



**Alchanave Limited v Kimani (Enviromental and Land Originating Summons  
E002 of 2025) [2025] KEELC 4863 (KLR) (30 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4863 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2025**

**JG KEMEI, J  
JUNE 30, 2025**

**BETWEEN**

**ALCHANAVE LIMITED ..... PLAINTIFF**

**AND**

**SIMON NGIGI KIMANI ..... RESPONDENT**

*(In respect of the Plaintiff's Application dated 21/1/25  
and Defendants Preliminary Objection of 10/2/2025)*

**RULING**

1. The Plaintiff's motion dated the 21/1/25 seeks the following orders;
  - a. Pending the hearing and determination of the Originating Summons, this Court be pleased to issue an order prohibiting the Defendant, his servant, agents and employees from damaging, destroying, defacing, or carting away and/or removing or in any manner whatsoever any of the permanent and moveable fixtures, furniture, machinery or any moveable or immoveable property situated in Nairobi/Block 1481/1609 Stone House Hostel, off Silanga Road, Karen within Nairobi City County and the plaintiff be allowed to secure the property through its own private security firm to preserve the property.
  - b. Pending the hearing and determination of the Originating Summons, the Defendant be ordered within 7 days to furnish an account of all rental income and/or profits obtained from the suit premises Nairobi/Block 1481/1609 Stone House Hostel, off Silanga Road, Karen within Nairobi City County for the period 1<sup>st</sup> January, 2024 to 31<sup>st</sup> December, 2024 for purposes of taking of accounts for the assessment of mesne profits due to the plaintiffs from 18<sup>th</sup> September, 2024 until vacant possession is handed over to the plaintiff.



- c. This Honourable Court be pleased to issue a mandatory order directing the defendant to vacate and deliver vacant possession of the property known as Nairobi/Block 1481/1609 Stone House Hostel, Off Silanga Road, Karen within Nairobi City County to the plaintiff.
  - d. This Honourable Court be pleased to issue an order directing the plaintiff to appoint a Court bailiff to execute the order of evicting and OCS, Hardy Police Station be compelled to provide security for the exercise.
  - e. Any other order that this Honourable Court shall deem mete and just.
  - f. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of one Charles Wamae, a director and shareholder of the Plaintiff company, sworn on the 21/1/25. He averred that the Plaintiff acquired the suit property in a public auction on 12/3/24 which was carried out by Garam Investments Auctioneers on the instructions of Equity Bank Limited, the chargee, whereupon the Plaintiff and the Auctioneer executed the memorandum of sale on 12/3/2024 wherein the defendant ceased to be the lawful owner of the property. That upon compliance of the terms of the auction, the chargee and the Plaintiff executed a transfer by chargee on 28/5/24.
  3. It was averred that attempts by the Plaintiff to take physical possession of the Property has been resisted by the Defendant who continues to collect rent from the property despite not being the lawful owner of the property following the successful disposal of the suit land to the Plaintiff at the aforesated auction. That despite the Plaintiff issuing a notice to the Defendant to vacate the property and deliver vacant possession, the Defendant has not honoured the said notice forcing the Plaintiff to issue a statutory notice under the provisions of Section 152 of the *Land Act* (Form LA.r.37) dated 18/9/24 requiring the Defendant to vacate and hand over possession of the premises. The said notice which was served upon the OCS Hardy Police Station and the Deputy Commissioner Langata Subcounty in compliance with the law has since lapsed but the defendant still refuses to vacate the property and continues to collect rent from the premises. The Court was urged to direct the Defendant to furnish an account of the rental income and or profits accruing from the premises for the period 1/1/24 and 31/1/24 for purposes of assessing mesne profits due to the Plaintiff from 18/9/24 till vacant possession of the property is handed over to the plaintiff.
  4. It was further averred that the actions of the Defendant in refusing to vacate the suit premises are unlawful and illegal and have deprived the Plaintiff its right to enjoy quiet possession of its property, an affront to its property rights under Art 40 of *the Constitution*.
  5. In opposing the application, the Defendant filed a Preliminary Objection dated the 10/2/25 on the following grounds;
    - i. That this Honourable Court lacks jurisdiction to hear and determine this matter as the substratum of the suit herein is a contested enforcement of financial securities as per the dictum of the Court of Appeal in Civil Appeal No. E055 of 2022 – Bank of Africa Kenya Limited & 1 Other v TSS Investment Limited & 2 Others which clarified that this Court lacks the requisite jurisdiction to hear and determine disputes over mortgages, charges, or any contract that is not connected to or incidental to the “use” of land.
    - ii. That the suit herein is incompetent, irregular and a nonstarter for violating sections 6 & 8 of the *Civil Procedure Act* and it amounts to multiplicity of suits, leapfrogging and forum shopping by the Plaintiffs since there is a pending HCOMM/E35/2024- Simon Ngigi Kimani Vs Equity Bank & Garam Investment Auctioneers where the alleged public auction carried on 12<sup>th</sup> March



2024 giving rise to the Plaintiff's claim to the suit property has been contested for violating section 97 of the Land Act and Rule 11(b) (x) of the Auctioneers Rules and the Plaintiff is using this suit to defeat the Court process in the said matter.

