



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC CASE NO. 41 OF 2020**

**CELINA NKIRINA.....PLAINTIFF**

**VERSUS**

**SUSAN NKATHA.....1<sup>ST</sup> DEFENDANT**

**TERESIA KAINDIA THIRINDI.....2<sup>ND</sup> DEFENDANT**

**PATRICK KAMENCU ROBERT.....3<sup>RD</sup> DEFENDANT**

**MARTHA WANJA GITONGA.....4<sup>TH</sup> DEFENDANT**

**CONSOLIDATED WITH ELC CASE NO. 42 OF 2020**

**DANIEL KIRIMI MUTUA.....PLAINTIFF**

**VERSUS**

**PATRICK KAMENCU ROBERT.....1<sup>ST</sup> DEFENDANT**

**SUSAN NKATHA.....2<sup>ND</sup> DEFENDANT**

**TERESIA KAINDIA THIRINDI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiffs in the two suit filed their complaints dated 10.9.2020 seeking orders inter-alia, a declaration that their eviction from plot 3 and 3A (hereinafter the suit premises) in Laare market was unlawful, malicious and callous and they sought orders to be reinstated back into those premises. The plaintiffs also filed applications contemporaneously with the suit pursuant to the provisions of Sections 1A & 3A of the Civil Procedure Act and Order 40 Rule 1, 2 & 10 of the Civil Procedure Rules, 2010 seeking the following orders;

1) Spent.

2) A mandatory injunction to be issued to compel the defendants to immediately reinstate the plaintiffs in their business on plot number 3 and 3A Laare market, from which they were evicted on 2/9/2019, on the grounds that the eviction herein present a clear case of stealing a match, abuse of the court orders and processes, during the covid-19 moratorium period and present special circumstances of a wrongful determination of a protected and controlled tenancy, for which a mandatory injunction and restitution are designed to remedy, to prevent the defendants from maintaining a position of advantage obtained illegally.

3) A prohibitory injunction do issue barring the defendants or any of them from letting out or otherwise parting with possession of the plaintiffs business premises, until the hearing and determination of above prayers and ultimately the suit.

4) Directions as to service of this application, pleadings and any order that may issue at the ex parte stage are given.

5) Costs of the application.

2. When the application dated 10.9.2020 was presented before me on 16.9.2020, I gave directions for the same to be served for interpartes hearing on 5.11.2020. Soon thereafter, the plaintiffs filed another application dated 23.9.2020 seeking an order of review of the directions given on 16.9.2020 and to substitute the said orders with those of “*maintaining the status quo ante by preserving in vacant possession of the suit premises until 5.11.2020*”. Since the orders sought in the application of 23.9.2020 were not given, then I hereby proceed to mark the said application as SPENT.

### Case for the applicants

3. The application of the plaintiffs is premised on the grounds on the face of the application as well as the supporting and supplementary affidavits of the applicant. The claimant for plot no. 3, avers that she has been carrying out a business therein having entered the premises with authority of M’Mirongo M’Uthaka who is deceased and later in 2018, she continued to use the premises with authority of Martha Wanja Gitonga, a wife of the a deceased son of M’Mirongo known as Gitonga Robert. She has paid rent in advance up to December 2021. For plot 3A, the applicant was carrying out hotel business, being a tenant of one Patrick Kamenchu Robert. He has paid rent in advance in respect of the suit premises up to September year 2022.

4. The applicants contend that they were unlawfully evicted from the suit premises on 2.9.2020 in the presence of the OCS, Laare police station. That upon inquiry, they were told that there was a court order to that effect. The applicants aver that they were not aware of the court order and that the said order was obtained in proceeding where they had no locus standi as the same was in the estate of the deceased, where they were not beneficiaries therein. That no tenant was afforded a hearing before the High court, where the suit premises were awarded to Susan Nkatha and Teresia Kainda and that the plaintiffs have been condemned unheard. They have also averred that during the eviction, their goods, and equipment in trade were stolen and damaged. Further the Chief Justice had issued a statement barring evictions in respect to orders made during the Covid pandemic.

5. The applicants seek orders of reinstatement into the suit premises so as not to be rendered destitute and to prevent the defendants from maintaining a position of advantage illegally acquired.

6. The applicants submitted that they were not parties to the succession cause, that the high court order was not served upon them hence they were not afforded an opportunity to be heard and that the said court proceeded to determine the application as if it had jurisdiction for a matter of occupation and use of a deceased persons landed property by 3<sup>rd</sup> parties who were not named in any capacity in the succession cause. Want of joinder of the plaintiffs deprive the high court of jurisdiction to issue eviction orders against strangers and their lack of participation in the proceedings giving rise to the eviction orders render the said proceedings and eviction order null and void and the same amounts to nothing thus the plaintiffs were not obliged to move the court to set aside a void order.

7. The plaintiffs had no standing before the family court and the right to appeal from the impugned order cannot be belatedly exercised after lapse of a long time without visiting grave injustice to the tenants whose term relative to the premises is expiring in 2021/2022. The applicant also could not have gone to the Business Premises Rent Tribunal as the landLord-tenant relationship was severed and their only recourse was to file this suit and invite the court to make ex-debito justice interim mandatory injunction to reinstate the tenants.

