



REPUBLIC OF KENYA



**Endmor Steel Millers & 2 others v Equity Bank (Kenya) Limited & another
(Civil Case E008 of 2025) [2025] KEHC 9132 (KLR) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE E008 OF 2025
RC RUTTO, J
JUNE 19, 2025**

BETWEEN

ENDMOR STEEL MILLERS 1ST PLAINTIFF

PAUL WATORO GICHU 2ND PLAINTIFF

NYAGINJINGA INVESTMENTS COMPANY LIMITED 3RD PLAINTIFF

AND

EQUITY BANK (KENYA) LIMITED 1ST DEFENDANT

WESTMINSTER COMMERCIAL AUCTIONEERS 2ND DEFENDANT

RULING

1. By a Notice of Motion application dated 20th March 2025, the 1st defendant has invoked the provisions of order 2 Rule 15 (1) (d) and order 40 Rule 7 of the Civil Procedure Rules 2010 and the inherent powers of the court seeking orders that :
 1. Spent;
 2. This application be heard in priority to the plaintiff's application dated 17th March 2025;
 3. The order of 18th March 2025 be set aside and/or discharged;
 4. The plaint dated 17th March 2025 be struck out;
 5. The costs of this application and of the suit be awarded to the 1st defendant.
2. The application is supported by the grounds contained on the body of the application and the affidavit of Kariuki King'ori, deponed on 20th March 2025, and further affidavit deponed on 7th April 2025 in his capacity as Manager, Legal services of the 1st defendant.



3. The 1st defendant avers that the plaintiffs had previously instituted Kiambu High Court Civil Case Number E008 of 2025 Endmor Steel Millers, Paul Watoro Gichu & another v Equity Bank Limited & another (the Kiambu proceedings) on 17th March 2025.
4. In the Kiambu proceedings, the plaintiffs sought interim reliefs, inter alia, an order restraining the 1st defendant from selling or appointing receivers or interfering with the plaintiff's ownership of LR Number 13330/338, LR Number Nairobi/ Block 77/360, LR Number Nairobi Umoja Block 83/854 and LR Number 12715/211 (charged suit properties) pending the hearing and determination of the application.
5. It is deponed that on 17th March 2025, Mshila J, considered the application filed under certificate of urgency filed in the Kiambu proceedings and did not grant any of the interim reliefs sought.
6. Mshila J, directed that the matter be transferred to Milimani High Court Commercial and Tax Division as the properties the subject of the suit are located in Nairobi.
7. It is the 1st defendant's case that the plaintiffs instead of complying with this order, filed a Notice of Withdrawal of the Kiambu proceedings and filed the exact same suit that had been filed in Kiambu before this court. It was deponed that the plaintiffs neither disclosed to this court that they had previously filed the Kiambu proceedings nor made this court aware that there were directions given by Mshila J, on 17th March 2025.
8. It is deponed that the 1st defendant was not served with the pleadings in the Kiambu proceedings and it had to retrieve the same from the Judiciary electronic filing system and on comparison found that the Kiambu proceedings and those in the instant suit are similar save for the place of suing.
9. It is deponed that this court, by an ex parte order made on 18th March 2025, granted prayer 2 of the plaintiffs' application dated 17th March 2025, restraining the 1st defendant from selling the charged properties, giving directions on the filing of a response to the injunction application and fixing the injunction application for hearing on 28th April 2025.
10. The 1st defendant avers that the plaintiffs were under duty to make full and frank disclosure of all the facts when approaching the court ex parte including disclosing the previous proceedings they had filed. It is deponed that as the plaintiffs did not disclose this, they did not approach the court on the basis of utmost good faith and clean hands thus the interim order of 18th March 2025 should be set aside.
11. It is also averred that the plaintiffs' actions amount to blatant abuse of the court process and forum shopping which should not be permitted. The 1st defendant buttress this contention with the Court of Appeal decision in Jane Njeri Karongo & Harrison Munga Karongo v Hannah Wanjiku Kamau [2021] KECA 802 (KLR).
12. The 1st defendant avers that it would be a travesty of justice to allow the plaintiffs abuse of the court process to continue by hearing and determining this matter.
13. The application is opposed through the 2nd plaintiff's replying affidavit dated 4th April 2025 and further affidavit deponed on even date.
14. This application was canvassed by way of written submissions as per the directions of this court on 8th April 2025. The 1st defendant's submissions are dated 15th April 2025 and the plaintiffs' submissions are dated 25th April 2025.