- iii. That the suit herein together with the Application dated 21/1/2025 is incompetent having been filed in violation of existing Court orders in the said HCOMM/E35/2024- Simon Ngigi Kimani Vs Equity Bank & Garam Investment Auctioneers where the Defendant enjoys interim temporary injunctions suspending any taking of possession by the Plaintiff being an agents/ assignee of Equity Bank Ltd until the said Application and suit challenging the impugned auction on 12/3/24 is heard determined.
  - iv. That the suit herein is fatally defective since the same has been brought under the wrong provisions of the law and/or the Plaintiff herein has no locus standi to institute the suit since the alleged title deed it holds is null and void having been obtained through violation and circumvention of the mandatory provisions of section 97 of the Land Act, 2012.
  - v. That the suit herein is incompetent, bad in law, and an abuse of the Court process and the same should be dismissed forthwith with costs to the Defendant.
6. In further opposition to the application, the defendant filed a Replying Affidavit sworn by Simon Ngige Kimani sworn on the 1/3/25. He avowed that he is the absolute owner of the suit land and that he was advanced a loan facility by Equity Bank Limited (the bank) in which the suit land was offered as collateral. That in 2022 he challenged the bank's attempts to sell the land via auction in a Misc Application No E771/2022 wherein the bank was temporarily restrained from evicting the defendant from the suit land and the auction suspended pending compliance with the Auctioneers Rules. That the said orders have neither been set aside, vacated and or appealed and were still active at the time of the alleged auction. That noting the limitations relating to Misc. applications, he filed a suit namely HCOMM/E35/2024- Simon Ngigi Kimani Vs Equity Bank & Garam Investment Auctioneers wherein he obtained orders that he remains in the property which orders he avows are still active.
7. As a result, therefore, the deponent states that this suit is incompetent on account of the principles of subjudice. That it amounts to multiplicity of suits and forum shopping by the Plaintiff with the intention to defeat the Defendant's suit in the commercial Division of the High Court. That the order for taking accounts is premature as possession has never changed hands. That the Plaintiffs title was obtained through violation of Court orders stopping the said auction and for that reason the title of the Plaintiff has no life or legal protection within the confines of Section 25 and 26 of Land Registration Act.
8. The deponent further stated that the orders sought are final and ought not be granted at the preliminary stage before parties are heard and therefore mesne profits are not awardable in the circumstances as he is in occupation of the property legally. That the order for inspection of immovable assets is not tenable since the said moveable assets do not form part of the suit land. That he has a right to collect rent and nothing should warrant any production of any account of rent collection and received. Lastly the Court was urged to dismiss the application with costs.

### **The interim Orders**

9. On the 13/2/25 when the matter came up for hearing in the presence of counsels for both parties, the Court granted the following orders/directions;
  - a. The application dated the 21/1/25 and the preliminary objection of 10/2/25 shall be heard together and parties were directed to file written submissions by 13/3/25.



- b. Pending the hearing and determination of the application interim orders in terms of prayer No 2 were allowed for the purpose of preserving the suit property.

