



**Ambwere T. S. & Associates v Wakufwa & others; Ouko & 2 others (Applicant) (Environment and Land Miscellaneous Application 47 of 2018) [2023] KEELC 17093 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17093 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 47 OF 2018**  
**SM KIBUNJA, J**  
**MAY 3, 2023**

**BETWEEN**

**AMBWERE T. S. & ASSOCIATES ..... PLAINTIFF**

**AND**

**FRANK NYAMBU WAKUFWA & OTHERS ..... DEFENDANT**

**AND**

**GETRUDE UMULISA OUKO ..... APPLICANT**

**MOSES MUNYAO NDUNDA ..... APPLICANT**

**MARY NAMALWA ..... APPLICANT**

**RULING**

1. The court has traced three pending applications in this matter. Two of the applications bear the same date. The one by Getrude Umulisa Ouko, 1<sup>st</sup> applicant, will be referred to as the first application and the one by Moses Munyao Ndunda, 2<sup>nd</sup> applicant, as the second application. The application by Mary Namalwa, 3<sup>rd</sup> applicant will be referred as the third application. This ruling is therefore for all the above listed three applications.
2. The first application by the 1<sup>st</sup> applicant and filed through Ms. Mkan & Co. Advocates. It seeks for inter alia the setting aside of the judgement and proceedings pending the hearing and determination of the main suit and that the applicant be granted unconditional leave to file defence and or response to the main case/taxation. The application is based on the eleven (11) grounds on its face marked (1) to (X1) and supported by the affidavit of Getrude Umulisa Ouko. It is the applicant's case that the plaintiff has already advertised her house for a public auction on the 1<sup>st</sup> February 2022 following a representative suit where the plaintiff was representing the defendants; that she had not instructed the plaintiff to represent her; she had been joined in the suit as the owner of the suit property; that she was not aware



of, or a party to the suit from which the execution emanated and the judgement against her was entered in error; the subsequent execution proceedings were equally entered by mistake as it was premised on an invalid judgement; that unless the stay of execution is granted, she will irreparable loss and damage.

3. The second application is by the 2<sup>nd</sup> applicant and was filed through Ms. Tarus & Co. Advocates. It seeks for temporary injunction restraining the respondents, their servants, workmen, agents, employees and otherwise whosoever from relieving the applicant of their possession of any property by way of attachment and sell pending the hearing and determination of this suit. The application is premised on the five (5) grounds on its face marked (a) to (e) and supported by the affidavit sworn by Moses Munyao Ndunda on the 26<sup>th</sup> January 2022. It is the applicant's case that on the 24<sup>th</sup> January 2022 he learnt of an impending auction through a tenant who had received proclamation documents. That as he had not been formally or informally been involved with the court proceedings, he contacted his advocates. That he has no personal interest whatsoever over the suit property Plot No. 413/11/MN Mombasa, but if the auction proceeds, it will be very prejudicial to the estate of John Musyoki Mbondo, the property's rightful owners. That the family of the said deceased has filed Machakos Succession Cause No. 80 of 2019. That the plaintiff had in bad faith instructed the 34<sup>th</sup> defendant/respondent to proceed and execute by attaching the suit property on the alleged presumption that it was his. That the auction should not be allowed to proceed in a suit that he was wrongly joined as that would cause great injustice to the estate of the deceased John Musyoki Mbondo, that was not involved in the suit. That if execution continues, he will suffer irreparably as he had been wrongly joined in the suit.
4. The third application is by the 3<sup>rd</sup> applicant and filed through Ms. Mamasaka & Kariuki Advocates. It seeks for leave for the said firm of advocates to come on record for the applicant after judgement; applicant be discharged from execution of the proclamation of attachment dated the 30<sup>th</sup> August 2021 by virtue of the agreement between the applicant's advocates and plaintiff and permanent injunction against the plaintiff restraining him from attaching and or auctioning the applicant's properties. The application is premised on the nine (9) grounds on its face marked (1) to (9) and supported by the affidavit sworn by George Odull advocate on the 4<sup>th</sup> October 2021. It is the applicant's case that following the plaintiff proclaiming and attaching her properties in satisfaction of a court awarded decree for payment of legal fees, the applicant's advocates entered into a settlement agreement with the plaintiff under which the applicant paid Kshs.250,000 in two installments in full settlement of her portion of the decree. That her attached goods were released but the plaintiff has decided to go against the settlement agreement and apply for further warrants of attachment and sale of the applicant's property which will expose her to great prejudice.
5. The record shows that the first application was placed before the duty judge on the 27<sup>th</sup> January 2022, and among others certified as urgent in terms of prayer 1. The court granted prayer 2 of stay of execution pending hearing and determination of the application. The court further issued directions that the application be served for inter partes hearing on the 16<sup>th</sup> March 2022 before court 3. The second application was equally placed before the duty judge on the 31<sup>st</sup> January 2022, and the court directed as follows;

“... I fail to appreciate the complaint of the applicant. He suggests that the property being attached does not belong to him but to the estate of John Musyoki Mbondo. If that is the case, he cannot complain on behalf of an estate that has an administrator. I am therefore unable to certify the application as urgent or give any interim orders. If the applicant is still keen on the application, he can take a date at the registry and serve.”