15. It is the 1st defendant's case that out of the four charged suit properties, only one, being LR Number 12715/211, is located in Machakos County. In light of this, the 1st defendant submits that the plaintiffs do not explain why they chose to file the suit in Kiambu County.
16. It is submitted that Mshila J, considered the application before her in the Kiambu proceedings and ordered that the matter be transferred to the Milimani High Court Commercial and Tax division as three of the charged properties are located in Nairobi.
17. It is submitted that a determination has been made that the dispute instituted by the plaintiff as set out in the plaint in the Kiambu proceedings should be heard and determined by the High Court Commercial & Tax Division in Nairobi.
18. It is contended that the plaintiffs were aware of this order but instead of complying with the order, filed a Notice of Withdrawal of the matter that has already been transferred to Nairobi on 18th March 2025.
19. It is submitted that on the same day, 18th March 2025, the plaintiffs filed the instant suit whose pleadings are identical to the proceedings in the Kiambu proceedings save for the place of suing.
20. It is submitted that this court gave an ex parte order on 18th March 2025 granting order 2 of the plaintiffs' application dated 17th March 2025 restraining the 1st defendant from selling the charged properties, giving directions on the filing of a response to the injunction application and fixing the injunction application for 28th April 2025.
21. It is urged that the plaintiffs admit that they did not disclose the previous Kiambu proceedings and the suit's transfer to Nairobi as evidenced by the replying affidavit sworn by Paul Watoro Gichu on 4th April 2025.
22. It is contended that decision to institute fresh proceedings in Machakos without disclosing the Kiambu proceedings is not an error but a deliberate act by the plaintiffs after they were aware of Mshila J's orders. In this regard, it is submitted that the decision in Phillip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR relied on by the plaintiffs is distinguishable from the present case.
23. It is urged that the plaintiffs' arguments that they had to withdraw the Kiambu proceedings because the court did not have jurisdiction is unsustainable. It is urged that High Court stations are purely administrative and there is only one High Court in Kenya. The 1st defendant relies on the decision in Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 Others [2005] 1 KLR 292 to fortify this assertion.
24. It is submitted that the decision in Phoenix of EZ Assurance Company limited v SM Thiga t/a Newspaper Service [2019] KECS 767 (KLR) is distinguishable from the present case.
25. It is urged that the plaintiffs had a duty to make full and frank disclosure of all facts when approaching the court ex parte including the Kiambu proceedings and that these proceedings had been transferred to Nairobi before they filed their Notice of Withdrawal. The 1st defendant relies on the decision in Uhuru Highway Development Limited v Central Bank of Kenya [1995] eKLR to bolster this assertion.
26. It is the 1st defendant's case that the order made on 18th March 2025 should be set aside as the plaintiffs failed to disclose material facts to the court. On this, it relies on the decisions in GOTV Kenya Limited v Royal Media Services & 2 Others [2015] KEHC 3792 (KLR), and Total Kenya Limited v Permanent Secretary, Ministry of Energy & 14 others [2006] eKLR.