### **The written Submissions**

10. The Plaintiff framed three issues for determination as thus; whether the defendants Preliminary Objection meets the threshold; whether the Court is clothed with jurisdiction to hear and determine the suit and whether the Plaintiff should be granted the remedies sought.
11. Citing the decision of the Court in Mukisa Biscuit Manufacturing Co Limited, the Plaintiff submitted that a Preliminary Objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if facts have to be ascertained or if what is being sought is the exercise of judicial discretion. That a Preliminary Objection should not deal with disputed facts nor derive its foundation from factual information.
12. It was submitted that the defendant seeks to challenge the process by which the Plaintiff acquired the suit property and in order to determine the issue the Court will be required to probe the pleadings and evidence adduced by the parties so as to ascertain the probity of the Plaintiffs title, thus placing the objection outside the realms of a pure point of law.
13. Counsel for the Plaintiff submitted that the defendant alleges that the presence of a suit in the High Court- Commercial Division – (HCCOM E355 of 2024 Simon Ngigi Kimani Vs Equity Bank & Garam Investment Auctioneers), which case the Plaintiff averred that it is not aware nor is a party, if at all it exists. The orders alleged to have been issued in the said suit have not been placed before the Court for the Court to interrogate the same vis a vis the current application and the suit, thereby ousting the objection from being a pure point of law.
14. On the second issue, Counsel for the plaintiff submitted that this Court’s jurisdiction flows from the provisions of Art 162(2) (b) of *the Constitution* of read together with Section 13 of the ELC Act. That the gist of the suit herein is whether or not the Plaintiff holds a valid title and whether or not the Defendant is occupying the said property illegally, it, having been acquired by the Plaintiff through a public auction. That these are questions that fall within the jurisdictions of the Court as scoped by Section 13 of the ELC Act.
15. It was further submitted that the chargor’s right to property extinguishes at the fall of the hammer and the remedy for an aggrieved chargor is to seek damages from the chargee. That given that the defendant alleges to have sued the chargee, he can seek damages from the said chargee without unreasonably denying the plaintiff possession of the property. See the case of Sunrise Security Services Limited & 2 others Vs National Bank of Kenya Limited & Anor (2018) EKLK.
16. In further submissions, the Court was further urged to grant orders of eviction as the Defendant’s right to the suit property was extinguished on 12/3/24 at the fall of the hammer and his remedy lies in seeking damages against the chargee, if in his opinion the auction was not conducted within the purview of the law.
17. Counsel for the plaintiff submitted and cited the decision of the Court in Etrade Limited & Anor Vs Thrift Estates Limited & 2 others (2019) EKLK which cited the case of Joyce Wairimu Karanja & James Mburu Ngunjiri & 3 others (2028) EKLK where the Court stated as follows;

“In my view, there is little reason to belabour the point. Once a statutory power of sale is legally activated, any irregularity in the sale is only remediable with damages to the mortgagor if it injures him. Secondly, a purchaser at an auction conducted in the exercise



of the statutory power of sale is immunized from suit under section 99 of the Land Act. Thirdly, a mortgagor's equity of redemption is extinguished upon the fall of the hammer in a public auction. Fourthly, there is no requirement in law or equity that a mortgagor re-issues the statutory notice if a planned auction is temporarily stopped by the Court and then permitted to proceed through the lifting of the temporary orders."

18. That from the above a purchaser of land at a public auction is protected at the fall of the hammer except in cases of fraud misrepresentation or any dishonest conduct on the part of the chargee of which the purchaser had actual or constructive notice. That the Plaintiff was a bonafide purchaser for value and therefore enjoys protection under the provisions of Section 99(2) of the Land Act. That the Plaintiff is not aware of any irregularity and nor is it a party to any irregularity and that any grievance that the defendant may have with regards to the sale of the property should be addressed under Section 99(4) of the Land Act. That in the circumstances the defendant has no lawful reason to deny the plaintiff vacant possession of the property as he lost his proprietary rights at the fall of the hammer on 12/3/24.
19. As to whether orders of temporary and permanent injunction should be granted, Counsel for the plaintiff answered in the affirmative. Citing the provisions of Order 40 Rule 1 of the CPR, the Plaintiff submitted and reiterated the background of the acquisition of the property and further submitted that there is no justifiable reason why the defendant should deny the plaintiff vacant possession, 12 months after the auction. That the plaintiff has issued the necessary statutory notices provided for in the law to no avail. That the Plaintiff is apprehensive that the property may be destroyed and/or be carted away by the defendant should the order not be granted. That Section 152 A of the Land Act prohibits any unlawful possession of land and the owner of any such land has a right to evict such unlawful occupier in accordance with the law.
20. That in the case of Margaret Karwirwa Mwongera Vs Francis Kofi (2019) EKLr the Court granted eviction orders after being satisfied that notice was duly served upon the defendant and the Deputy Commissioner under Section 152 E. This Court was urged to dismiss the objection and grant the orders as prayed
21. As to whether the Court has jurisdiction to hear and determine the matter, the Defendant cited the case of The Owners of Motor Vessels Lilian "S" Vs Caltex Oil Kenya Ltd (1989) KLR and emphasized the importance of the Jurisdiction of a Court and that once a Court finds that it has no power, it must stop and take no more step. The Defendant submitted that this Court is not the appropriate forum to litigate cases where the substratum relates to the realization of financial securities. That the issues of rent collection do not fall within the jurisdiction of the Court.
22. As to whether the Plaintiff has locus to file this suit, the Defendant submitted in the negative on the basis that the title allegedly held by the Plaintiff is under challenge in the High Court and the act of filing this suit is but an abuse of the process of the Court.

