

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC LC E542 OF 2025

NANCY NYAWIRA MWANGI

PLAINTIFF

VERSUS

SKYVIEW GARDENS LIMITED 1ST

DEFENDANT

MAYFAIR AUCTIONEERS 2ND

DEFENDANT

RULING

1. What is before the Court for determination is the Plaintiff's Chamber Summons application dated 30th October 2025 in which she seeks for the following Orders:

a) Spent.

b) Spent.

c) That pending the hearing and determination of the arbitral proceedings, the Honourable Court be pleased to issue an interim measure of protection by way of a temporary injunction restraining the Defendants, whether by themselves, agents, employees, cronies or any person claiming under them from trespassing, entering upon, evicting, threatening to evict, dispossessing, selling, charging, alienating, or in any manner whatsoever interfering with the Plaintiff's occupation of all that property known as Apartment No. A22 erected on Land Reference No. 1870/V/69 within Nairobi County and the Officer Commanding Kileleshwa Police Station to ensure compliance with this Order.

d) That costs of this application be provided for.

2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. She avers that on 15th July 2020, she entered into an agreement for sale of **Apartment No. A22** erected on **Land Reference No. 1870/v/69**, where she was subsequently granted exclusive use and possession

subject to the terms of the said agreement, which she has been performing by remitting monthly payments.

3. She claims that on 16th October 2025, the 1st Defendant through the 2nd Defendant and in company of hired goons stormed the suit property without notice and attempted to evict her together with her family, a matter she reported at Kileleshwa police station.
4. She contends that pursuant to Clause 21 of the impugned Sale Agreement, she has declared a dispute arising from its breach against the 1st Defendant and unless interim protection is granted pending referral of the matter to arbitration, she risks eviction and the suit property may be sold to unsuspecting third parties, which action would unnecessarily convolute the dispute and render the arbitral proceedings nugatory.

Response

5. In opposition, the Defendants filed a replying affidavit sworn by Robert Nicholas Darby, a director of the 1st Defendant. He avers that the Plaintiff has approached the Court with unclean hands by failing to make material disclosure of the fact that she has previously filed a suit in this Court seeking similar orders, being **ELCLC E295 of 2025 - Nancy Nyawira Mwangi v Skyview Gardens Limited**, thus she is engaging in forum shopping and wants another bite at the cherry before a different judicial officer, which conduct amounts to abuse of Court process and is a waste of judicial resources.
6. He points out that in the former matter, this Court (Hon. Justice Charles G. Mbogo) declined to grant the injunctive orders sought by the Plaintiff and held that having defaulted on the Sale Agreement and been issued with demand notices (including the Notice to Vacate), the Plaintiff rushed to Court to seek intervention to prevent eviction but failed to show any prima facie case that the said Court could consider.

Further, the Court found that the Plaintiff did not deny that she was in arrears and neither did she challenge the validity of completion and demand notices issued by the 1st Defendant. He asserts that the prayers now couched herein as "*interim measures of protection*" are moot and res judicata.

7. He avers that subsequent to the Ruling in the former suit, the 1st Defendant successfully evicted the Plaintiff on 14th October 2025 and that during the exercise, she did not seek assistance from the Officer Commanding Kileleshwa Police to stop the eviction. Further, that it is not possible for a second eviction to have taken place on 16th October 2025 as claimed. He insists that no dispute has been declared against the 1st Defendant by the Plaintiff that would necessitate commencement of arbitration proceedings.

8. In response to the Defendants' reply, the Plaintiff filed a further affidavit. She avers that the suit is not res judicata within the meaning of Section 7 of the Civil Procedure Act as

the cause of action herein is distinct, and the reliefs sought arise from continuing and imminent acts of eviction, which were not conclusively adjudicated upon in the previous proceedings. She denies that she was evicted and insists that she remains in occupation and possession of the suit property. She reiterates that there exists a real, immediate, and imminent threat of eviction.

9. The application was canvassed by way of written submissions.

Submissions

10. The Plaintiff submits that she has met the threshold for grant of injunctions sought. She asserts that she has a prima facie case with a probability of success, having entered into an agreement for the sale of the suit property with the 1st Defendant. Further, that the balance of convenience tilts in her favour, since she is bound to suffer more than the Defendants if an injunctive order is not granted, as she is

going to be evicted from the suit property and impending arbitral proceedings will be rendered nugatory.

- 11.** She also submits that the issues in the present suit are not similar to the issues that were raised in the former suit as in the present suit, she seeks injunctive orders to preserve the intended arbitration. Further, that the parties and the specific orders sought in the present suit are also not substantially similar to the ones in the former suit.
- 12.** To buttress her averments, the Plaintiff relied on the following decisions: **Giella v Cassman Brown Co. Ltd (1973) EA 358; Mrao Limited v First American Bank & 2 others (2003) eKLR; John Florence Maritime Services Limited vs CS Transport and Infrastructure & 3 others KESC 39 (KLR), Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others (2016) eKLR and Nguruman Limited v Jan Bonde Nielsen & 2 others (2014) KECA.**

- 13.** On their part, the Defendants submit that contrary to this Court's directions of 11th November 2025, that the Plaintiff's further affidavit and Submissions be filed by close of business on 27th November 2025, the Plaintiff filed the same out of the Court's deadline without prior leave of Court thus the said documents are a nullity and ought to be expunged. To this end, they relied on the decisions of **Kiru Tea Factory Company Limited v Stephen Maina Githiga & 13 Others (2019) eKLR**, and **Suleiman Said Shabhal v IEBC & 3 Others (2014) eKLR**.
- 14.** They also submit that the Plaintiff's Chambers summons is without merit since it is res judicata.

