



REPUBLIC OF KENYA



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**Kimuyu v Ngulili & 2 others (Environment & Land Case  
E040 of 2024) [2025] KEELC 32 (KLR) (20 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 32 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E040 OF 2024  
EO OBAGA, J  
JANUARY 20, 2025**

**BETWEEN**

**PAUL MUSYOKA KIMUYU ..... PLAINTIFF**

**AND**

**JOHBOSCO MUNYAO NGULILI ..... 1<sup>ST</sup> DEFENDANT**

**TABITHA KAVUU & COMPANY ..... 2<sup>ND</sup> DEFENDANT**

**KWETU SACCO SOCIETY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This is a ruling in respect of a Notice of Motion dated 9<sup>th</sup> January, 2025 in which the Plaintiff/Applicant seeks the following orders;
  - i. Spent
  - ii. That this honourable court be pleased to review its orders and directions issued on 28<sup>th</sup> November, 2024.
  - iii. That this honourable court be pleased to issue temporary orders of injunction restraining the Defendants either by themselves, their servants, agents or any other person whomsoever acting on their instructions or on their behalf, from levying distress upon the Plaintiff's household goods, tools, equipment, appliances, implements of work or any other movable or immovable property which lawfully belong to the Plaintiff pending the full hearing of this application and suit.
  - iv. That the costs of this application be in the cause.



## **Background**

2. The suit property is an unregistered plot in which lies a building known as Itumbule Building which was previously owned by the 2<sup>nd</sup> Respondent. The suit property was sold to the 3<sup>rd</sup> Respondent on 4<sup>th</sup> May, 2015. The Applicant entered in part of the suit property in 2003 at a monthly rent of KShs.8,000. The 1<sup>st</sup> Respondent was an agent of the 2<sup>nd</sup> Respondent.
3. On 19<sup>th</sup> September, 2024, the advocate for the 3<sup>rd</sup> Respondent issued an eviction notice against the Applicant who is trading under the name of Makueni Pioneer Workshop and Machinery Services on account of rent arrears of KShs.386,000. The eviction notice prompted the Applicant to file a Notice of Motion dated 28<sup>th</sup> November, 2024 in which he sought injunction orders against the Respondents.
4. When the application dated 28<sup>th</sup> November, 2024 was placed before Lady Justice Murigi on the same date, the Judge directed that it be served for inter partes hearing on 2<sup>nd</sup> December, 2024. On 2<sup>nd</sup> December, 2024, the Applicant's advocate did not appear in court. The 3<sup>rd</sup> Respondent's lawyer who was present in court informed the Judge that they had received a postdated cheque for the arrears. The 3<sup>rd</sup> Respondent's lawyer asked for a mention date to confirm whether the cheque had gone through.
5. On 9<sup>th</sup> January, 2025, the Applicant filed another application in which he sought review of the orders of 28<sup>th</sup> November, 2024. In the meantime, he pleaded with the 3<sup>rd</sup> Respondent's lawyer not to bank the cheque dated 30<sup>th</sup> November, 2024 as he had insufficient funds in his account. The Applicant issued another post-dated cheque dated 3<sup>rd</sup> December, 2024. This cheque was banked on 4<sup>th</sup> December, 2024 but was returned unpaid for lack of sufficient funds.

## **Applicant's Contention**

6. The Applicant contends that when he entered into an unwritten lease agreement with the 2<sup>nd</sup> Respondent, he found the premises which was in a dilapidated state. He agreed with the 1<sup>st</sup> Respondent that he was to repair the premises to suit his needs. He states that he incurred a sum of KShs.373,000 to put the premises in tenable state.
7. In 2015, he learned that the suit property had been sold to the 3<sup>rd</sup> Respondent and that there were no arrangements on how he was to recoup what he had spent in repairs including installation of electricity to the premises. The 3<sup>rd</sup> Respondent through its advocate sent Auctioneers who proclaimed his goods. He was thus forced to issue a postdated cheque though he knew that he had no funds.
8. The Applicant states that though the 3<sup>rd</sup> Respondent was served with the Notice of Motion of 28<sup>th</sup> November, 2024, neither memorandum of appearance nor Defence has been filed or a response to the application. He instead received numerous phone calls from the Auctioneers threatening distress for rent. He was forced to close down his business to avert being distrained for rent arrears. Efforts to have the matter resolved amicably have failed. This is what prompted the Applicant to file the present application as he was threatened with distress for rent with complete eviction from the premises.

## **Third Respondent's Contention**

9. The Applicant's application was opposed by the 3<sup>rd</sup> Respondent through a replying affidavit sworn on 12<sup>th</sup> January, 2025. The Respondent states that it is the owner of the suit property having purchased it from the 2<sup>nd</sup> Respondent on 4<sup>th</sup> May, 2015. The Respondent contends that the Applicant's application is an abuse of the process of the court in that there is another similar application dated 28<sup>th</sup> November, 2024 which is still pending.



