd –vs- Stadium Service Station Ltd & Another* (2002) eKLR, Onyango Otieno J. (as he then was) stated as follows:

“I still stand by what I did say in the case of *James Francis Kariuki & Another –vs- United Insurance Co. Ltd*. HCCC No. 1450 of 2000 that such an Affidavit sworn in violation of Section 4(1) of the Oaths and Statutory Declaration Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.

Mr. Rebello has asked me to consider that it was a mistake by a third party namely the advocate and that being the case, the error should not be visited upon the deponents. My answer to that is first that it was a breach of an Act of Parliament, the deponents cannot hide under the advocate concerned as ignorance of the law is no defence. They chose the person to swear the Affidavits before. They knew only too well that the same Commissioner for Oaths was representing the second Defendant who is alleged to be a director and shareholder of the first Defendant. They cannot say they did not know what they were doing. Secondly if they did not know that Wekesa should not have commissioned the affidavits, (and it is possible a person like Dr. Oluka may not have known that) then their counsel who did draw all the offending affidavits knew that Wekesa was involved in this matter and the same counsel as



the agent of the deponents had a duty to ensure the affidavits were sworn before the correct person.

I feel certainly in my mind that whatever way one looks at those affidavits, they were simply not affidavits at all for the purpose of the law. I have considered the affidavits in support and I do not think the errors were inadvertent.”

33. That indeed was the same position taken in the more recent case of Lesrima Simeon Saimanga –vs- Independent and Electoral Boundaries Commission and 2 Others (2018) eKLR where RPV Wendoh J. held as follows:

“The key question is whether the defect in the impugned affidavits is merely procedural or substantive. Order 19 Rule 7 of the Civil Procedure Rules also provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defects, inter alia mis-description of the parties or otherwise in the titles or other irregularity in the form thereof or any other technicality ... In my view however, the above rule cannot act as a cure for the affidavits commissioned contrary to Section 4 of Cap 15 which is a statutory provision while Order 19 is subsidiary legislation. In my considered view, since the affidavits are commissioned in contravention of Section 4 of Cap 15 they do not amount to affidavits known in law... I agree with the finding in the Caltex Oil case which is in point with this case and find that the defect in the three affidavits goes to the substance and not the form. They contravene Section 4(1) of the Cap 15 and are hereby struck out.”

34. Arising from the foregoing, it is apparent that the Affidavits relied upon by the Defendant were fatally defective and that there was accordingly no response to the Plaintiff’s application.

35. The Plaintiff has stated that it is not in arrears of the rent demanded by the Defendant having paid the same. From the material placed before the court, it was clear to me that even if indeed the Plaintiff was in arrears in payment of rent, the exact amount payable will be affected by the pending decisions in regard to whether the revision of the annual rents payable was lawful or unlawful.

36. It follows that I am persuaded that the Plaintiff has proved that it has a prima facie case with probability of success at the trial.

37. In the premises, I allow the Motion dated 9th December, 2024 in terms of the alternative prayer No.4 thereof.

38. The Costs of the application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 4TH DAY OF JULY, 2025

.....

J.O. OLOLA

JUDGE

In the presence of:

a. Ms. Firdaus Court Assistant.

b. Mr. Mwanzia holding brief for Gikandi Advocate for the Plaintiff

c. Mr. Karina Advocate for the Defendant