#### Analysis and Determination

23. Having read and considered the application and the Preliminary objection which are subject to this Ruling, the issues that fall for determination are;
  - a. Whether the Preliminary objection is merited
  - b. Whether the application dated the 21/1/25 is merited
  - c. Who meets the costs.



### **Whether the Preliminary Objection is Merited**

24. The jurisdiction of this Court flows from Article 162(2) of *the constitution* read together with the provisions of Section 13 of the 13 of the ELC Act include the environment and the use and the occupation of and title to land.
25. The Defendant has argued that since the dispute arises from a charge/mortgage this Court has no jurisdiction to determine the dispute. It is the case of the Plaintiff that it acquired the suit land through a public auction after which it was registered as the owner of the land on 31/7/24. That upon registration, it issued a notice to the Defendant that it had acquired the suit land in the public auction and demanded that he vacates the suit land. When the defendant refused to vacate, it issued a 90-day notice under Section 152 of the LRA requiring him to vacate, which notice was not heeded forcing it to file this suit. The Defendant on the other hand contends that it is still the owner of the land; that the alleged public auction of the suit land was illegal since the auction was done while there were interim orders restraining the bank and the auctioneer from selling the property hence the reason why the sale is now under challenge in the High Court.
26. I have perused the originating summons dated the 21/1/25 between the parties in which the core claim of the Plaintiff is vacant possession and an account of the rent collected. The Plaintiff has demonstrated that it is now registered as owner of the land vide a title issued in 2024. The Plaintiff therefore in the main seeks eviction of the Defendant from the suit land. To the extent that the claim is for eviction inter alia the Court finds that it has jurisdiction to hear and determine the matter.
27. With respect to the issue as to whether or not the suit is res judicata, the defendant led evidence that he filed two suits in the High Court, the first being a Misc Application No E771/2022 in which he was issued with restraining orders in his favour. The second case he filed and which is still pending determination is the one of HCOMM/E35/2024- Simon Ngigi Kimani Vs Equity Bank & Garam Investment Auctioneers in which the Court issued orders restraining the defendants from removing him from the premises.
28. Upon perusal of the limited pleadings placed before the Court, it is clear that the Plaintiff herein is not a party to the suits in the High Court. The very act of perusing the documents and facts by the Court ipso facto ousts the preliminary objection from being a pure point of law.
29. The Court wishes to rely on the case of In the case of Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another (2014) eKLR, where the Court stated that the issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence ..... They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections. The applicant therefore ought to have moved the Court vide a notice of motion to allow the production of the pleadings in the suits.
30. The question as to whether or not the Plaintiff has locus or not is a question of fact which oust the objection from being a pure point of law as the Court is being called upon to inquire into matters factual.

### **Whether the Application is Merited**

31. It is not in dispute that the suit land was sold at a public auction on 12/3/24. The Defendants contention is that it was sold while restraining orders were in force and therefore the sale was unlawful. The orders referred to by the Defendant were issued on the 22/10/23. There was no evidence tabled



by the Defendant to show that the said Misc cause was heard and determined. The Court was shown an interim order granted on 1/8/24 way after the auction took place in March 2024.

32. It has not been disputed that the Defendant is in occupation of the suit land. The Plaintiff has urged the granting of eviction orders in the suit and the application. The Court finds that this prayer is premature and cannot be granted at the interlocutory stage before the parties are accorded the opportunity to be heard.
33. The purpose of a temporary injunction as stated in Order 40 Rule 1 of the Civil Procedure Rules, 2010 is to stay and prevent the wasting, damaging, alienation, the sale, removal or disposition of the suit property. The Order provides that;

“ 1. Where in any suit it is proved by affidavit or otherwise-

- a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or b) That the Respondents threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Respondents in the suit,

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders”.

34. That said the court finds that to further preserve the substratum of the subject matter of the suit prayer No 4 be and is hereby allowed pending the hearing and determination of the suit.
35. With respect to prayer No 5, no prejudice has been shown if the prayer is granted for purposes of furnishing the accounts to the Plaintiff pending the hearing and determination of the suit.
36. In the end I make orders as follows;
- a. The Preliminary objection is unmerited. It is dismissed
- b. The application dated the 21/1/25 is allowed partially in terms of prayer No 4, 5 & 7 of the application.
- c. I order each party to meet their own costs.

37. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JUNE, 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

Delivered Online in the presence of:

NA for the Plaintiff

Mr Ouma for the Defendant

CA- Ms Yvette Njoroge