10. The Respondent states that the Applicant has been a tenant in the suit property paying a monthly rent of Kshs.8,000. The Applicant stopped paying rent in March, 2019. On 19<sup>th</sup> September, 2024 an eviction notice was issued against him demanding rent arrears of Kshs.386,000. On 4<sup>th</sup> October, 2024, Auctioneers instructed by the Respondent levied distress against the Applicant who sought for two months to move out of the premises. The Applicant then gave a postdated cheque dated 30<sup>th</sup> November, 2024 for the unpaid rent of Kshs.386,000. The cheque was never banked as the Applicant sought for more time to raise funds.
11. The Respondent further states that the Applicant's claim for amounts due to him is an afterthought which is meant to frustrate the recovery of rent arrears. The Respondent contends that it was not privy to the arrangements between the Applicant and the 2<sup>nd</sup> Respondent and that in any case the Applicant cannot have incurred money in 2003 only to come and claim it in 2024 the Respondent having purchased the premises on 4<sup>th</sup> May, 2015. If the Applicant spent any monies on electricity and other government permits, that is a cost to be borne by him.
12. The Respondent further contents that the filing of the second application was made after the Applicant failed to get exparte orders and this was done in bad faith and is only meant to frustrate the Auctioneers.

### **Analysis and Determination**

13. I have carefully considered the Applicant's application as well as the opposition to the same by the 3<sup>rd</sup> Respondent. I have also considered the oral submissions by the counsel for the Applicant. This application was orally argued on 13<sup>th</sup> January, 2025. Though the Applicant states that there was no response to his application, I notice that the response by the 3<sup>rd</sup> Respondent is dated 12<sup>th</sup> January, 2025 and was already in the CTS on 13<sup>th</sup> January, 2025 when the application was argued. It was the duty of the Applicant's counsel to check on the CTS to confirm if any response had been filed.
14. The issues which fall for determination are firstly whether this court should review the orders made on 28<sup>th</sup> November, 2024. Secondly whether an injunction should be given in the manner sought. Thirdly whether this application is an abuse of the process of the court.
15. On the first issue, I notice that when the application dated 28<sup>th</sup> November, 2024 was brought to the attention of the Judge, the Judge did not see any urgency in it which would have necessitated the grant of exparte orders. Directions were given that the application be served for inter partes hearing on 2<sup>nd</sup> December, 2024. Come 2<sup>nd</sup> December, 2024, neither the Applicant nor his counsel were present to prosecute the application. It is only the 3<sup>rd</sup> Respondent's counsel who was present.
16. As the Applicant had given a postdated cheque, the Respondent's counsel asked for a mention date to confirm if the cheque would have gone through. A mention date was given for 6<sup>th</sup> February, 2025. The Applicant later filed the present application on 9<sup>th</sup> January, 2025. Again the Judge did not see any urgency in it. It was directed that it be served for interpartes hearing on 13<sup>th</sup> January, 2025. There is therefore nothing to be reviewed as this prayer was technically overtaken by events when the Judge declined to grant it on 2<sup>nd</sup> December, 2024.
17. On the second issue, the principles for grant of an injunction are well set out. First, an Applicant has to establish a prima facie case with probability of success. Second, an injunction will not issue unless an Applicant will suffer injury which will not be compensated in damages. Third, if the court is in doubt, it will decide the application on a balance of convenience. See *Giella v Cessmen Brown & Co. Limited* (1973) EA 358.



18. In the instant case, the Applicant has not demonstrated that he has a prima facie case against the Respondents. As per his own affidavit, he must have incurred some of the costs such as installation of electricity if any in 2003. This amount is being claimed in 2024.
19. There is no contention that the Applicant has rent arrears. He has admitted in his affidavit that he stopped paying rent. When the same was demanded, he attempted to issue postdated cheque one of which was returned unpaid. If it turns out that he incurred any recoverable amount, this can be paid to him and therefore he will not suffer any loss which will not be compensated in damages.
20. I have no doubt in this case as to consider the application on a balance of convenience. The Applicant has admitted owing rent arrears which by now is over Kshs.400,000 if the replying affidavit is anything to go by. The balance of convenience therefore tilts in favour of the 3<sup>rd</sup> Respondent who is owed rent arrears.
21. On the third issue, there is no doubt that the Applicant did not prosecute or seek to withdraw the application dated 28<sup>th</sup> November, 2024. When the Applicant failed to get ex parte orders on 28<sup>th</sup> November, 2024, he came back to court and filed the present application. He gave two postdated cheques one of which was banked but was returned unpaid. The other was not banked at his request. It is clear therefore that the Applicant is abusing the process of the court.
22. From the above analysis, it is clear that the Applicant's application is devoid of merit. The same is dismissed with costs to the 3<sup>rd</sup> Respondent.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MAKUENI ON THIS 20<sup>TH</sup> DAY OF JANUARY, 2025.**

**HON. E. O. OBAGA**

**JUDGE**

In the presence of:

Mr. Kivindyo for Plaintiff/Applicant

Court assistant - Steve Musyoki

