



**Blue Heart International Trust v Nyadimo (Environment and Land Appeal E019 of 2023) [2024] KEELC 702 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 702 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E019 OF 2023  
JA MOGENI, J  
FEBRUARY 13, 2024**

**BETWEEN**

**BLUE HEART INTERNATIONAL TRUST ..... APPELLANT**

**AND**

**JAE L RISPER NYADIMO ..... RESPONDENT**

**RULING**

1. Before me for determination is the Notice of Preliminary Objection dated 2/10/2023 by the Respondent which seeks to strike out the Appellant's Application dated 5/09/2023 on the grounds that under Sections 3A, 6 and 7 of the *Civil Procedure Act* this Court has no jurisdiction to entertain this suit. The grounds raised in the preliminary objection are as follows:
  1. That the Appellant is prosecuting two parallel suit processes Milimani MCCC/E2567/2023 Blue Heart International Trust v Jael Risper Nyadimo and Milimani MCCC/E0270/2023 Khan Nadeem Shakoor & Blue Heart International Trust v Jael Risper Nyadimo & Sannex Enterprises T/A Sannex Enterprises Auctioneer.
  2. That the first court/suit is yet to be heard and dispensed with.
  3. That interim orders were issued in the first court/suit yet the same interim orders were not granted by this honourable court.
2. The Appellant/Applicant filed the Notice of Motion under Certificate of Urgency dated 5/09/2023 pursuant to Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 42 Rule 6 & Order 51 of *Civil Procedure Rules 2010*, Rule 3 (1) & (2) of the *High Court (Practice & Procedure Rules)* and all other enabling provisions of law. The Appellant/Applicant is seeking for the following Orders:
  1. Spent.
  2. Spent.



3. That this Honourable court be pleased to order for stay of execution of the Ruling delivered by the Honourable Caroline Cheptoo Kemei given at Nairobi on 1/09/2023 pending hearing and determination of this Appeal.
  4. That the costs of this Application be borne by the Respondent.
  5. That any other orders be issued that this Honourable Court may deem just and expedient.
3. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Lucas Njuguna, the Applicant herein, sworn on 5/09/2023.
  4. Briefly, it is the Appellant's case that the Respondent, after the Ruling that is the subject of the Appeal before this court was delivered where their Application dated 5/06/2023 was dismissed, has already proceeded to execute the orders by distressing the movable property interfering with the Organization's peaceful occupation yet there are no rent arrears due. The occupants of the suit property, who include children in school have been unable to freely move in and out of the said premises. That the said premises have been locked indefinitely and as a result the children are unable to attend school violating their constitutional right owed to them under law.
  5. He avers that payments for rent pursuant to provisions of the Lease Agreement covering up to the month of November had already been made which makes the distress for rent illegal and against the laws of natural justice. It is his prayer in the interest of justice that this Honourable Court issue a stay of execution order in the interim as he is suffering irreparably and experiencing immense loss as the Respondent has already commenced recovery proceedings against me. It is his belief, his Appeal has triable issues and has a high chance of success. He is also willing and ready to abide and satisfy all the conditions for stay under law.
  6. The Application is opposed vide a Preliminary Objection dated 2/10/2023, a Replying Affidavit sworn by Jael Risper Nyadimo, the Respondent herein on 5/10/2023 and Grounds of Opposition dated 5/10/2023. The Application is opposed on the following grounds:
    1. There is no mistake or error apparent on the face of the record on the verdict based on the parties' pleadings.
    2. That the appellant has instituted two parallel suit processes and had already obtained fresh interim orders.
    3. That the first court/ suit is yet to be heard and dispensed with.
    4. That the application is a delaying tactic designed to bar the Respondent from executing orders of the Court and levy distress for rent.
    5. That the applicant has failed to prove existence of an arguable appeal with high likelihood of success.
  6. That the Application is bad in law, an abuse of the court process and ought to be dismissed with costs to the Respondent.
  7. It is the Respondent's case that she has read the Ruling delivered on 1/09/2023 by Honourable Caroline Cheptoo Kemei at the Chief Magistrate Court at Nairobi and she believes that the interpretation of the law was legally and factually sound. She been advised that the Honorable Court in reaching its verdict that the Plaintiff's Application dated 15/06/2023 is *res judicata*, satisfied the provisions under Section 7 of the Civil Procedure Code as the matter had been adjudicated upon and a Ruling thereon delivered by Honorable S.A. Opande (PM) on the 11/05/2023 in Milimani Magistrate



Court Civil Case No E0270/2023 Khan Nadeem Shakoor & Blue Heart International Trust v Jael Risper Nyadimo & Sannex Enterprises T/A Sannex Enterprises Auctioneers. (Hereinafter “the First Court/ Suit”).

