



**Troy Medicare Pharmacy Limited v Nishapa Investments Limited & another
(Environment & Land Case E236, E235, E033, E035, E036 & E032 of 2023
(Consolidated)) [2023] KEELC 20390 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E236, E235, E033,
E035, E036 & E032 OF 2023 (CONSOLIDATED)**

MD MWANGI, J

OCTOBER 6, 2023

BETWEEN

TROY MEDICARE PHARMACY LIMITED PLAINTIFF

AND

NISHAPA INVESTMENTS LIMITED 1ST DEFENDANT

FASHION PLAZA LIMITED 2ND DEFENDANT

RULING

Background

1. On 23rd August, 2023, the Presiding Judge of the land Division of the Nairobi ELC directed that all the files relating to the suit premises, the subject matter in ELCC E236 of 2023 and ELCC E235 of 2023 be handled by this Court to avoid the possibility of different courts issuing contradictory orders. The Learned Judge therefore ordered that all the files be mentioned before me on 29th September, 2023.
2. The purpose of the mention before the Court was to give directions on the hearing and disposal of the numerous pending interlocutory applications in the respective files. There are a total of 13 applications so far, all pending hearing.
3. On the said mention date however, Senior Counsel, Dr. Khaminwa, the leading Counsel for the Plaintiff in ELCC No. E236 of 2023, proceeded to make an oral application seeking the immediate reinstatement of his client, Troy Medicare Pharmacy Ltd into the suit premises. Dr. Khaminwa SC alongside Mr. Kiprop and Mr. Mutunga, all representing Troy Medicare Pharmacy Ltd submitted that their client had been illegally evicted from the suit premises by hired goons in spite of the orders of this court of 21st July, 2023. The Advocates passionately submitted that the Plaintiff had heavily invested into the suit properties by creating a total of approximately 500 stalls which she had in turn subleased



to small-scale business people who are carrying out diverse business ventures therein. The Plaintiff had borrowed money in millions, as put by the Advocates, for purposes of creating the stalls. They mentioned the figure of Kshs 150 million. The repayment of the loans was dependent on the rents that the Plaintiff had expected to collect from the sub-tenants. Consequent to her eviction from the suit premises, the Plaintiff has been unable to service the loans and is now at a risk of bankruptcy.

4. The Plaintiff's Advocates therefore pleaded with the court to exercise its authority and discretion to reinstate their client into the suit premises forthwith awaiting the hearing and determination of the applications and cases filed by the various parties. Their position was that the contracts/leases entered into between their clients and the owners of the suit premises were still valid and in force.
5. The application by the Plaintiff's Advocates was strenuously opposed by the Advocates for the owners of the suit premises - Nishapa Investments Ltd, Fashion Plaza Ltd and Peekee Developers Ltd, the Interested Parties who are sub-tenants in the suit premises and Royal Palms Mustard Ltd, the new head-tenant.
6. Mr. Gisemba Advocate for the owners of the premises submitted that ownership of the suit premises was not in dispute. His clients admitted leasing the suit premises to Troy Medicare Pharmacy Ltd but the leases had since been terminated for breach of the covenants therein. He submitted that at the time of termination, the Plaintiff was in rent arrears totaling Kshs. 156 million. He dismissed the assertion that his clients were discriminative of Troy Medicare Pharmacy Ltd since it was headed by a woman. The only reason for the termination of the leases was breach of the terms of the lease.
7. Mr. Gisemba further proffered that his clients had since leased both premises to a new entity called Royal Palms Mustard Ltd and which was in possession as from 13th July, 2023. By the time this Court was issuing its orders of 21st July, 2023, Royal Palms Mustard Ltd was already in possession of the suit premises. That is what prompted the filing of the application dated 25th July, 2023 seeking that the court vacates its orders of 21st July, 2023.
8. Mr. Gisemba submitted that Troy Medicare Pharmacy Ltd was attempting to force itself on the Landlords. He opined that the only issue before the court was whether the termination of the leases was lawful or not. In case the finding was that the termination was not lawful, Troy Medicare Pharmacy Ltd could be compensated by way of damages.
9. Mr. Miano Advocate for Royal Palms Mustard Ltd on his part in his submissions pointed out that the matter was only scheduled for mention and directions yet the Plaintiffs were praying for substantive orders. He termed the Plaintiff's move as trial by ambush.
10. Mr. Miano submitted that his client had filed suits No. ELCLC E032 of 2023 and ELCLC E033 of 2023 to protect its rights which were being jeopardized by the dispute between the Plaintiff and the Landlords. He reminded the court that the causes were still at the preliminary stage and the orders sought by the Plaintiff cannot issue at this point in time. He urged the court to maintain the status quo orders which were informed by the site visit and the subsequent report of the Deputy Registrar of this court. He urged the court to stamp its foot down and give directions on the hearing of the pending applications.
11. Mr. Opiyo Advocate too submitted in opposition to the oral application by the Plaintiff's Advocates. He submitted that his clients had not entered into any formal agreement with the Plaintiff. Therefore, when the lease between the Plaintiff and the Landlords was terminated, they automatically became the tenants of the Landlord. The Landlord on 30th July, 2023 directed them to pay their rents to the new head tenant, Royal Palms Mustard Ltd and they duly complied.



