



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC CASE NO. E414 of 2024

LUCY KAIMURI KABURU.....1ST

APPLICANT

KABURU MUGUIKA.....2ND

APPLICANT

PROSOYA KENYA LIMITED.....3RD

APPLICANT

VERSUS

ABDIWAHAB ABDOW IBRAHIM.....1ST

RESPONDENT

**THE CONSOLIDATED BANK OF KENYA
LIMITED.....2ND**

RESPONDENT

PHILLIPS INTERNATIONAL AUCTIONEERS.....3RD

RESPONDENT

RULING

1. In the application dated **1st October 2024** the Plaintiffs/
Applicants seek the following orders;

1) THAT the application be certified as urgent and heard ex-parte in the first instance.

2) THAT pending the hearing and determination of this application interparty the Respondents herein, their agents, servants, employees, or any individuals action on their behalf hereby be ordered to immediately return to the Applicants the personal property unlawfully seized from the premises situated at LR. 13324/49 (New number 1111), House No. 49 Akiba Bellevue South C

Estate, Nairobi County, including but not limited to;

- a) Clothing and household goods;**
- b) Business files and documents;**
- c) Photographic equipment and other electronics;**
- d) Any other items taken from the said premises.**

3) THAT pending the hearing and determination of this application interparty this Honourable court does order the Respondents herein, their agents, servants, employees, or any individuals acting on their behalf be hereby ordered to grant the Applicants immediate and unrestricted access to the property situated at L.R 13324/49 (New Number 1111), House No. 49 Akiba Bellevue South C Estate, Nairobi County.

4) THAT pending the hearing and determination of this suit the Respondents herein, their agents, servants, employees, or any individuals acting on

their behalf hereby be ordered to immediately return to the Applicants the personal property unlawfully seized from the premises situated at L.R 13324/49 (New Number 1111), House No. 49 Akiba Bellevue South C Estate, Nairobi County including but not limited to:

- a) Clothing and household goods;**
- b) Business files and documents;**
- c) Photographic equipment and other electronics;**
- d) Any other items taken from the said premises.**

5) THAT pending the hearing and determination of this suit this Honourable court does order the Respondents herein, their agents, servants, employees, or any individuals acting on their behalf be hereby ordered to grant the Applicants immediate and unrestricted access to the property situated at L.R 13324/49 (New Number 1111), House No. 49 Akiba Bellevue South C Estate, Nairobi County.

6) THAT the cost of this suit.

2. The application is premised on the grounds that in January 2021 the Applicant acted as a guarantor for a loan of Kshs 20,000,000 borrowed by the 3rd Applicant for the purpose of expanding its business. The loan facility was secured by a charge over LR 13324/49 (New Number 1111) Akiba Bellevue South C hereinafter referred to as the suit property.
3. That 3rd Applicant defaulted after facing financial difficulties during the Covid 19 pandemic. As a result the property was auctioned to the 1st Respondent at a cost of Kshs 15,200,000. Efforts by the 1st and 2nd Applicants to challenge the auction at the **Chief Magistrates Court** vide **ELC E 431 of 2022** were unsuccessful.
4. Meanwhile, in an attempt to obtain vacant possession of the property the 1st Respondent filed an application dated 19th March 2024 seeking eviction orders. The Applicants contend that despite the fact that they were not served with the hearing notice, the 3rd Respondent purported to levy distress for rent against the 1st and 2nd Applicant.
5. The Applicants have pleaded that notwithstanding the auction of the suit property, their eviction was unlawful

particulars thereof as cited in the application. They claim that in the course of the unlawful eviction they lost personal documents, tools of trade and medication.

6. The 2nd Respondent has raised a preliminary objection on the grounds that the instant suit is *Res Judicata* **Misc E 431 of 2022** and *Sub Judice* **Milimani ELCA E011 of 2023**. The 2nd Respondents contend that the issues herein have been determined before the Chief Magistrates Court hence cannot be relitigated upon. That the decision of the magistrate's court is now pending the hearing and determination of an appeal. As such the present suit is *sub judice*. Lastly the 2nd Respondents argue that the 2nd Defendant is not a necessary party as they already signed the transfer to the 1st Respondent and hence cannot be culpable for any action that took place thereafter.