27. The 1st defendant submits that the plaintiffs conduct in filing the Kiambu proceedings, withdrawing it after receiving the orders of 17th March 2025, and thereafter filing identical proceedings in Machakos is the most appalling form of abuse of the court process and forum shopping.
28. It is contended that the plaintiffs meant to ensure that they obtained an interim order ex parte through their non-disclosure of Mshila, J's order which should not be allowed. The 1st defendant relies on the decision in *Charity Keter v Eco Bank Kenya Ltd* [2024] eKLR for this assertion.
29. It is submitted that if the plaintiffs were litigating in good faith, they would have proceeded with the matter in Nairobi and it is evident that the plaintiffs were forum shopping and that their actions constitute an abuse of the court process and should not go unpunished. The decisions in *Dr. Kiama Wangai v John N. Mugambi & another* [2012] eKLR, *Geminia Insurance Co. Ltd v United Pharma (K) Limited & another* (2025) KEHC 480 (KLR), *Sam Nyamweya v Sports Disputes Tribunal & 2 Others* [2017] eKLR are relied on for this contention.
30. The plaintiffs, in opposition to this application, submit that there are two issues for determination; whether the plaint dated 17th March 2025 should be struck out and whether interim orders made on 18th March 2025 should be set aside.
31. The plaintiffs submit that the withdrawal of the Kiambu proceedings were done to promote judicial efficiency, and fairness, in good faith in the interest of ensuring that the matter is adjudicated in the most appropriate forum. They rely on the decisions in *Fortis Tower Management Limited & another v Trendmark Computers Limited* (2018) eKLR and *Phoenix of EZ Assurance Company limited v SM Thiga t/a Newspaper Service* [2019] KECS 767 (KLR).
32. The plaintiffs submit that this case does not involve multiplicity of proceedings and their actions lack the hallmarks of forum shopping. They rely on the decision in *Ali Omar Ali Abdulrahman v Mohamed Ali Abdulrahman* (2019) eKLR to buttress their assertion.
33. It is submitted that the filing at the appropriate forum and withdrawal were done simultaneously therefore the plaintiffs did not maintain any parallel litigation in Kiambu and Machakos.
34. It is the plaintiffs' case that Order 25 Rule 1 of the Civil Procedure Rules accord parties an unfettered right to withdraw suits at any stage prior to the matter being set down for hearing. They rely on the decision in *Charles Kiptarbei Birech v Paul Waweru Mbugua & another* [2021] eKLR for this assertion.
35. It is urged that the Kiambu proceedings having been withdrawn before any substantive determination have no bearing on the present matter and cannot constitute a bar to the institution of a fresh suit before a competent court.
36. It is submitted that it is well settled law that a suit ought not be struck out unless it is so hopeless and devoid of merit that it discloses no cause of action and this is not the case on the instant suit. They rely on the decisions in *Geminia Insurance Co. Ltd v United Pharma (K) Limited & another* (2025) KEHC 480 (KLR), *Phillip Keipto Chemwolo & another v Augustine Kubende* [1886] eKLR, *Sam Nyamweya v Sports Disputes Tribunal & 2 Others* [2017] eKLR to buttress this assertion.
37. It is urged that the plaintiffs have instituted a suit that discloses a reasonable cause of action necessitating judicial consideration on its merits.
38. It is submitted that Article 159 (2) of *the Constitution* enjoins a court to administer justice without undue regard to procedural technicalities and that this matter should proceed to hearing on its merits.