8. The Respondent contended that she been advised that the Honourable Magistrate was right to hold that: the suit property/House whose tenancy is in dispute is the same. The suit property in both matters is LR No 209/13738/10 South C, Ash Gate Court Nairobi and the same is rented by the same Plaintiff Blue Heart International Trust, and in which resides the Plaintiff’s principal, Khan Nadeem Shakoor who pays the rent and that the issues in dispute in both suits are the same. The issue in dispute is the rent arrears, being rent for the Months of September 2022, and February to May 2023, plus Estate Security management fee for these months and Auctioneers bill. The Distress for Rent and the Proclamation was issued on the same rent arrears.
9. The Respondent avers that the appellant has instituted two parallel suit processes, Millimani MCCC/E2567/2023 Blue Heart International Trust v Jael Risper Nyadimo, and Milimani MCCC/E0270/2023 Khan Nadeem Shakoor & Blue Heart International Trust v Jael Risper Nyadimo & Sannex Enterprises T/A Sannex Enterprises Auctioneer. That the First Court/ Suit is yet to be heard and dispensed with therefore this Honourable Court should down its tools and wait for a proper Appeal to be brought before it.
10. The Respondent contended that the Appellant herein filed a fresh Application dated 6/09/2023 and obtained fresh interim orders in the First Court/ Suit, the same orders that the Appellant was denied herein. that the application is misconceived, has no merit, bad in law and constitutes an abuse of the court process. based on the conduct of the Appellant of filing application after another, the Appellant is acting in bad faith and employing mischievous tactics just to frustrate the Respondent’s distress for rent. It is the Respondent’s contention that the application is a diversionary delaying tactic from the Appellant designed to frustrate the Respondent’s efforts to recover the outstanding rent owed by the Appellant. That no mistake or error is apparent on the face of the record, as the Honorable Chief Magistrate Court reached its verdict based on the pleadings. Lastly, the Respondent avers that the Appellant/Applicant’s application is unmeritorious and ought to be dismissed with costs.
11. The Court on 9/10/2023 gave directions that both the Notice of Preliminary Objection dated 6/10/2023 and the Application dated 5/09/2023 be canvassed by way of written submissions. A Ruling date was scheduled. As t the time of writing this Ruling, there were no submissions filed by both parties.

### **Issues for determination**

12. Having considered the Preliminary Objection together with the Application and the rival affidavits, the following arise as the issues for determination before this court;
  - a. Whether the preliminary objection as raised is merited.
  - b. Whether this Appellant’s Application has merit.

### **Analysis and Determination**

#### **a. Whether the Preliminary Objection as raised is merited.**

13. I have considered the Respondent’s application on a point of Preliminary Objection to the effect that the Appellant’s Application should be struck out for contravening the provisions of Section 6 and Section 7 of the *Civil Procedure Act*.



14. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* [1969] EA 696 where their Lordships observed thus:

“---a preliminary objection consists of a 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 a contract giving rise to the suit to refer the dispute to arbitration”. In the same case Sir Charles Newbold, P. stated:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

15. The summation of the Respondent’s Preliminary Objection is that the Appellant is prosecuting two parallel suit processes being Milimani MCCC E2567 of 2023 Blue Heart International Trust v Jael Risper Nyadimo and Milimani MCCC EE0270 of 2023 Khan Nadeem Shakoor & Blue Heart International Trust v Jael Risper Nyadimo & Sannex Enterprises T/A Sannex Enterprises Auctioneer wherein parties in both suits are the same or litigate under the same title. That the same is therefore barred pursuant to Section 6 and 7 of the [Civil Procedure Act](#).
16. To contextualize the Respondent’s application on a point of Preliminary Objection, it is necessary to set out the relevant provisions of the [Civil Procedure Act](#) which they rely on and I set the same out hereunder: -
17. Sections 6 and 7 of the [Civil Procedure Act](#) prohibits a court from hearing a matter that is *sub judice* or *res judicata* as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