The third application was also placed before the duty court on the 7<sup>th</sup> October 2021 and 12<sup>th</sup> October 2021 and certified urgent. Leave for the firm of advocates to come on record for the



applicant and interim stay of execution in terms of prayers 2 and 3 were granted pending the inter partes hearing on the 28<sup>th</sup> October 2021.

6. The court has perused the record and has not traced any reply by the plaintiff or any other party in respect to the second and third applications. However, there is on record a replying affidavit by Shitakha Tom Ambwere advocate sworn on the 2<sup>nd</sup> August 2022 in reply to the first application dated 26<sup>th</sup> January 2022 of on Getrude Umulisa Ouko, in which he among others deposed that contrary to the applicant's contention, she had on 20<sup>th</sup> April 2016 appended her signature and identity card number 20484510 giving her consent for the representative suit; that the applicant was the 25<sup>th</sup> plaintiff as the 3<sup>rd</sup> plaintiff was Jimmy K. Mongo as per the attached consent document; that the applicant's application has no merit and should be dismissed with costs.
7. The learned counsel for the 1<sup>st</sup> applicant and the plaintiff filed their written submissions dated the 24<sup>th</sup> February 2023 and 28<sup>th</sup> February 2023 respectively which the court has considered.
8. The following are the issues for the court's determinations;
  - a. Whether 1<sup>st</sup> applicant has set out a reasonable case for setting aside the judgement and proceedings, and if so in respect of which suit.
  - b. Whether the 1<sup>st</sup> applicant should be granted unconditional leave to defend the casa/taxation.
  - c. I have perused the record and it is abundantly clear the 8<sup>th</sup> defendant has not taken any steps to fix the second application for hearing. I have also not seen evidence that the application has been served upon any of the respondent though more than one year lapsed from the date of filing.
  - d. Whether the 2<sup>nd</sup> application has met the threshold for grant of temporary injunction to restrain the plaintiff from selling the proclaimed property.
  - e. Whether the 3<sup>rd</sup> applicant has satisfied the threshold for issuing of permanent injunction against the plaintiff and whether an order discharging her from execution proceedings should issue.
  - f. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> applicants have served their applications upon the plaintiff.
  - g. Who pays the costs in each of the three applications.
9. The court has carefully considered the grounds on each of the applications, the affidavit evidence, submissions filed as detailed above, the record and come to the following findings;
  - a. I have perused the record and it is abundantly clear Moses Munyao Ndunda, the 2<sup>nd</sup> applicant, has not taken any steps to comply with the court's directions of 31<sup>st</sup> January 2022 to set down the second application for hearing for over one year. I have also not seen evidence that the application has been served upon any of the plaintiff/respondent even though more than one year has lapsed from the date of filing it. That the plaintiff could not have been expected to respond to the application without it being brought to his attention through formal service. The applicant probably decided to abandon the application after the court in its directions of 31<sup>st</sup> January 2022 questioned his capacity to question or complain about the attachment of property that belonged to the estate of the late John Musyoki Mbondo while he is not an administrator of the said estate. That as under section 1A (3) of the *Civil Procedure Act*



chapter 21 of Laws of Kenya the applicant and his counsel are under a duty to assist the court to further the overriding objective of facilitating the just, expeditious, proportionate and affordable resolution of this dispute, by complying with the court's directions and have failed to do so, the court finds justice will better be served by taking the application to have been abandoned and strike it out with no orders as to costs. That will go towards furthering the overriding objective by ensuring there is no further delay and foster the timely disposal of the proceedings at an affordable cost in accordance with section 1B(1)(d) of the said Act.