8. In support of their case, the applicants relied on the following authorities

- **Craig vs Kanseen (1943) 1KB 25; 1943 1 All ER. 108.**
- **Macfoy vs United Africa Company Limited (1961).**
- **Kamau Mucuha vs Ripples (1992) CA 186 (Hancox CJ, Kwach and Cockar JJ A)**
- **Charles Mwangi Kamau vs Mohammed Hassan Sheik Noor (2005) H.C.C.C No. 2 of 2005 (Ruling of DK Maraga J.) (as he then was) (Unreported).**

9. The Susan Nkatha and Teresia Thirindi are the named as he 1<sup>st</sup> and 2<sup>nd</sup> respondents in the case no.41 of 2020, while they are listed as 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the case no. 42 of 2020. They have opposed the application via the replying affidavits of Susan Nkatha dated 4<sup>th</sup> November, 2020. It is deponed that Patrick Kamencu Robert and Susan Nkatha are siblings, children of Teresia Kainda Thirindi.

10. Susan avers that her brother Patrick is the one who filed Meru High Court Succession Cause No. 308 of 2010 where the court awarded her and her mother the suit plots in Laare as per the judgment dated 14/02/2019. That she made an application for the eviction of the plaintiffs among others which application was allowed vide eviction order dated 27/04/2020 and the court authorized and empowered the O.C.S Laare Police station to carry out the eviction. She added that the suit is incompetent as it is the court which authorized the said evictions, hence the application should be dismissed with costs to the two respondents.

11. It was submitted for the aforementioned respondents (Susan and Teresia) that the applicant can only challenge the eviction order in the succession cause as per Section 34 of the Civil Procedure Act. Further, the issue of jurisdiction cannot arise as the succession cause did not concern either the environment and use and occupation of or title to land. They urge the court to dismiss plaintiff’s suit entirely with costs to the aforementioned respondents.

### **Determination**

12. The issue for determination is whether this court should grant the orders sought in the applications dated 10.9.2020 or whether the two suits should be struck out.

13. I find that the applications at hand are primarily seeking to overturn the order issued in **Meru High Court Succession Cause No. 308 of 2010**. The said order dated **26.8.2020** which has been availed by Susan states as follows:

(a) *“Patrick Kamencu do pay Kshs.1,190,000 to the objector/applicant.*

(b) *The tenants who owe obedience to Patrick Kamenchu and in particular Daniel Kirimi Mutua and other tenants be and hereby evicted to give vacant possession to Susan Nkatha.*

(c) *The OCS Laare police station be and is hereby authorized and empowered to enforce this order by evicting the tenants from plot no. 3 Laare Market.*

(d) *Patrick Kamenchu be committed to civil jail for contempt of court.*

(e) *Costs to the objector/applicant”.*

14. It is crystal clear that the eviction of the applicants from the suit premises was through a court sanctioned process. Even if this court has jurisdiction to deal with matters of Land and environment, including occupation and use of such land, the court cannot give orders whose end result would be to overturn decisions given by the High court.

15. In the case of **Salesio Mati Mwirichia vs Fredrick Mugambi and another (2017) EKLRL**, It was held that;

***“It is good practice and correct thing for judges to respect judgements delivered by their brothers and sister judges ..... I find that I have no jurisdiction to set aside the judgement delivered by a judge who then had both concurrent and horizontal jurisdiction similar to the jurisdiction I have .....”***

16. In the case of **Alvin Mbae and 2 others vs Kinyua Muketha and 2 others (2018) eKLR**, the court had this to say on matters jurisdiction.

***“I find that I have no authority to decide in favour of the plaintiffs when another court which had horizontal jurisdiction similar to mine had found the issues concerning the suit land as having been heard and determined on their merits..... A studios by stander watching the court doing so would surmise that he is beholding veritable judicial phantasmagoria. A decision made by a judge seized of concurrent and/or horizontal jurisdiction with another judge having his decision juxtaposed against that of another of similar status!, he would think that the judiciary is a house of babel. I think that this would spawn judicial anarchy and chaos. I opine that the plaintiffs have been involved in a forum shopping misadventure.”***

17. What resonates from the above case law is that this court has no authority to set aside the orders made in the succession cause on 26.8.2020 which paved way for the eviction of the applicants. The reason being that this is a Court of Equal status with the High court, having concurrent and horizontal jurisdiction on some matters. Thus this court cannot in any way cloth itself with appellate attires in so far as the orders issued in the succession cause are concerned. This is not a procedural technicality which is easily curable. Nay, it is, in my view a jurisdictional issue which cannot be wished away. In light of the foregoing analysis the application must fail.

18. Finally, this court has been urged to strike out the two suits for want of jurisdiction. In as much as this court has made it clear that it will not reverse the orders of the High Court, on the other hand, I am not inclined to strike out the suits at this interlocutory stage. Not until the issue is formally raised by way of a preliminary objection on matters jurisdiction.

**19. The end result is that the applications dated 10.9.2020 in both suits are hereby dismissed with costs to Susan Nkatha and Teresia Thirindi.**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 5<sup>TH</sup> DAY OF MAY, 2021 IN PRESENCE OF:**

C/A: Kananu

Kimani Gucha for applicants

Sandi for defendants

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**