39. On the second issue of whether the interim orders made on 18th March 2025 should be set aside, it is urged that the court has the discretion to set aside ex parte orders vide Order 51 Rule 15, however, this discretion should be exercised judiciously in a manner that avoids injustice. They rely on the decision in *Nanjala Limited v Mayhouse Limited (2025)* eKLR to buttress this assertion.
40. It is urged that at the time of the interim orders were sought and granted, there were no parallel proceedings or active litigation between the parties in any other forum. Therefore, the existence of a withdrawn matter cannot amount to concealment of a material fact warranting the setting aside of orders.
41. It is urged that the 1st defendant has not demonstrated any prejudice occasioned by the alleged omission. The court is referred to the decision in *Filista Chemaiyo Sosten v Samson Mutai (2019)* eKLR where the judge declined to set aside injunctions.
42. It is submitted that the 1st defendant's plea for setting aside the interim injunction orders issued on 18th March 2025 is unmeritorious and without legal foundation.
43. I have considered the application, the affidavit in support and annexures thereto, the replying affidavit, further affidavit and annexures thereto, and the submissions. The issue that arise for determination is whether this court should exercise its discretion and set aside its orders of 18th March 2025.
44. The 1st defendant urges this court to set aside the ex parte orders granted on 18th March 2025 and the plaint dated 17th March 2025 on grounds that the orders were obtained through non-disclosure of material facts, forum shopping and that the suit is an abuse of the court process. In opposition, the plaintiffs' position is that there was no forum shopping, that the Kiambu proceedings were filed in error and have since formally withdrawn upon realization of the jurisdictional defect and that the plaintiffs interest was only in ascertaining that the matter is adjudicated in the most appropriate forum.
45. I proceed to deal with whether the court should set aside the ex parte orders granted on 18th March 2025. I have perused the court order by Mshila J, granted on 17th March 2025 transferring the Kiambu proceedings to Milimani High Court and Tax division as the properties the subject matter of the suit are located in Nairobi within that court's jurisdiction.
46. I also note from annexures that the plaintiffs withdrew the matter the following day on 18th March 2025. I am therefore unsatisfied with the plaintiffs' deposition and submissions that, "upon review of the pleadings filed it became evident that Kiambu High Court lacked the requisite territorial jurisdiction to adjudicate the dispute given that the subject matter of the suit is not situated within its territorial confines." It is evident from the record that the plaintiffs only withdrew the matter after Mshila J, made the orders on 17th March 2025.
47. What is concerning to me is that the plaintiffs did not mention these orders of 17th March 2025 when they sought and obtained interim orders from this court. It is not in dispute that the instant suit is similar to that filed in the Kiambu proceedings. It is also not in dispute, that there were orders on record in the suit filed in Kiambu. This begs the question, why didn't the plaintiffs adhere to these orders? Even more importantly, why did the plaintiffs not disclose these orders to this court, in good faith, even if they had withdrawn the Kiambu proceedings?



48. In *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1995] eKLR, the Court of Appeal observed:

“In his leading judgment in the *Brink’s MAT* case (*supra*) at 193-194, Ralph Gibson LJ dwelt comprehensively on non disclosure and its consequences which deserve to be fully set out as follows:

“In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following .

The duty of the applicant is to make a 'full and fair disclosure of all the material facts': see *Rv Kensington Income Tax Comrs, ex p princess Edmond de Polignac* [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers.”(emphasis mine)

49. In *Total Kenya Limited v Permanent Secretary, Ministry of Energy & 14 others* [2006] eKLR, the High court observed:

“ 11. 0 Of Concealment and/ or Misrepresentation of Material Facts.

Non-disclosure and/or misrepresentation of material facts at ex parte stage may vitiate any ex parte orders, or advantage gained by a party at the ex parte stage. It is the Court, not the party or its Advocate which determines the materiality or otherwise of any fact. So a party which approaches the Court ex parte does so on the basis of utmost good faith *uberrimae fidei*.(emphasis mine).

50. In *Edward Karanja Ragui v Barclays Bank of Kenya Ltd* [2002] KEHC 1223 (KLR), Ringera J held:

“It is settled law that if an interlocutory injunction has been obtained by means of misrepresentation or concealment of material facts, the same will on the application of the party aggrieved be discharged (see the cases of *John Muritu Kigwe & Another v Agip (Kenya) Ltd* [HCCC No.2382 of 1999] and *Margaret Nduati & Another v Housing Finance Company of Kenya* [HCCC No.307 of 2001]. So I ask myself whether the injunction here was obtained as a result of misrepresentation or concealment of material facts.

.... In my opinion, as an order of injunction is an equitable remedy issued to prevent the ends of justice from being defeated, it may be discharged or set aside if it is shown to be unjust or inequitable to maintain it in force.”