18. I have considered the Preliminary Objection and the Affidavit of existence of preceding Applications and suit accompanying the same. The respondent contended that this Appeal arose from a Ruling by the lower court in Milimani MCCC E2567 of 2023 Blue Heart International Trust v Jael Risper Nyadimo (the second court/suit) wherein the court upheld the Defendant/Respondent’s Preliminary Objection and dismissed the Plaintiff’s entire suit. The second court ruled that it lacked jurisdiction as the second suit was *res judicata*, already having been dispensed with by a first court/suit in the ruling of Hon. S.A Opande dated 11/05/2023 in Milimani MCCC E0270 of 2023 Khan Nadeem Shakoor & Blue Heart International Trust v Jael Risper Nyadimo & Sannex Enterprises T/A Sannex Enterprises Auctioneer (the first court/suit).
19. The Respondent deponed that in the Ruling of the second court/suit (MCCC E2567 of 2023), the Court found that the facts and the parties in the first court (MCCC E0270 of 2023) are exactly the same as those raised in the second suit. The suit property/house whose tenancy is in dispute is the same. The suit property in both matters is L.R No 209/13738/10 South C, Ash Gate Court Nairobi and the



same is rented by the same plaintiff, Blue Heart International Trust, and in which resides the Plaintiff's principal, Khan Nadeem Shakoor who pays the rent.

20. It is the Respondent's contention that the issue in dispute in both suits are the same. The issue in dispute is the rent arrears, being rent for months of September 2022 and February to May 2023, plus Estate Security management fee for these months and Auctioneers bill. The distress for rent and the proclamation was issued on the same rent arrears. Further, that this court has no jurisdiction to entertain this suit as the first court/suit (MCCC E0270 of 2023) is yet to be heard and determined.
21. The Respondent added that by asking this court to grant interim orders staying the execution of the Ruling of the second court/suit, the Appellant seeks to have the second suit reinstated and also its interim orders issued on 16/06/2023 by Hon. Caroline Cheptoo Kemei reinstated as thus;
- “That temporary orders of injunction to issue restraining the Defendant/Respondent, its agents, or any other person acting on her behalf from distressing, selling and/or auctioning the applicant's movable property, or interfering with the plaintiff's-peaceful enjoyment and occupation of the suit premises pending the hearing of this application inter parties.”
22. It is the Respondent's contention that despite this Honourable Court having declined to restore the Interim Injunction Orders of the Second Court/ Suit, the Court in the First Court/Suit went ahead to grant the same Interim Injunction Orders that were denied the Appellant before this Court courtesy of parallel suits. The Interim Orders obtained by the Appellant in its application dated 6/09/2023 in the First Court/Suit are exactly the same as the Interim Orders of Honorable S.A. Opande (PM) given on 27/02/2023 in the First Court/ Suit, and which Interim Orders of 27/02/2023 were vacated on 11/05/2023. The Appellant is seeking in this application dated 5/09/2023, in its parallel application dated 6/09/2023 in the First Court/Suit, and in its earlier Notice of Motion Application dated 30/01/2023 (that was dismissed in the First Court/Suit, the same orders for stay against the exact same parties, and upon facts that are exactly the same yet its Notice of Motion dated 30/01/2023 was dismissed. That this amounts to an abuse of the Court process.
23. In his application that was filed together with the Appeal, the Appellant averred that the Learned Magistrate erred in law and fact by holding that the matter is *res judicata* when the subject matter in the two cases CMCC No E2567 of 2023 and CMCC No E270 of 2023 were different. That the Learned Magistrate erred in law and fact in arriving at a decision that the parties to the two matters were the same when one case had two Applicants while the other case had only one Applicant.
24. In *Joel Kenduiywo v District Criminal Investigation Officer Nandi & 4 others* (2019) eKLR the Court of Appeal considered the purpose of the said section and held that:
- “Section 6 of the *Civil Procedure Act* is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”
25. The conditions precedent for the *sub judice* rule to apply were restated by the court in *Republic v Registrar of Societies - Kenya & 2 others Ex-Parte Moses Kirima & 2 others* [2017] eKLR that:
- “...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between



parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

26. In *Thika Min Hydro Co. Ltd v Josphat Karu Ndwiga* (2013) eKLR the Court opined that:

“It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleading in both cases.”

