



**Bady v Kanyi & another (Environment and Planning Civil Case E006 of 2023) [2025] KEELC 4470 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4470 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND PLANNING CIVIL CASE E006 OF 2023**

**YM ANGIMA, J**

**JUNE 12, 2025**

**BETWEEN**

**BADY TWALIB BADY ..... PLAINTIFF**

**AND**

**DAVID MUREITHI KANYI ..... 1<sup>ST</sup> DEFENDANT**

**MIDDLE EAST BANK (K) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**A. Introduction**

1. The material on record shows that vide an application dated 11.06.2024 the 2<sup>nd</sup> defendant sought the dismissal or striking out of the plaintiff's suit on two main grounds. First, that the court had no jurisdiction to entertain the suit by virtue of Article 165(3) (a) of the *Constitution*. Second, that the plaintiff had no locus standi to file suit and question the 2<sup>nd</sup> defendant's exercise of its statutory power of sale. Among the authorities cited by the 2<sup>nd</sup> defendant on the second ground was the case of Bank of Africa Kenya Ltd vs TSS Investments Ltd (2024) KECA 410(KLR).
2. The record shows that by a ruling dated 12.11.2024 the court (Hon. N. A. Matheka J) held that the court had jurisdiction to entertain the suit under the law and proceeded to dismiss the 2<sup>nd</sup> defendant's application for striking out the suit on similar grounds. However, it is not clear from the ruling whether the court determined the question of the plaintiff's locus standi to file suit.

**B. 2<sup>nd</sup> defendant's application**

3. By a notice of motion dated 13.01.2025 expressed to be brought pursuant to Sections 1B and 80 of the *Civil Procedure Act* (Cap 21), Article 165 (3) (a) of the *Constitution* and all other enabling provisions of the law, the 2<sup>nd</sup> defendant sought a review and setting aside of the ruling dated 12.11.2024 and an order for dismissal of the suit against it.



4. The application was based on the very same grounds upon which the earlier application was based. The first was that the court had no jurisdiction to entertain the suit by dint of Article 165 (3) (a) of the Constitution. For good measure, it was emphasized that the court had improperly disregarded binding precedent in its ruling of 12.11.2024. The 2<sup>nd</sup> ground was that the plaintiff had no locus standi to file the suit against it. It was emphasized that the court had failed to make a specific determination on this issue in the earlier ruling.

### **C. Plaintiff's response**

5. The plaintiff filed grounds of opposition dated 27.01.2025 in response to the application. The plaintiff opposed the application on the following grounds;
  - a. The application lacks merit and should be dismissed in the first instance.
  - b. The case laws quoted by the applicant that is Bia Distribution vs Kenya Breweries (2023) KESC 12(eKLR), Lydia Nyambura Mbugua vs Diamond Trust Bank (2018) eKLR and Bank of Africa TSS Investment Limited are irrelevant on the issues at hand because the respondents are not tenants but owners of the mentioned portions of land sold to them by the 1<sup>st</sup> defendant.
  - c. The court has jurisdiction to adjudicate the matter
  - d. The issues raised in the present application were dealt with by the court in the 1<sup>st</sup> application dated 11.06.2024 and therefore the matter is res judicata.
  - e. The application is defective and is brought under the wrong provisions since it has not been supported by a supporting affidavit.
  - f. The application is an abuse of the court's process and a total waste of time and the same should be dismissed with costs.

### **D. Directions on submissions**

6. When the application was listed for inter partes hearing, it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the 2<sup>nd</sup> defendant filed its submissions on 06.02.2023 whereas the plaintiff's submissions were filed on 14.02.2025.

### **E. Issues for determination**

7. The court has perused the 2<sup>nd</sup> defendant's application dated 13.01.2025, the plaintiff's grounds of opposition as well as the material on record. The court is of the view that the following are the main issues which arise for determination herein;
  - a. Whether the application is res judicata
  - b. Whether the 2<sup>nd</sup> defendant has made out a case for review of the ruling made on 12.11.2024.

### **F. Analysis and determination**

SUBDIVISION - a. Whether the application is res judicata

8. The plaintiff submitted that the instant application is nearly identical to the earlier application dated 11.06.2024 which was dismissed by the court on 12.11.2024. It is also evident that the application



is based upon essentially the same grounds save that the court is being called upon to determine the question of locus standi which was not specifically determined in the earlier ruling.

9. The court is of the opinion that the question of the court's jurisdiction to entertain the suit was conclusively determined vide the ruling dated 12.11.2024. The court also gave its reasons for the decision. If the 2<sup>nd</sup> defendant was dissatisfied with that determination, the only option lawfully available to it was to appeal. It was not at liberty to file a similar application and re-litigate the same issue with a view to obtaining a different decision thereon.
10. The court is of the view that even if the 2<sup>nd</sup> defendant were to persuade the court that the Judge was wrong in the earlier ruling of 12.11.2024, there is nothing this court can lawfully do to annul the earlier decision. The court has not power or jurisdiction to review or overturn a decision made by a court of co-ordinate jurisdiction on the basis that it was erroneous in law. That mandate belongs to a higher appellate court. The 2<sup>nd</sup> defendant's application on the first ground must fail.

**b. Whether the 2<sup>nd</sup> defendant has made out a case for review of the ruling made on 12.11.2024**

11. The court has also considered the material and submissions on record on the second ground. The plaintiff's pleaded case was that on or about 12.10.2018 he purchased the bungalow No.7 (with a parking) from the 1<sup>st</sup> plaintiff, paid the purchase price and took possession thereof. It was his case that later on he discovered that the 1<sup>st</sup> defendant had or about 11.11.2021 fraudulently charged the property to the 2<sup>nd</sup> defendant to secure payment of a sum of Kshs.29 million. It was thus his case that the latter transaction took place on account of fraud of the 1<sup>st</sup> defendant and the negligence of the 2<sup>nd</sup> defendant.
12. Although the plaintiff was not party to the charge instrument, his claim to bungalow No. 7 is of a proprietary nature. He claims to have acquired a legal interest in the property which belonged to the 1<sup>st</sup> defendant prior to the creation of the charge in favour of the 2<sup>nd</sup> defendant. The plaintiff does not claim as a tenant or licensee of the 1<sup>st</sup> defendant. The court is thus of the view that the plaintiff has locus standi to ventilate his claim and the case of Bank of Africa Kenya Ltd vs TSS Investments Limited and 2 others(supra) is clearly distinguishable. As to whether or not the plaintiff shall ultimately succeed in his suit that is a different matter altogether which has nothing to do with the existence of locus standi.
13. The court is of the view that the plaintiff's claim cannot be completely and effectively adjudicated upon in the absence of the 2<sup>nd</sup> defendant who is the holder of a legal charge over the mother title. At the very least, the 2<sup>nd</sup> defendant shall be a necessary party in any litigation as between the plaintiff and the 1<sup>st</sup> defendant. For that reason, it would be premature to remove the 2<sup>nd</sup> defendant from the proceedings at this stage or to have the claim against it struck out.

**G. Conclusion and disposal order**

14. The upshot of the foregoing is that the court finds no merit in the 2<sup>nd</sup> defendant's application. As a consequence, the notice of motion dated 13.01.2025 is hereby dismissed with costs to the plaintiff.

It is so ordered.

**RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

.....

**Y. M. ANGIMA**

**JUDGE**



In the presence of:

Gillian - Court assistant

Mr. Birir for plaintiff

Mr. Karanja for the 2<sup>nd</sup> defendant

No appearance for the 1<sup>st</sup> defendant