7. The 1st Defendant filed a Replying affidavit in which he conceded that he filed an eviction order which was allowed in **Milimani E462 of 2024**. That the Applicants herein have filed an application for review therein. He states that the Plaintiffs lived rent free in his property and hence the

household items were sold to recover rent arrears. He therefore supports the 2nd Defendants plea of *Res Judicata* or *Sub judice*

8. The 1st and 2nd Applicant filed a further affidavit clarifying that they had withdrawn the application for review. In their submissions they insist that they were never served with the pleadings in **Milimani E 462 of 2024**. They stressed that the issues herein are substantially different from those in the earlier and ongoing proceedings.

9. Having considered the issues herein I distill the following issues for determination;

- **Whether the suit is Res Judicata**
- **Whether the suit is sub judice**
- **Whether the 2nd Defendant is a necessary party**
- **Whether the court should grant the orders sought by the Applicants**

10. I will address the question of **Res Judicata** first.

Section 7 of the Civil Procedure Act reads ; -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been

directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

11. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation.

12. The elements for a successful plea of res judicata were set out in **Uhuru Highway Development Ltd v Central Bank of Kenya & Others [1996] eKLR** and **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**, namely:

1. The matter must have been directly and substantially in issue in the former suit;

2. The former suit must have been between the same parties or their privies;

3. The matter must have been heard and finally determined; and

4. The court determining the former suit must have been competent to do so

13. From the material placed before this Court, the Magistrates' Court addressed the question of validity of statutory notices and the propriety of the sale. To the extent that the Plaintiffs seek to re-open that question, the issue is res judicata. However, the legality and manner of eviction and the handling of personal effects are distinct post-sale issues not shown to have been finally determined. Res judicata does not bar consideration of those issues.

14. It is alleged that the suit is *sub judice* **ELCA E011 of 2023** which is an appeal against the finding of the magistrate's court. **Section 6 of the Civil Procedure Act** which states that: -

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously

instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

15. The pending appeal is on the legality of the sale. It does not address the issue of how the post Judgement process of eviction took place. These are new issues which arose after the court had delivered its decision on the earlier issues before it.
16. The 2nd Defendant argues that to the extent that these issues arose after it had completed the sale, they should be discharged from the proceedings. The eviction was exercised pursuant to the charge exercise of statutory power of sale. Any determination touching on the legality of the eviction process, the purported levy for distress for rent raises triable issues. The 2nd Defendant is a necessary party to enable the court effectually and completely determine the issues.

17. Regarding the plethora of orders sought by the Plaintiffs, I note that the Plaintiffs seek access to the premises which seem to infer reinstatement into the suit property. Reinstatement at this interlocutory stage is a drastic remedy and is declined.
18. However on the claim that the Applicants personal effects and medication were attached, the court exercising its inherent powers to do justice orders that the tools of trade, personal effects and medication be returned.
19. The court therefore issues the following orders;
- a. The plea of res judicata succeeds only in respect of the challenge to statutory notices and validity of sale.**
 - b. The Preliminary objection on plea of *sub judice* and striking out of 2nd defendant fails**
 - c. The 2nd and 3rd Defendants shall within 14 days file and serve a full inventory of all items removed during eviction.**

- d. The Defendants shall within 21 days release to the Plaintiffs all personal clothing, medication, and tools of trades in their possession**
- e. Costs shall abide the outcome of the suit.**

Dated, Signed and Delivered virtually at Kajiado this 5th day of February 2026.

JUDY OMANGE

JUDGE

IN THE PRESENCE OF;

Mr. Atancha for the 2nd Applicant.

Mr. Odongo for Akello for the plaintiff.

Peter - Court Assistant.