



REPUBLIC OF KENYA



**Bayusuf v Nyale (Environment and Land Case E011 of 2024)
[2025] KEELC 6191 (KLR) (25 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6191 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E011 OF 2024
JO OLOLA, J
SEPTEMBER 25, 2025**

BETWEEN

RIYADH ARIF AHMED BAYUSUF PLAINTIFF

AND

THOMAS KITI NYALE DEFENDANT

RULING

1. By the Notice of Motion dated 16th September 2024 Riyadh Arif Ahmed Bayusuf [the Plaintiff] prays for an order of a temporary injunction to issue barring the Defendant and or his agents from removing or selling by public auction any of the Plaintiff's property in an attempt to levy distress and from interfering in any other manner whatsoever with the Plaintiff's occupation and use of a parcel of land known as Mombasa/Block XI/160 pending the hearing and determination of this suit.
2. The application which is supported by an Affidavit sworn by the Plaintiff is premised inter alia on the grounds that:
 - i. The Plaintiff and the Defendant are a tenant and a landlord respectively with respect to the property known as Mombasa Block/XI/160;
 - ii. The Defendant has instructed auctioneers to levy distress for rent in an attempt to recover alleged rent arrears amounting to Kshs. 3,840,000/= plus Auctioneer's and Advocate's charges amounting to Kshs. 960,000/=;
 - iii. The Plaintiff avers that the distress is unlawful, wrongful and irregular as the arrears sought to be recovered are not accurate;
 - iv. The Plaintiff is ready and willing to pay the correct outstanding rent arrears which the Defendant has refused to accept for some 8 months now for no justifiable reason; and



- v. It is in the interest of justice that this court issues interim protection measures protecting the Plaintiff from the Defendant's ploy to illegally levy distress condemning him to pay Auctioneers' and Advocates' fee as a result of the Defendant's own doing.
3. Thomas Kiti Nyale [the Defendant] is opposed to the application. In his Replying Affidavit sworn on 25th October 2024, the Defendant avers that vide a lease agreement dated 25th January 2022, he did let his house situated on the suit premises to the Plaintiff for a term of 2 years and 6 months at a monthly rent of Kshs. 160,000/=.
 4. The Defendant asserts that the Plaintiff only paid rent for 6 months and that by 30th June 2024 when the term of the tenancy was meant to end, the Plaintiff had accumulated rent arrears in the sum of Kshs. 3,840,000/=. The Defendant further avers that the Plaintiff has failed to move out of the premises and instead filed a reference before the Business Premises Rent Tribunal which was dismissed on 19th May 2023.
 5. The Defendant further asserts that the application before the court is re judicata and that the same amounts to an abuse of the court process.
 6. I have carefully perused and considered the application by the Plaintiff as well as the response thereto by the Defendant. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
 7. By this application before the court, the Plaintiff prays for a temporary order of injunction barring the Defendant and/or his agents from removing or selling by public auction any of the Plaintiff's properties in an attempt to levy distress and/or from interfering in any manner whatsoever with the Plaintiff's occupation and use of the parcel of land known as Mombasa/Block XI/160 pending the hearing and determination of this suit.
 8. The conditions for consideration in granting an order of injunction were long settled in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358 where the court held thus:

“First, an applicant must establish a prima facie case with probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
 9. As to what would amount to a prima facie case in a matter such as this, the Court of Appeal offered guidance in the case of *Mrao Limited v First American Bank of Kenya Limited & 20 Others* [2003] eKLR, where the court held as follows:

“A prima facie case in a Civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”
 10. In the matter before me, the Plaintiff's complaint is that the Defendant has made an attempt to auction his properties in an attempt to recover rent arrears amounting to Kshs. 3,840,000/=. The Plaintiff avers



that the arrears sought are wrongful, irregular and inaccurate. According to the Plaintiff, he is in arrears for only 8 months and such arrears according to him have been solely occasioned by the Defendant.

11. Further, the Plaintiff complains that there is a deliberate attempt by the Defendant to kick him out of the demised premises for the alleged non-payment of rent to enable the Defendant to lease out the premises to other preferred tenants.
12. From the material presented to the court this far, there was no dispute that the Defendant is the registered owner of the suit property. Vide a lease agreement dated 25th January 2022, the Defendant did let out his building on the suit property to the Plaintiff for a term of two years and six months.
13. According to the Plaintiff, sometimes in October 2022, the leased premises where he conducts a car wash business was destroyed by the Mombasa County Officials on account of what he terms as the Defendant's negligence. As a result, the Plaintiff asserts that he was out of business for almost a year and that it was therefore agreed between the Plaintiff and the Defendant that during that year, rent would not be payable until the Plaintiff's business was up and running.
14. As it were, the Plaintiff has neither disclosed the alleged negligence on the part of the Defendant nor has he displayed the agreement which allowed him not to pay rent until September 2023 when he claims that he was able to kick start his business. His claim that he is only in arrears of rent of 8 months is therefore not backed by any evidence.
15. While the Plaintiff filed this application in September 2024 claiming that the Defendant was using the issue of inaccurate rent arrears to evict him from the suit premises, it was clear from a perusal of clause 2 and 3 of the Lease Agreement that the term had expired in June 2024 and there was therefore no basis upon which the Defendant could be restrained by way of injunction from taking back the premises.
16. In addition, it was clear that in November 2022 when the Defendant demanded arrears of rent then outstanding from the Plaintiff, the Plaintiff instituted BPRT Case No. E264 of 2022 where he sought an order of injunction to restrain the Defendant from evicting him from the suit premises and/or terminating the lease. In a Ruling delivered by the Tribunal on 19th May 2023, the Plaintiff's application was dismissed and the Defendant was granted leave to proceed to levy distress for rent as he had already begun.
17. There was no evidence that the said orders of the Tribunal had been reviewed and/or set aside on appeal. Accordingly, it was clear that the issues placed before this court by the Plaintiff were res-judicata as the same had been litigated before a competent court which had made a final decision thereon.
18. The import, tenor and scope of the doctrine of res judicata was re-stated by the Supreme Court of Kenya in the case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [Petition No. 17 of 2015] [2021] KESC 39 [KLR] where the apex court held thus:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of the court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”



19. Arising from the foregoing, I am persuaded that the Motion dated 16th September 2024 and the suit upon which it is based not only lack merit but are res judicata. Both amount to nothing but an attempt to abuse the process of this court.
20. In the premises I hereby strike out the Motion dated 16th September 2024 as well as the entire suit herein with costs to the Defendant.
21. It is so ordered.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 25TH DAY OF SEPTEMBER, 2025

J.O. OLOLA

JUDGE

In the presence of:

Ms. Firdaus Court Assistant.

Mr. Kago Advocate for the Plaintiff/Applicant

Mr. Lewa Advocate for the Defendant/Respondent

