



REPUBLIC OF KENYA



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Mama Watoto Supermarket Lts v Ncba Bank & another (Civil Case E009 of 2025) [2025] KEHC 13713 (KLR) (3 October 2025) (Ruling)

Neutral citation: [2025] KEHC 13713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE E009 OF 2025
S MBUNGI, J
OCTOBER 3, 2025**

BETWEEN

MAMA WATOTO SUPERMARKET LTS PLAINTIFF

AND

NCBA BANK 1ST DEFENDANT

LIDYA WAWERU T/A PURPLE ROYAL AUCTIONEERS 2ND DEFENDANT

RULING

1. The Applicant by a notice of motion dated 17th July, 2025 sought the following orders.
 - i. That the present application be certified urgent and be heard on priority basis.
 - ii. That pending the hearing of this application in the interpreted the 2nd defendant be restrained by an order of injunction from selling, transferring, receiving 90% of the purchase price and/ or continuing with the sale of LR. Butso/so/Shikoti/1780 Kakamega town block 1/84 , Butso/so/Shikoti/241 and Kakamega town block 11/119 and 120 pursuant to the alleged public auction conducted on 26/6/2025,
 - iii. That pending the hearing of this application in the interpartes the 2nd defendant be restrained by an order of injunction from selling, transferring, receiving 90% of Kakamega town block 1/84, Butso/so/Shikoti/241 and Kakamega town block 11/119 and 120 pursuant to the alleged public auction conducted on 26.6.2025.
 - iv. That pending the hearing of this application the 1st defendant be directed by a mandatory order on injunction to avail to the applicant the current statement of account of the loan account in issue.
 - v. That costs of the application be provided for.



2. The Application was brought under certificate of urgency , the court on 22nd July,2025 did not certify the Application urgent and fixed the Application for inter party hearing for 17th September, 2025 and ordered the Applicant to serve the Respondent.
3. On 23rd July, 2025 the Applicant filed another Application under certificate of urgency seeking the following orders.
 - i. That the present application be certified urgent and be heard on priority basis.
 - ii. That the exparte orders made 21.7.2025 be set aside and/or be reviewed.
 - iii. That the court considers granting interim orders in terms of prayer 2 of the Application dated 17.7.2025.
4. The said Application was certified as urgent , inter party hearing fixed for 30th July, 2025 and the Applicant was ordered to serve.
5. On 30th July, 2025 the court was not satisfied that the proper service was done and ordered for a physical service and further to cushion the Applicant a temporary order restraining the Respondents from transferring the parcels of land in issue was granted pending the hearing of the Application interpartes on 17th September, 2025.
6. On the 17th September, 2025 Mr. Rotich for the Respondent notified the court that he had filed an Application dated 20th August, 2025 seeking the following orders:-
 - i. That this honourable court be pleased to certify this matter as urgent and be heard ex-parte during the current high court vacation.
 - ii. That pending the hearing and determination of the present Application, this honourable court be pleased to lift, suspend, vary, review and/or discharge the temporary stay orders issued by Hon. Justice Stephen Mbungi on 30th July, 2025.
 - iii. That this honourable court be pleased to dismiss the Plaintiff suit in its entirety instituted by way of plaint dated 17th July, 2024 with costs to the Defendants.
 - iv. That This honourable court be pleased to find that Paul Kahiu Waweru, the Plaintiff's deponent, committed the offence of perjury by making false and misleading statements under oath in the supporting affidavits dated 17th and 23rd July, 2025 and the verifying affidavit.
 - v. That this honourable court be pleased to find that Daniel Fwamba, the Plaintiff's court process serve, committed the offence of perjury by making false and misleading statements under oath in the Affidavit of service dated 28th July, 2025 with an aim of aiding the Plaintiff to obtain favourable orders.
 - vi. That this honourable court be pleased to punish Paul Kahiu Waweru and Daniel Fwamba for perjury or in the alternative, recommend that Paul Kahiu Waweru and Daniel Fwamba be charged with the offence of perjury under section 108 of the penal code Cap 63 Laws of Kenya.
 - vii. That the costs of this suit be awarded to the Defendants.
 - viii. That any other relief this honourable court may deem fit to grant to protect the best interest of the minor,