Analysis and Determination

- 15.** Upon consideration of the instant Chamber Summons application including the respective affidavits and rivalling submissions, the following are the issues for determination:

- **Whether the Plaintiff's further affidavit and submissions are properly on record.**

- **Whether the Plaintiff has met the threshold for interim protection pending arbitration.**

16. On the first issue, the Defendants contend that the Plaintiff filed her further affidavit and submissions out of time without leave thus they should be expunged from the record. It is trite that the Courts are granted discretion to enlarge time and admit documents even if they were filed out of time. I note the Defendants have not demonstrated what prejudice they stood to suffer if the Plaintiff's further affidavit and written submissions filed albeit late were allowed to form part of the Court record. In exercise of my discretion noting that this is an issue touching on procedural technicality which offends the provisions of Article 159 (2) (d) of the Constitution, I will allow the further affidavit and written submissions filed by the Plaintiff, out of time, to form part of the Court record and the same to be deemed as properly filed.

17. On the second issue, the Plaintiff alleges that she has declared a dispute under Clause 21 of the impugned Sale Agreement, arising from its breach by the 1st Defendant and seeks interim protection pending referral of the matter to arbitration. The Defendants denied receipt of any such notice declaring a dispute and insists that the instant application is res judicata since the Plaintiff had previously filed a related suit being **ELCLC E295 of 2025 (Nancy Nyawira Mwangi v Sky View Gardens Limited)** where she sought similar injunctive orders, which Justice Mbogo declined to grant. The Plaintiff however argues that this suit is distinct from the former suit as in the instant suit, she seeks interim measures pending arbitration based on continuing acts of eviction.

18. As to whether the Plaintiff is entitled to the Orders as sought, I wish to rely on the principles as established in the case of **Giella v Cassman Brown (1973) EA 358** as well as section 7 of the Arbitration Act which provides that:

'7. Interim measures by court

(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.'

19. In the case of **Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR**, it was held as follows:

“Under our system of the law on arbitration the essentials which the court must take into account before issuing the interim measures of protection are: - 1. The existence of an arbitration

agreement. 2. Whether the subject matter of arbitration is under threat.3. In the special circumstances which is the appropriate measure of protection after an assessment of the merits of the application 4. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the tribunal's decision making power as intended by the parties.....It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves. Such orders take different forms and go under different names. Whatever their description however, they are intended in principle to operate as 'holding' orders, pending the outcome of the arbitral proceedings."

20. In this instance I note the Plaintiff's claim revolves around **Apartment No. A22** erected on **Land Reference No. 1870/V/69** which is the suit premises in **ELCLC E295** of

2025 (Nancy Nyawira Mwangi v Sky View Gardens Limited). I further note that the Plaintiff has not denied that she had previously sought for injunctive orders in **ELCLC E 295 of 2025** to restrain the Defendants from evicting her from the same suit premises, which orders were denied by Justice Mbogo. Further, the Defendants insist that the Plaintiff has since been evicted from the suit premises.

21. The Plaintiff now once more seeks interim measures to restrain the Defendants from evicting her from the same suit premises claiming she has invoked the arbitration provisions in Clause 21 of the Sale Agreement. It is worth noting that the Plaintiff had filed the previous suit revolving around the same suit premises and never invoked the said arbitration provisions in the first instance. To my mind, I find this not only ironical but indeed amounts to forum shopping and an abuse of the Court process. I opine that the instant application and the determined application in the previous suit were all seeking orders of interim injunction.

22. Section 7 of the Civil Procedure Act provides that:

“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.”

23. In **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR)**, the Supreme Court held as follows:

“(317) The concept of res judicata operates to prevent causes of action, or issues from being relitigated once they have been determined on the merits. It encompasses limits upon both issues and claims, and the issues that may be raised in subsequent proceedings....There are conditions to the application of the doctrine of res judicata: i.

the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title...”

24. Further, in **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] KEHC 6100 (KLR)**, the Court stated that:

“.....a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else.”

25. Insofar as the Courts have the discretion to grant interim measures pending arbitration in accordance with section 7 of the Arbitration Act, in my view this should have been sought before the Plaintiff had filed the previous suit where interim orders were declined. Further, I find that since she commenced the previous suit, she abandoned her right to refer the dispute to arbitration. I hence find the instant application res judicata.

26. Based on the facts before Court while relying on the legal provisions cited and associating myself with the decisions quoted, I find that the instant application is indeed res judicata as a Court of competent jurisdiction already heard and determined an application where the Plaintiff was seeking orders of interim injunction. In the foregoing, I find that the Plaintiff has not established a prima facie case to warrant the orders of interim measures sought.

27. Further, in relying on the case of **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**, where the Court

of Appeal had stated that when a party fails to prove a prima facie case, the Court need not proceed to make a determination of the other two limbs on injunction, I will hence decline to do so.

28. In the circumstances, I find the Plaintiff's instant Chamber Summons application unmerited and will disallow it.

29. Costs to the Defendants.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
14TH DAY OF APRIL, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Omulama for Respondent

Moshe holding brief for Mwangi for Applicant

Court Assistant: Joan