



**Mwangi v Munyiri & 5 others (Environment & Land Case
323 of 2022) [2023] KEELC 16085 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 323 OF 2022
AA OMOLLO, J
FEBRUARY 9, 2023**

BETWEEN

KINYUA MWANGI PLAINTIFF

AND

CECILIA NAMSI MUNYIRI 1ST DEFENDANT

PAUL MUNYIRI KAGUAMBA 2ND DEFENDANT

NAMSI LIMITED 3RD DEFENDANT

H FCO LIMITED 4TH DEFENDANT

FUND LIMITED 5TH DEFENDANT

GROFIN CAPITAL LTD 6TH DEFENDANT

RULING

1. The plaintiff/applicant brought the application dated September 28, 2022 under the provisions of section 3A and order 40 rules 2 – 6 of the [Civil Procedure Rules](#). The applicant seeks to be granted the following orders:
 - i. That the application be certified as urgent and service be dispensed with
 - ii. That pending the hearing and determination of this application inter-parties the Respondents either by themselves, their agents, servants and/or personal representative from interfering with the plaintiff's/applicant's quiet possession and access to the property LR Number 13867/11 House No "K" – within Karen Plains County Homes, Jasmine Lane, Off Karen Plains Road, Karen Nairobi City County.
 - iii. That pending hearing and determination of the application interpartes, the honourable court be pleased to issue a temporary injunction restraining the respondents either by themselves, their



agents, servants and/or personal representative from interfering with the plaintiff's/applicant's quiet possession and access to the property LR No 13867/11 House no "K" – within Karen Plains County Homes, Jasmine Lane, Off Karen Plains Road, Karen Nairobi City County.

- iv. That the County Commander in charge of Nairobi City County be directed to ensure enforcement of the orders granted by this honourable court.
 - v. Costs of the application be provided for.
2. The application is premised on the following grounds:
- i. That an order to restrain the defendants/respondents jointly and severally from preventing quiet possession and access of the property by the plaintiff/applicant is absolutely necessary as the that the plaintiff/applicant is the registered proprietor of all that parcel of land and property therein namely LR Number 13867/11 House No "K" – within Karen Plains County Homes, Jasmine Lane, Off Karen Plains Road, Karen Nairobi City County.
 - ii. That the plaintiff/applicant purchased the same through public auction from the 4th, 5th and 6th defendants/respondents.
 - iii. That the 1st, 2nd and 3rd defendants/respondents were tenants jointly in previously registrations. They had also indicated to be paying tenants to the agents of the plaintiff/Applicant but declined to be paying rent.
 - iv. That the respondents have failed or refused to vacate the premises or deliver possession to the plaintiff/applicant who has been the registered proprietor since 28/5/2021 inspite of notice to do so.
 - v. That the defendants/respondents jointly and severally have no claim or right to prevent access, quiet possession and use of the suit property by the plaintiff/applicant who is a bone fide purchaser and registered proprietor.
 - vi. Plaintiff/applicant is the registered proprietor who has the legal right of access and use.
3. Further, Mr Kinyua Mwangi swore an affidavit on September 28, 2022 in support of the motion and deposed *inter alia* that while in the process of getting possession of the suit parcel, he found the 1st and 2nd defendant residing on the suit plot claiming they are tenants. That on enquiring and making attempts to have the 1st and 2nd defendants leave the suit property, the two refused to vacate and even prevented the applicant and his agent's access and possession. The 3rd – 6th defendants are accused of failing to fulfil their obligation of delivering vacant possession of the suit premises. He argued the respondents will not suffer any prejudice if the orders sought are given.
4. The 1st – 3rd respondents opposed the application vide a replying affidavit sworn on their behalf on November 4, 2022. The 1st – 3rd respondents accuse the applicant of forum shopping, and abusing the court process. In particular, the 1st respondent deposes that the applicant is aware of the existence of HCC (Commercial and Tax Division) case No 026 of 2018 between all the parties herein with the 1st – 3rd Respondent's challenging the sale of the suit property to the applicant as per copies of plaint in that suit annexed as "CN 1". Further she annexed copies of pleadings Milimani Civil Misc App No E 944 of 2022 filed on July 1, 2022 and in which case the applicant sought orders to issue to the OCS Karen to provide security to the auctioneer to move into the suit premises and remove goods proclaimed over alleged rent arrears.



