



REPUBLIC OF KENYA



**Dapash v Aharoni (Miscellaneous Cause E046 of 2025)
[2025] KEHC 5287 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5287 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CAUSE E046 OF 2025**

G MUTAI, J

APRIL 24, 2025

BETWEEN

MARION SILAU DAPASH APPLICANT

AND

YEHUDA AHARONI RESPONDENT

RULING

1. The Notice of Motion before the Court is dated 22nd February 2025. It is expressed to be brought under Articles 47, 48, 50 (1), 53, 159 and 165 (6) of *the Constitution* of Kenya, 2010 and Sections 1A, 1B, 3, 3A, 18 and 80 of the *Civil Procedure Act*.
2. The applicant, Ms Marion Silau Dapash, seeks the following orders:-
 1. Spent;
 2. That this honourable Court be pleased to call for the Court file in Mombasa CMJCC No E002 of 2025; Yehuda Aharoni vs Marion Silau Dapash, in the exercise of its supervisory jurisdiction for the purpose of satisfying itself on the propriety of the proceedings before the trial Court and exparte eviction orders issued on the 20th February 2025;
 3. That this honourable Court be pleased to review, set aside and or vacate the exparte orders issued in Mombasa CMJCC No E002 of 2025; Yehuda Aharoni vs Marion Silau Dapash on the 20th February 2025 for being irregular and unprocedural pending the determination of this application;
 4. That this honourable Court be pleased to issue him order directing that the case in Mombasa CMJCC NO E002 of 2025; Yehuda Aharoni vs Marion Silau Dapash be transferred and be heard before another competent judicial officer other than Hon Noelyne Reuben Akee; and
 5. That costs of this application be provided for.



3. The applicant averred that there had been attempts to evict her from the house she was residing in with the issue of the relationship between her and the Respondent. She averred that unless this Court issued orders sought herein she would be evicted from the subject premises and that she would thereby suffer irreparable loss and damage and the application will thereby be rendered nugatory.
4. Upon being served the Respondent filed a Notice of Preliminary Objection dated 28th February 2025 which was based on the grounds that there had been a material non disclosure by the Applicant and that the Applicant hadn't complied with mandatory procedural requirements of the Civil Procedure Rules, in particular Order 42 Rule 6 of the Civil Procedure Rules and that the application was bad in law, frivolous, vexatious and unmeritorious and ought to be struck out with costs.
5. The Respondent also filed a Replying Affidavit sworn on 28th February 2025 vide which he stated that following persistent acts of domestic violence, he filed MGJCC NO E002 of 2025; Yehuda Aharoni vs Marion Silau Dapash, seeking protection orders from the Court below. The subject application was served on the Applicant herein on 19th February 2025 for hearing the next day.
6. He further deposed that the matter came up for hearing on 20th February 2025, on the said dated, Ms. Juma for the Applicant (in this cause) was present. He stated that prior to delivering her orders, the learned Magistrate heard all the parties and directed that the application would be heard on merits on 24th March 2025. In the meantime, the Applicant herein was granted 14 days to file a response to the application.
7. It was stated that the applicant was guilty of material non-disclosure to the extent that she alleged that the hearing proceeded without hearing her, and also on account that the hearing took place on a date the matter was due for mention when, in real fact, it had been slated for hearing.
8. The Respondent urged that he had been subjected to severe psychological, verbal and physical abuse by the Applicant. He stated in particular that the Applicant had threatened to kill him and that he was apprehensive that he was in danger given the fact that he is a foreigner and of advanced age.
9. He denied that the applicant had ever been his employee. He averred that he ran businesses in Mombasa, leased the suit premises and although he was an Israeli national, he spent most of his time in Mombasa, Kenya.
10. He denied that the Applicant would suffer an irreparable loss as he had in his view offered alternative accommodation.
11. He defended the trial court and averred that he acted procedurally in her ruling and that the decision was based on the compelling evidence which had been adduced.
12. He thus urged this Court not to interfere with the finding of the Court below.
13. Due to its urgency, the matter proceeded by way of oral submissions.
14. Ms Juma, for the applicant, submitted that the trial Court misdirected itself as it heard the matter on a date that was slated for direction. She stated that she was present. Despite her protest, the Court granted the eviction orders.
15. It was her submission that the effect of the grant of prayer 3 of the said Notice of Motion was that the entire suit became superfluous as the eviction was the main prayer in the suit before the court below.
16. It was urged that the hearing took place on a date the matter was slated for mention, something which the Applicant's counsel impugned.



