



**Rubis Energy Kenya PLC v Estate of Josiah Munyua Kimemia & 2 others (Environment & Land Case E026 of 2022) [2023] KEELC 16011 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16011 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E026 OF 2022**

**LN MBUGUA, J  
MARCH 2, 2023**

**BETWEEN**

**RUBIS ENERGY KENYA PLC ..... PLAINTIFF**

**AND**

**THE ESTATE OF JOSIAH MUNYUA KIMEMIA ..... 1<sup>ST</sup> DEFENDANT**

**SIMON NGANGA MBUGUA ..... 2<sup>ND</sup> DEFENDANT**

**SUMA AUCTIONEERS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This suit was filed way of an Originating summons dated June 22, 2022, where the applicant is seeking a determination as to who is the lawful proprietor of the land known as LR No 21052 (No IR 66888) as between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for purposes of payment of rent and carrying out obligations under a lease agreement dated December 31, 1996 between it and one Josiah Munyua Kimemia.
2. A Notice of Motion application dated June 22, 2022 was filed contemporaneously with the suit. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants then filed the Notice of Motion application dated July 6, 2022 seeking orders to strike out the suit. On December 7, 2022, the court directed that both applications be heard together. Logic demands that the application of July 6, 2022 be determined first.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are the applicants in the above application. They seek orders for the suit to be struck out. The 2<sup>nd</sup> Defendant has sworn a supporting affidavit dated July 6, 2022, deposing that he is the bonafide purchaser for value without notice of the suit property from the 1<sup>st</sup> defendant and he is not aware of the existence of the lease agreement alluded to by the plaintiff.
4. He avers that upon realizing that the Plaintiff was in occupation of the suit premises, out of courtesy and in good faith, he approached the Plaintiff and indicated that he had no objection to it continuing to occupy the suit property for as long as it continued to pay rent as before to him, but the Plaintiff



refused to pay the rent. That is why he issued a formal demand to the Plaintiff to pay rent on August 10, 2020 and when it declined, he informed it that he would take appropriate steps to protect his interest. The 2<sup>nd</sup> defendant therefore instructed the 3<sup>rd</sup> Defendant on June 9, 2022 to recover rent arrears from the Plaintiff who is in default of its obligations as his tenant.

5. He avers that he sued the 1<sup>st</sup> Defendant as the previous owner in ELCC No E163 of 2021 Hon Simon Nganga Mbugua, Mp v The Estate of Josiah Munyua Kimemia and the court issued orders entitling him to the suit property which decree he forwarded to the Plaintiff vide a letter dated January 21, 2022.
6. In response to the application, the Plaintiff filed a replying affidavit sworn on October 7, 2022 by one Mike Kebaso, its in-house counsel. He deposes that the Plaintiff has been in occupation of the suit property by virtue of a subsisting lease agreement dated December 31, 1996 between itself and Josiah Munyua Kimemia (deceased) for a period of 30 years with an option to extend it further by 10 years. He further deposes that the Plaintiff learnt that Josiah Munyua Kimemia passed away but since it had lost contact with him, it decided to hold all rental payments accruing under the lease on stakeholder basis awaiting notification of appointment of an administrator of his estate.
7. He avers that the 2<sup>nd</sup> Defendant has consistently laid claim over the suit property particularly through his letters dated August 10, 2020, August 26, 2020, September 3, 2020 and September 7, 2020 but he is yet to deliver critical documents to the Plaintiff to prove his allegations of proprietorship as requested by the Plaintiff vide its letter dated February 7, 2022 since the 1<sup>st</sup> Defendant has never intimated to the Plaintiff that it has disposed the suit property.
8. He also avers that the Plaintiff received a proclamation notice and threats of eviction from the 3<sup>rd</sup> Defendant, ostensibly acting on instructions of the 2<sup>nd</sup> Defendant. He adds that the Plaintiff is willing to regularize its rent payment with either of the Defendants subject to the lease agreement as shall be determined by the court.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants seek a dismissal of this suit on the basis that the issue of ownership of the suit property has been determined by the court by virtue of the decree issued on August 19, 2021 in ELCC No E163 of 2021 Hon Simon Nganga Mbugua v Elizabeth Wambui Kimemia (Being sued as the administrator of The Estate of Josiah Munyua Kimemia). In that matter, the Defendant was ordered to deliver vacant possession of the suit property to the 2<sup>nd</sup> Defendant herein.
10. However, while that decree has not been appealed against or varied, the 1<sup>st</sup> Defendant has through the affidavit of Elizabeth Wambui Kimemia, an administrator of the estate of the 1<sup>st</sup> Defendant sworn an affidavit on December 2, 2022 contending that she filed an application to set aside the aforementioned decree on the basis that it is derived from a consent judgment entered into irregularly through misrepresentation of facts by the 2<sup>nd</sup> Defendant herein. She avers that the suit property is still in the name of the deceased and that the purported sale of the suit land was conducted prior to the issuance of the confirmed grant. Thus the property remains part of the undistributed property of the estate of the 1<sup>st</sup> defendant.
11. I have considered all the issues raised herein. In *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR, the Court of Appeal stated;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.