- b. That in relation to the third application by Mary Namalwa, the 3<sup>rd</sup> applicant, there is no evidence that the same has been served upon the plaintiff or any steps taken to set it down for hearing from the 12<sup>th</sup> October 2021 when the interim order of stay was granted. That as more than one year has lapsed and there has been no application made and granted to extend the interim order, the same stands lapsed in terms of order 40 rule 6 of Civil Procedure Rules. That for the same reasons of party/counsel duty to the court as set out in respect of the second application in (a) above, the third application is also taken to have been abandoned and hereby stuck out.
- c. Returning the first application by Getrude Umulisa Ouko, the 1<sup>st</sup> applicant, the same has been opposed through the plaintiff's replying affidavit as shown above. Both counsel filed submission and primarily what the applicant point out is that the identification card presented to the court as hers is not clear. The plaintiff, as the respondent, has reiterated that the applicant was the 25<sup>th</sup> plaintiff in the primary/original suit, ELC No. 81 of 2016 (OS). Annexed to the replying affidavit is the consent document that the plaintiff deposed that all the plaintiffs had signed indicating their identity card numbers as they gave him instructions. It is instructive that the applicant has not disputed the details of the identity card that the plaintiff deposed as hers. If indeed the signature on the document attributed to the applicant was indeed not hers but a forged one, a reasonable person would have expected the applicant would by now have reported to the Directorate of Criminal Investigation for appropriate action. The court finds that the applicant has failed to show that she was not among the people who instructed the plaintiff to file ELC No. 81 of 2016 (OS) on their behalf. In that suit, the plaintiff was later replaced as counsel and he filed his bill of costs in this file, ELC Misc. Appli. No. 47 of 2018, for taxation which was done. What the plaintiff is executing is the decree of this court against his former clients who were the plaintiffs in ELC No. 81 of 2016 (OS) who include the 1<sup>st</sup> applicant as the 25<sup>th</sup> plaintiff.
- d. The applicant has not attached to her application the judgement or ruling that she seeks to set aside. I have perused the entire file and I have not come across any interlocutory judgement that was entered against the applicant in ELC No. 81 of 2016 (O.S) or in this current miscellaneous application. I have however, come across the court's Ruling dated the 11<sup>th</sup> November 2020 on the plaintiff's application dated 20<sup>th</sup> May 2020, where he sought an order for judgement to be entered against the respondents for the sum of Kshs 970,175/= as stated in the certificate of costs dated 13<sup>th</sup> March 2020. The court allowed the application and granted the plaintiff a sum of Kshs 970,175/- jointly and severally against the respondents (including the 1<sup>st</sup> applicant herein). As already stated earlier, what the 1<sup>st</sup> applicant claims is that she neither instructed the plaintiff's firm to represent her in ELC No. 81 of 2016 (OS) nor participated in the said suit or in this present miscellaneous application. The plaintiff on the other has rejected this position and argued that the 1<sup>st</sup> applicant was the 25<sup>th</sup> plaintiff in Mombasa ELC No. 81 of 2016 (OS) and that there was an advocate-client relationship between the 1<sup>st</sup> applicant and the plaintiff. The plaintiff has attached consent to file a representative suit dated 20<sup>th</sup> April 2016 and filed



on 21<sup>st</sup> April 2016 in ELC Civil Suit No. 81 of 2016 (O.S). The consent demonstrates among others, that the 1<sup>st</sup> applicant instructed Frank Nyambu Wakufwa and 3 others to file, defend and prosecute the suit on their behalf. The 1<sup>st</sup> applicant claim that she had not instructed the respondent to file suit on her behalf therefore fails.

- e. In my view, the applicant is seeking to set aside the ruling of the court dated 11<sup>th</sup> November 2020 and its consequential orders. However, the applicant has failed to establish that the said ruling was delivered in default of appearance, as I have come across a Notice of Appointment of Advocate dated 11<sup>th</sup> January 2019 and filed on 14<sup>th</sup> January 2019 by the firm of Chebukaka & Associates Advocates. The said advocates were entering appearances for all the 41 respondents herein (including the 1<sup>st</sup> applicant). The plaintiff herein served the firm of Chebukaka & Associates Advocates with a hearing notice dated 4<sup>th</sup> September 2020, for the hearing of the application dated 20<sup>th</sup> May 2020 on the 13<sup>th</sup> October 2020. The plaintiff also filed a return of service on 12<sup>th</sup> October 2020. I do also note that the court in its ruling noted that despite being served, counsel for the respondents (the firm of Chebukaka & Associated Advocates) did not appear. It is therefore the finding of this court that the 1<sup>st</sup> applicant has also failed to establish any grounds upon which the ruling dated 11<sup>th</sup> November 2020 can be varied, reviewed and or set aside. It follows that the applicant's notice of motion is without merit.
  - f. As under section 27 of the *Civil Procedure Act* costs follow the event, the 1<sup>st</sup> applicant, Getrude Umulisa Ouko, will pay the plaintiff/respondent costs in the application.
10. That in view of the foregoing, the court finds and orders as follows;
- a. That the applications dated the 26<sup>th</sup> January 2022 and 4<sup>th</sup> October 2021 by Moses Munyao Ndunda and Mary Namalwa, the 2<sup>nd</sup> and 3<sup>rd</sup> applicants herein, are deemed to have been abandoned and consequently struck out with no order as to costs.
  - b. The notice of motion dated the 26<sup>th</sup> January 2022 by Getrude Umulisa Ouko, the 1<sup>st</sup> applicant herein, is without merit and is hereby dismissed with costs to the plaintiff/respondent.
  - c. There being no other pending matter this suit be and is hereby closed.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 3RD DAY OF MAY 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF;**

**PLAINTIFF/RESPONDENT: Absent**

**DEFENDANTS: Absent**

**APPLICANTS : Absent**

**COUNSEL: Mr. Mkan for the Applicant/Respondent and Mr. Bwire for Respondent/Applicant.**

**WILSON – COURT ASSISTANT.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