12. Mr. Opiyo stated that his clients were happy with the status quo orders issued by this court on 21st August 2023 as his clients were enjoying quiet possession and there was no confusion as to the payment of rent.
13. Mr. Wasaga Advocate for the Interested parties too agreed with the submissions by Mr. Opiyo. Both advocates represent sub-tenants. Mr. Wasaga submitted that the dispute herein is on the legality of the termination of the leases between the Plaintiff and the Landlords and which issue can only be determined after the hearing of the cases. He prayed for the maintenance of the orders of status quo.
14. Mr. Mutunga in rejoinder on behalf of the Plaintiff reiterated that his client was evicted by Royal Palms Mustard Ltd and not the Landlords. Dr. Khaminwa on his part stated that if any party had been unhappy with this court's orders of 21st July, 2023, it should have come back to court to have it varied and or set aside. He reminded the court that it is also a court of equity and good conscience. The court should therefore ensure that no party suffers incurably.

Determination

15. In making my determination, I will be deliberately economical with my words conscious of the fact that there are pending applications which this court will be considering shortly. To say the least what is before me is a classic example of a convoluted matter hence the caution on the part of the court not to be seen to descend into the arena where its vision may become blurred by the dust of the conflict.
16. As I pointed out from the outset, these matters were listed before me on the 29th September, 2023 for mention and directions. The Advocates for the Plaintiff however resulted to an oral application on behalf of their client.
17. I note from the brief proceedings before Judge Lucy Mbugua that a similar application was made before her but she declined to consider it since as she rightly stated, the files had been placed before her for administrative directions only.
18. I need at this juncture to state that the administration of justice in this country is premised on the Constitution, the Statutes and the various rules, practices and laid down procedures. The practices, rules and procedures serve to make the process of Judicial adjudication and determination fair, just, certain and even handed, as eloquently elaborated by Justice Kiage, JA in the case of Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 others [2013] eKLR.
19. Courts must therefore not aid in the bending and circumventing of rules because, 'while it may seem to aid one party, it unfairly harms the innocent party who strives to abide by the rules and procedures.'
20. I echo the sentiment by the learned Judge of Appeal that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity.
21. There exists a plethora of authorities that a matter cannot proceed to hearing unless with the express consent of all the parties, neither can substantive orders issue on a mention date. (See Rahab Wanjiru Evans v Esso (K) Ltd [1995-1998] 1 EA 332, & Daniel Maingi Muchiri v Jubilee Insurance Co. Ltd [2017] eKLR.)
22. The application by the Plaintiff was made on a date scheduled for mention and directions without notice to the other parties. The application too was orally made with the Advocates literally giving evidence from the bar. I agree with learned Advocate Mr. Miano that it was trial by ambush. In contested matters like this one, there is no room for oral applications for substantive orders except maybe to correct typographical errors or insignificant omissions in the pleadings.



23. While I have no doubt in my mind that this court has a wide discretion as intimated by the Plaintiff's Advocates, the discretion must be exercised judiciously and within the confines of the law. Lord Mansfield in the case of R vs. Wilkes, rightly defined the term "discretion" when applied to courts of justice to mean "sound discretion guided by law". It must be governed by rules, not by humour; it must not be arbitrary; vague and fanciful, but legal and regular.
 24. I feel the urgency in the submissions by the learned counsel for the Plaintiff to have this matter resolved; but whatever we do in the name of the administration of justice must be within the law. This Court is a court of record and must never lose sight of the repercussions of what it decides and how it decides it. It must also be careful on the precedent it may be setting.
 25. The upshot is that the application by the Plaintiff is disallowed.
 26. This Court will, exercising its authority under the provisions of Order 11 of the *Civil Procedure Rules*, with a view to furthering the expeditious disposal of the numerous interlocutory applications pending in the respective files convene a case conference in the shortest possible time under rule 3(2) thereof for purposes of creating a suitable schedule or timetable, (as referred to in the rules) to facilitate expeditious hearing and disposal of those applications. The court will also consider the possibility of consolidating the files.
 27. In the meantime, the status quo orders issued by this court on 21st August 2023 shall remain in force.
- It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF OCTOBER 2023.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Dr. John Khaminwa with Mr. Mutunga for Troy Medicare Limited

Mr. Miano holding brief for Ms. Otunga for Royal Palms Mustard Limited

Mr. Gisemba for Nishapa Investment Limited, Fashion Plaza Limited & Peekee Developers Ltd.

Mr. Opiyo for 16 Interested Parties/Sub-tenants

No appearance for the 2nd Interested Party