12. I find that the issues raised by the 1<sup>st</sup> defendant are rather weighty. It is crucial for the defendants to establish their claim of ownership of the suit property in a trial. In the circumstances, I find that at this stage, there is no conclusive determination of the question of ownership of the suit land which is the issue the Plaintiff herein seeks the court to determine. I hence find that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Notice of Motion application dated 6<sup>th</sup> July 2022 has no merits and the same is hereby dismissed. The costs thereof shall abide the outcome of the suit.

### **Application dated June 22, 2022**

13. The plaintiff is seeking interim injunctive orders restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants whether by themselves or through their agents from proclaiming, seizing or levying distress for rent or in any way interfering with plaintiff's occupation over the suit property. The plaintiff has cited the lease agreement dated December 31, 1996 as the basis of its prayers.
14. The application is opposed by the 1<sup>st</sup> Defendant by way of the replying affidavit sworn on December 2, 2022 by Elizabeth Wambui Kimemia, an administrator of the estate of the late Josiah Munyua Kimemia. She deposes that the deceased died on April 11, 2001 and though a certificate of confirmation of grant of his estate was issued on May 11, 2007 and rectified on July 22, 2022, the suit property is not listed as part of the assets of the deceased since his administrators were not aware of its existence until October 3, 2022 when she was served with the instant pleadings.
15. She avers that the suit property is registered in the name of the deceased and admits there exists a lease between him and the Plaintiff. She adds that a portion of rental fees agreed under the lease was paid to the deceased in advance and that she has written to the Plaintiff formally objecting to the release of any rental income held by the Plaintiff under the lease agreement.
16. She contends that the sale of suit property prior to confirmation of grant of letters of administration was irregular and that she never participated in the proceedings in ELC No E163 of 2021 in which a decree entitling the 2<sup>nd</sup> Defendant herein to the suit property was issued. She avers that she has filed an application to set aside the said decree.
17. The application is also opposed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide the replying affidavit sworn on September 26, 2022 by the 2<sup>nd</sup> Defendant. The same mirrors his averments in support of his application dated July 6, 2022.
18. I have considered all the arguments and submissions proffered herein. As spelt out in the case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358, the Principles for grant of an injunction require the Applicant to demonstrate that he has a prima facie case against the Respondent with high chances of success, that the Applicant will suffer irreparable loss that cannot be compensated in damages if the orders sought are not granted and when in doubt the court determines the matter on a balance of convenience.
19. The Plaintiff admits that he is in rent arrears to his land lord Josiah Munyua Kimemia (Deceased) and also admits that he is ready to pay up. On the other hand, the 2<sup>nd</sup> Defendant admits that he instructed the 3<sup>rd</sup> Defendant to send a proclamation notice for distress of rent to the Plaintiff on the basis that he owns the suit property. The 1<sup>st</sup> Defendant disputes the 2<sup>nd</sup> Defendants ownership.
20. I find that the Plaintiff has been left at cross-roads as to who is the rightful owner of the suit premises. That is the question he seeks to be determined in this suit. As already stated herein, the questions raised by the 1<sup>st</sup> defendant are rather weighty, that the suit property was allegedly sold contrary to the *Law of Succession Act*. The plaintiff clearly has a lease agreement dated December 31, 1996 between him and



Josiah Munyua Kimemia (deceased). In the circumstances, I find that the plaintiff has established a prima facie case.

21. Will the Plaintiff suffer irreparable loss if the orders sought are not granted? The Plaintiff has established that he has been in a long-term lease agreement running a business on the suit land. If the distress is allowed to continue, the Plaintiff stands to suffer irreparable loss. The balance of convenience also tilts in its favour as it has all along been in occupation of the suit property. The deserving party will be paid the arrears due when the question of ownership is determined.
22. I therefore find that the application dated June 22, 2022 is merited. The same is allowed and the costs thereof shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Kyalo holding brief for Kiprotich for the Plaintiff

Kubai for 1<sup>st</sup> Defendant

Sheuda holding brief for Khaemba for 2<sup>nd</sup> Defendant

Sheuda holding brief for Ojundwa for 3<sup>rd</sup> Defendant

Court assistant: Vanilla