5. The 1st, 3rd Respondents pleaded further that on July 6, 2022, the trial magistrate granted the applicant orders and which orders directed the applicant not to be used for eviction. The 1st respondent deposed that they have since obtained orders staying the sale of the attached goods and that their application was pending mention for submissions on a date of November 14, 2022.
6. The respondents argue that a litigant has no right to pursue two *pari passu* process at the same time. That abuse of court process consists of the intention, purpose and aim of the person exercising the right to harass, irritate and annoy the adversary and interfere with the administrative justice. They urged the court to dismiss the application with costs.
7. The 1st – 3rd respondents also filed a notice of preliminary objection raising the following grounds:
 - i. That the application falls short on the doctrine of “res judice” under section 6 of the [Civil Procedure Act](#) as there are two suits on the same subject matter pending determination being:
 - a. HCCOMM 026 of 2018 – Cecilia Namsi Munyiri, Paul Kaguamba And Namsi Limited –versus- Housing Finance Co Limited And Another (where the Plaintiff/ Applicant herein appears as an interested party)
 - b. Misc Application No 944 Of 2022 – Joel Titus Musya And Kinyua Mwangi –versus- Cecilia Namsi Munyiri And Paul Munyiri Kaguamba
8. This court gave directions that the preliminary objection and the application be heard together. The application was argued orally and counsel for the 4th respondents stated that the orders sought in the application did not affect them. The 5th – 6th defendants had not entered appearance or filed pleadings to oppose the application as at this date.
9. Miss Wanjiku learned Counsel for the 1st – 3rd respondents submitted that the application offended the sub judice rule and referred this court to pleadings in the two cases mentioned in the preliminary objection and replying affidavit. In opposing the preliminary objection, Mr Ngare advocate submitted that the preliminary objection is irrelevant to this case because;
 - i. The case before the commercial court is between the respondents themselves
 - ii. In this case they are seeking for orders of eviction to issue against the 1st and 2nd defendants.
10. Mr Ngare urged the court to grant the orders of injunction issued because the 1st and 2nd defendants are now illegally in the suit property. That in Misc Application No E944 of 2022, it is the current Applicant who was levying distress.
11. The guiding principles in considering whether or not to issue an order of temporary injunction are well settled ie prima facie case, irreparable loss and on whose favour the balance of convenience tilts. The orders being sought are for temporary injunction yet the Applicant admits the 1st and 2nd respondents are in occupation of the suit property. The occupation of the 1st – 3rd respondents is so loud that the applicants admits filing Milimani CMC Misc App No E944 of 2022 to levy distress for rent arrears.
12. There is a copy of an order issued by the chief’s magistrate court with a rider that the order was not to be used for eviction of the 1st & 2nd respondents. This court is then perplexed how the applicant would move this court to be granted an order restraining the respondents from interfering with his quite possession and access to the suit property when the applicant is not having possession in the first place. He has not sought mandatory order of injunction so the orders as pleaded are not available to the applicant.



13. The 1st – 3rd respondents have also raised a preliminary objection that this suit and application is subjudice. In responding to the objection, the applicant stated that the case before the Commercial and Tax Division is between the respondents themselves. He also stated that in spite of amending their plaint, the 1st – 3rd respondents had failed to join him in those proceedings. I have perused a copy of the annexed amended plaint in HC Commercial No E026 of 2018 and note that the applicant is joined an interested party in that suit.
14. The applicant has set out in his grounds in support of the motion that he purchased the suit property pursuant to a public auction. In paragraph (c) of the amended plaint, the 1st – 3rd respondents prayed for “a declaration that the subsequent sale of the subject property by the 1st defendant to the interested party was illegal.” The Applicant filed a notice of appointment through his current advocates vide notice dated October 27, 2022.
15. The applicant was thus aware of the existence of the earlier suit, is aware that the subject matter is that suit is the same property he is claiming as at the time of prosecuting his application. Having become part of that suit (HCC Com & Tax E026 of 2018), he became aware that the orders being sought on the 1st – 3rd Respondents suit will have a bearing on this suit. He has an opportunity to ventilate his claim if any in the 1st -3rd respondents’ suit either directly or through the bank instead of severing the claims as he is trying to do.
16. Section 6 of the *Civil Procedure Act* provides;

“Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.” (underline mine for emphasis)
17. In *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No 25 of 2002 [2009] KLR 229, the Court of Appeal held that:

“The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in *bona fides* and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it...The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice. Examples of the abuse of the judicial process are: -

 - i. Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
 - ii. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
 - iii. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.



- iv. Where there is no iota of law supporting a court process or where it is premised on frivolity or recklessness."
18. The order of injunction is an equitable remedy and he who seeks equity must come with clean hands. Here, the applicant has come to court with unclean hands for the following reasons:
- i. Filing two suits when the orders sought could be given in one court.
 - ii. Filing this application while aware there was a pending application on the issue of distress for rent which also touches on the possession of the suit property of the 1st & 2nd Respondents.
19. I find merit in the preliminary objection. Equally, I find no prima facie case established (seeking mandatory injunctive relief under the guise of a temporary order) to warrant the granting of the orders sought. For these reasons, I dismiss the application dated September 28, 2022 with costs to the 1st – 3rd respondents.

DELIVERED AND DATED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023

A. OMOLLO

JUDGE