27. I have perused through the record before me and I note that the issue in dispute in the two parallel suits is the issue with regard to rent arrears and/or distress for rent which issue is between the same parties. I note that the Appellant is of the view that the two parallel suit did not have the same parties when one case had two Applicants while the other case had only one Applicant. It is my considered view that this cannot be a valid reason to file a duplicate suit. It was untenable for the Appellant to have filed two suits in two different courts over the same subject matter.

28. I also find that the issues raised in the application for injunction filed in MCCC E0270 of 2023 that was dismissed on 11/05/2023 is similar to the application filed in MCCC E2567 of 2023 seeking the same orders. More particularly, I find that the interim prayer that was granted in the second court/suit (MCCC E2567 of 2023) on 16/06/2023 is similar to the prayers that had been sought in two applications filed by the Plaintiff (Appellant herein) in the first court/suit (MCCC E0270 of 2023). Prayer (b) from the Plaintiff’s Application dated 6/09/2023 filed in MCCC E0270 of 2023 sought for the following orders:

“Pending the hearing and determination of this Application, the court do Order the 1<sup>st</sup> Defendant, her agents and any other person acting on her behalf from interfering with the Quite use and enjoyment of the suit premises or interfering with the 1<sup>st</sup> plaintiff’s properties, and to allow entry to the premises and exit from the compound/premises either by foot or by use of motor vehicle/motor cycle.” Whereas the interim orders granted on 2/02/2023 in MCCC E0270 of 2023 read as follows;

“2. That in the interim the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents be and are hereby restrained from distressing for rent, selling and/ or auctioning the plaintiff’s/ applicant’s movable property or interfering with the plaintiff’s/ applicant’s peaceful occupation of the suit property L.R No 209/12738/10 as prayed in the Appellant’s application dated 30/01/2023.”

The same were vacated on 11/05/2023.

29. Further to the above, the Plaintiff sought for various orders in their application dated 30/01/2023 filed in MCCC E0270 of 2023. The orders read as follows;

“That the court be pleased issue an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents from distressing for rent, selling and/or auctioning the Plaintiffs’/ Applicants’ movable property or interfering with the Plaintiffs’/Applicants’ peaceful occupation of the suit property LR No 209/12738/10 pending hearing of the suit.” and “That the Respondents be prohibited and/or restrained from illegally/ unlawfully entering into Applicants’ suit premises and or unlawfully interfering with Applicants peaceful and quite possession of his personal belongings /household goods pending hearing and determination of the suit.”



30. In light of the above, I am inclined to agree with the Respondent's sentiments when she stated that by asking this court to grant interim orders staying the execution of the Ruling of the second court/suit, the Appellant seeks to have the second suit reinstated and also its interim orders issued on 16/06/2023 by Hon. Caroline Cheptoo Kemei reinstated. I find that this matter, if allowed will amount to reinstating the suit in MCCC E02567 of 2023 which is directly and substantially in issue with MCCC E0270 of 2023 and therefore in breach of the provisions of Section 6 of the Civil Procedure Act.
31. The court will not allow parties to be filing a multiplicity of suits on the basis that they have found the previous suit (s) wanting either in content or form. *sub judice* are principles that go to the core of rule of law as far as litigation is concerned.
32. In view of my finding that this suit offends the provisions of Sections 6 of the Civil Procedure Act, I am convinced that this is an appropriate case in which to exercise the drastic power of striking out. In the end, I strike out both the appeal and application with costs to the Respondent.

It is so ordered.

**DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2024.**

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**MOGENI J  
JUDGE**

In the virtual presence of: -

Mr. Muhatia for the Appellant

Mr. Okayo for the Respondent / Objector

Ms. C. Sagina: Court Assistant

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**MOGENI J  
JUDGE**