51. In *Filista Chemaiyo Sosten v Samson Mutai*[2012] KEHC 322 KLR] Justice Sila delivered himself thus:

“I think the discretion under Order 40 Rule 7 ought to be sparingly used so as to avoid a situation where it would appear as if the same is being used as a tool for appeal. This is



because before issuing the injunction, the court must have been satisfied that it was necessary to grant the same. If it were not satisfied, the court would not have issued the injunction in the first place. However, if the injunction was obtained by concealing facts which if put to the judge in first instance would have affected his judgment on whether or not to give the injunction, then a court can be inclined to vary or vacate the injunction in light of the new facts. So too if the circumstances of the suit have radically changed so that it is no longer necessary to have the injunction.”(emphasis mine)

52. It is my considered view that the Kiambu proceedings and their attendant orders were material facts which ought to have been disclosed to this court by the plaintiffs, in good faith when they approached this court ex parte. The proceedings were material facts because the instant suit is similar to that of the Kiambu proceedings and the ex parte orders sought therein are the same as those that were sought here. My sister Mshila J, however, did not grant the interim orders but transferred the matter to Nairobi because the suit properties were located there. Therefore, I am of the opinion that it was for this court to determine whether the Kiambu proceedings and the orders therein as well as the withdrawal of the proceedings would have affected judgment on whether or not to give the injunction. However, this court was not accorded this chance. I am constrained to find that the plaintiffs sought an equitable remedy with a touch of deceit on their part and lack of good faith. Thus, I am convinced that the 1st defendant has demonstrated that the ex parte orders granted by this court were obtained through concealment of material facts.
53. I note that the plaintiffs have not sufficiently explained why they did not proceed with the proceedings that were transferred to Nairobi. I also note that the plaintiffs deponed that the withdrawal of the Kiambu proceedings was done in good faith and in the interest of ensuring that the matter is adjudicated in the most appropriate forum. However, Mshila J, had already guided the plaintiffs on the most appropriate forum being Nairobi, where the properties the subject matter of the suit were located. In my considered view, it was an abuse of the court process to file identical proceedings to those in Kiambu before this court when it was clear that the appropriate forum was Nairobi where majority of the suit properties were located. I have a duty to preserve the judicial process and cannot allow the misuse of the court process.
54. The Court of Appeal in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, observed as follows on the principle of abuse of Court process:

“ In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process.

To reinforce the point, abuse of process has been defined in Wikipedia, the free encyclopedia:

“The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice.”



In *Beinosi v Wivley* 1973 SA 721 [SCA] at page 734F-G a South African case heard by the Appeal Court of South Africa, Mohomad CJ, set out the applicable legal principle as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse of process.” It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.”

Again the Court of Appeal in Abuja, Nigeria in the case of *Attahiro v Bagudo* 1998 3 NWLL pt 545 page 656, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

55. In the Nigerian Case of *Karibu-Whytie J Sc in SARAK v KOTOYE* (1992) 9 NWLR 9pt 264) 156 at 188-189 (e) the concept of abuse of judicial process was defined:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”

56. Guided by the foregoing, I am of the view that Mshila J’s orders were aimed at protecting the interests of justice. Accordingly, the plaintiffs in not proceeding to Nairobi as ordered but withdrawing the Kiambu proceedings and instead filing identical proceedings before this court, were attempting to thwart the effective and efficient administration of justice. I cannot, with a clean conscience allow this. Consequently, I am of the view that in the circumstances of this case, the plaintiffs abused the court process.
57. The long and short of it is that I have come to the conclusion that it would not be just or equitable to maintain the interlocutory injunction issued on 18th March 2025 in force. Consequently, the 1st defendant’s motion to set discharge the injunction is allowed.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 19TH DAY OF JUNE, 2025

RHODA RUTTO

JUDGE

In the presence of;

.....Plaintiff

.....Respondent



Sam, Court Assistant