17. She stated that the Court ought therefore to review the decision of the Court below.
18. The application was opposed by counsel for the Respondent. Mr Okeyo submitted that they raised a Preliminary Objection on the manner the Notice of Motion was filed. He urged that being dissatisfied with the decision of the trial Court the Applicant ought to have filed an appeal. He relied on the case of Nanjibhai Prabhudas & Company Ltd vs. Standard Bank Ltd [1968]EA 670 and submitted that an application must be anchored on a suit to be valid.
19. Mr. Okeyo stated that when the parties appeared before the court below the Applicant was overbearing. Upon observing the parties, the Court opted to have them stay in separate places. The Respondent was required to provide Kes.200,000.00 to the Applicant so that he could move out.
20. Counsel thus urged that this Court ought not to interfere with the decision of the Court below.
21. I have considered the application the responses thereto as well the submissions, both written and oral, filed by the parties.
22. It is well settled that the supervisory jurisdiction of the High Court should be exercised sparingly and only in exceptional circumstances.
23. It was stated in the case of Alice Sisina v Land Registrar Kajiado & another [2015] KEHC 640 (KLR)

“ 4. The supervisory powers of the High Court are enshrined in Article 165 (6) and (7) of *the Constitution* of Kenya. Article 165 (6) and (7) of *the Constitution* provides;

“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi - judicial function, but not over a superior court.

(7) For the purpose of Clauses (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in Clauses (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

The supervisory jurisdiction under Article 165 (6) and (7) of *the Constitution* empowers the High Court to move suo moto where it is necessary to ensure fair administration of justice or as to prevent abuse of the court process.”

24. In Republic v Chief Magistrate’s Court at Milimani Law Courts; Director of Public Prosecutions & 2 others(Interested Parties); Ex-parte Applicant: Pravin Galot [2020] KEHC 7529 (KLR)

“ 59. There is a clear distinction between supervisory jurisdiction, judicial review jurisdiction and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction, superior courts aim to keep subordinate courts within their prescribed sphere, and prevent usurpation. In order to exercise such control the power is conferred on superior courts to issue the necessary and appropriate writs.

60. This power of superintendence conferred by Article 165 (6) of *the Constitution*, as pointed out by Harries, C.J. in Dalmia Jain Airways Ltd. v



Sukumar Mukherjee, is to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the Court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under Article 165 (6) of *the Constitution* to interfere.”

25. In this case, the Court below issued drastic orders of eviction without first hearing the application on merits. Although Ms Juma was present when the orders were made, that alone does not mean that the hearing was a merit; hearing on merit requires that both parties present their respective cases for determination. In this case the Applicant was given 14 days to file a response as it had not done so. It was for that reason that a date for a hearing on merit on 24th March 2025 was fixed.
26. By allowing an eviction to be done within 2 days the Court failed to take into consideration paramountcy of the best interest of the child principle stated in Article 53(2) of *the Constitution* and Section 8 of the *Children Act, 2022*. It does not seem to me as likely for the Applicant to have obtained alternative accommodation within 2 days of the said date. Such an action would naturally prejudice the innocent child caught up in a tussle between his parents.
27. In any case, mandatory orders are not issued ex parte without a hearing on the merits unless there are exceptional circumstances. I do not, with respect, see what exceptional circumstances existed. It would appear that the Respondent wanted, with alacrity, to regain possession of his apartment. I say so as one of the ways he could avoid a violent spouse, at least until a decision on merit was made, would be for him to stay temporarily in a separate apartment. That, in my view, would have been the least disruptive option.
28. In the circumstances, I find the application to be one with merit, and I allow the same. I review and set aside the decision of the Court below of February 20, 2025. I direct that the cause be heard by another magistrate in the Mombasa Chief Magistrate Court with jurisdiction to hear the matter. In that regard, I order that Mombasa CMJCC NO E002 of 2025; Yehuda Aharoni vs Marion Silau Dapash be mentioned before the Hon Kalo, Chief Magistrate, on 30th April 2025 for purposes of reallocation.
29. I make no orders as to costs due to the nature of the matter.
30. It is so ordered.

DATED AND SIGNED IN MOMBASA THIS 24TH DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of



Ms Juma, for the Applicant;
Mr Okeyo, for the Respondent; and
Arthur - Assistant Court.