7. Ms. Namange for the Applicant told the court that he was served with the Application and he needed time to reply to the Application and further that owing the response done by the Respondents to the application dated 17th July, 2025 she needed to put a further affidavit. The court agreed .
8. Mr. Rotich for the Applicant in the Application dated 20th August, 2025 told the court that he was ready to argue orally on prayer 2 of his application .
9. Ms. Namange upon consultation with his boss said she was also ready to argue.
10. The court allowed the counsels to submit orally on that prayer.
11. Mr. Rotich submitted that the court is functus officio for the issues raised in the application dated 17th July, 2025 are the same issues which were raised in the Civil Suit No. E006 of 2025 and the accompanying Application dated 25th March, 2025 whereby this court gave a ruling dated 11th day of June, 2025 in respect to the issues raised therein.
12. Mr. Rotich further submitted that they filed the Application dated 17th July, 2025 , the application was inviting the court to sit as an appellate court on its own decision.
13. Ms. Namange for the Respondent submitted that the issues raised in Civil suit No. E009 of 2025 are distinct to the issues raised in Civil case No. E006 of 2025 in that in E006 of 2025 they sought to stop the sale by public auction of the following properties
 - i. Kakamega/Municipality/Block 1/83.
 - ii. Kakamega / Municipality /Block 1/84
 - iii. Kakamega/Town/Block 11/120
 - iv. Butsotso/Shikoti/1780
 - v. Kakamega/Town Block 11/119.
14. In Civil case No. E009 of 2025 they are challenging the process of the sale by public Auction of the following properties
 - i. Butsotso/Shikoti/241
 - ii. Kakamega / Municipality /Block 1/84
 - iii. Kakamega/Town/Block 11/120
 - iv. Butsotso/Shikoti/1780
 - v. Kakamega/Town/ Block 11/119.
15. Ms. Namange submitted that the Application dated 17th July, 2025 they are seeking to stop the transfer of
 - i. LR. Butsotso/Shikoti/1780.
 - ii. L.R Kakamega town Block 11/119
 - iii. L.R Kakamega town Block 11/120
 - iv. L.R Butsotso/Shikoti/241
 - v. L.R Kakamega Municipality Block 1/84



16. I have gone through the submissions of the counsels , the issue for determination is whether this court is functus officio/res-judicata as submitted by Mr. Rotich.
17. For a court to be functus officio the issues in question should have been in question in a matter before the same court and the same court rendered a conclusive decision on the issues. See *Nderitu & 55 others v Telkom Kenya Limited & another* (Civil Suit 165 of 2006) [2024] KEHC 2297 (KLR).
18. For a matter to be res judicata, the following elements should be proved
 - a. There is a former judgment or order which was final.
 - b. The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties and
 - c. There must be between the first and the second action identical parties, subject matter and cause of action.

See Supreme Court Decision in the case of *Dina Management Limited County Government of Mombasa 5 others* petition No . (E010) of 2021 at Paragraph 68 and 69.

19. The Application dated 25th March, 2025, sought an injunction to restrain the Respondent NCBA Bank from among other acts from selling and transferring Kakamega/Municipality/Block 1/83, Kakamega / Municipality /Block 1/84, Kakamega/Town/Block 11/120, Butsotso/Shikoti/1780, Kakamega/Town Block 11/119.
20. This court in its ruling dated 11th June, 2025 dismissed the Application dated 25th March, 2025 for reasons that the Applicant failed to satisfy the threshold for the grant of a temporary injunction as set out in *Giella V Cassman Brown & Co. ltd* (9173) EA 358 and affirmed in *Nguruman Ltd V Jan Bonde Nielsen and 2 others* (2014) eKLR.
21. I will agree with Mr. Rotich that this court if functus officio for it rendered itself on the issue of injunction in respect to the sale and transfer of Kakamega/Municipality/Block 1/83, Kakamega / Municipality /Block 1/84, Kakamega/Town/Block 11/120, Butsotso/Shikoti/1780, Kakamega/Town Block 11/119.
22. Had the Applicant disclosed this fact to the court, this court could not have issued the orders it issued on 30th July, 2025.
23. I have noted that property number L.R Butsotso/Shikoti/241 was not an issue in the application dated 25th March, 2025.
24. I therefore discharge the order dated 30th July, 2025 in respect to Kakamega/Municipality/Block 1/83, Kakamega / Municipality /Block 1/84, Kakamega/Town/Block 11/120, Butsotso/Shikoti/1780, Kakamega/Town Block 11/119 but the order sub exists in respect to L.R Butsotso/Shikoti/241.
25. On whether the issues raised on the suit are resjudicata, I have looked at the prayers in E009 of 2025 and prayers in E006 of 2025, I agree with Ms. Namange that the prayers are not the same. In E006 of 2025 the prayers were majorly to stop the sale by public auction of the listed properties whilst in E009 of 2025 the plaintiff is challenging the process of the sale.
26. In conclusion I find that the prayer to lift or discharge the orders of 30th July, 2025 partially succeeds as shown in Paragraph 24 of this ruling.
27. The parties are to file submissions to canvass the reminder of the prayers in the two Applications. The Applicant in each application to start and serve. Each party has 15 days.



28. Mention on 5th November,2025 to confirm compliance and for further directions.

29. Right Appeal of 30 days.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 3RD DAY OF OCTOBER, 2025.

S.N. MBUNGI

JUDGE

In The Presence Of;

CA: Angong'a

Mr. Rotich for the Defendant /Respondent present online.

Applicant absent.

Applicant counsel absent.

