

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E091 OF 2024

ASSOCIATION OF EVANGELICALS

IN AFRICA

- APPELLANT /LANDLORD

VS

NAIROBI ELITE ACADEMY

- RESPONDENT/TENANT

**[Being an appeal arising from the Ruling of Hon Gakuhi Chege in
BPRT NO E427/2024 delivered on 14/6/24**

JUDGEMENT

1. Vide an amended memorandum of appeal dated the 31/1/25 the appellant filed this appeal on grounds THAT the Tribunal erred in law and fact in;
 - a. failing to uphold the appellant's preliminary objection dated 6/5/24
 - b. failing to find that the Respondents' application dated 3/4/24 and 13/5/2024, both subjudice and res judicata by dint of a ruling in MCELC No E103/2024 in the Chief Magistrate's Court at Millimani.
 - c. By upholding the prayers sought by the respondent in their applications dated 3/4/24 and 13/5/24
 - d. By granting the respondent a 9-month period to vacate the said premises in total disregard of the landlord's rights under Section 4 of CAP 301
 - e. By failing to interrogate the circumstances under which the appellant came into repossessing its property from the respondent and specifically that possession had already been handed over to the appellant
 - f. In failing to take into consideration the context of the respondent, which shows deliberate intention of frustrating the appellant's ownership of its property.

- g. By taking into consideration the site inspection report, which did not accurately reflect the situation on the ground
 - h. Failing to consider all facts and authorities relied on by the appellant.
2. The appellant prays for the following orders;
 - a. That the court do set aside part of the ruling of BPRT delivered on 14/6/24 and issue consequential orders [including as to hand over of possession] as may be necessary
 - b. That this appeal be allowed with costs.
3. Directions were issued to the parties to file written submissions, but save for the appellant, the respondent failed to comply.
4. Counsel for the appellant submitted that the tribunal erred in upholding the preliminary objection of the appellant dated 6/5/24. They argued that at the time of filing the suit at the tribunal, there were two subsisting proceedings, namely; ELC/121/24 filed on 22/3/24, which was withdrawn on 9/4/24, and MCELC E103/2024, filed on 26/3/24, in which a ruling was delivered on 30/4/24 on issues identical to those raised in the current suit.
5. The respondent's conduct in initiating similar proceedings in multiple forums constitutes forum shopping and an abuse of the court's process. Moreover, the issues in this appeal were already addressed in the Chief Magistrate's proceedings and are therefore res judicata, preventing subsequent litigation between the same parties on the same cause of action. The tribunal was thus criticised for re-litigating the same issues.
6. The appellant challenged the extension of the respondent's occupation by nine months as inconsistent with section 4(4) of CAP 301, which provides that no tenancy notice shall take effect until a date not less than two months after receipt by the receiving party. It was submitted that the parties had been in communication, and the appellant had informed the respondent that it was in the process of selling the suit property and had even invited the respondent to make an offer to purchase the premises.

Furthermore, on 2/12/23, the appellant notified the respondent that it had leased the premises to a third party, and the respondent sought additional time to relocate; accordingly, it was agreed at the end of the first term, affording the respondent three months to relocate the school. The appellants took possession of the premises on 28/3/24 and leased them to a third party/new tenant. Clearly, the parties had agreed to implied terms and had ended their relationship, and the tribunal was impugned for extending the period to 9 months, contrary to the parties' terms and conduct. The tribunal could not rewrite what the parties had agreed.

7. That the site report did not reflect the accurate position on the ground, a fact that was raised by the appellant to the tribunal that it was no longer in possession of the premises.
8. Having considered the appeal in its entirety, the written submissions and all the material placed before it, the court finds the following issues falling for determination;
 - a. Whether the tribunal erred in failing to uphold the preliminary objection, that is, whether the current suit is sub judice or an abuse of the court's process, and whether the tribunal's decision was res judicata in light of the court's decision in MCELC No E103 of 2024.
 - b. Who meets the costs of the appeal?
9. This being a first appeal, it is the duty of this court to re-analyse the case and draw its own independent conclusion as was held in *Paramount Bank Limited vs First National Bank Limited & 2 others* (2023) KECA 1424 (KLR) that:

“... A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage.

Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of Section 78 of the Civil Procedure Act, a first Appellate Court can appreciate the entire evidence and come to a different conclusion... ”

10. It is widely accepted that the appellant owns the suit property, namely LR No 11605/4 and which they leased on 18/12/2014 for a period of three years. The tenant was operating a school on the premises. The lease expired on 17/12/2017, and the parties did not renew it. It appears that the respondent continued to occupy the premises, resulting in a periodic tenancy.
11. A disagreement arose between the parties on the disengagement of the lease or implied lease, and the respondent filed suits in quick succession in multiple forums. One such case was filed by the respondent at the ELC Court vide ELCLC/121/2024 on 22/3/24 but was withdrawn on 9/4/24. The second case was filed in M. CELC /E103/2024 on 26/3/24. Whilst this was pending, the respondent moved the tribunal vide the current reference on 21/3/24.
12. It is not in dispute that the respondent moved the court in MCELC E103/2024 for an interlocutory temporary injunction restraining the appellant from interfering with the respondent's possession of the suit premises. The appellant opposed the application by a preliminary objection, seeking that the plaint and the notice of motion dated 21/3/24 be struck out on grounds, inter alia, that the suit was sub judice; that the respondent was no longer in the premises; and that the entire suit was an abuse of the process of the court.
13. The court, upon determining the application and the preliminary objection, ruled that the suit was not sub judice to ELC No 121/2024 because the latter had been withdrawn on 9/4/24. Regarding the temporary injunction, the court held that the lease between the parties had lapsed after three years and that the respondent could not rely on it to establish any right; hence, there was no prima facie case. Despite the

expiry of the lease, the respondent continued in occupation under a periodic tenancy, paying rent quarterly. The court found that the balance of convenience favoured the appellant and declined to grant the injunction. Consequently, the application dated 21/3/24 and the preliminary objection were dismissed.

14. Having lost the application in the above case, the respondent quickly filed the suit at the tribunal whilst the one at the Chief Magistrate's Court was subsisting. I agree with the appellant that this conduct amounted to subjudice.
15. Section 6 of the Civil Procedure Act provides as follows;

“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.
16. At the tribunal, the respondent moved the court vide NOM dated 4/4/2024 for similar orders, including restraining the appellant from entering the suit premises, locking the respondent out of the premises, or interfering with the running of the school for a period of 9 months to facilitate the relocation of the school, and requiring the appellant to pay damages for termination of the lease or non-renewal.
17. Via another notice of motion dated 13/5/24, the respondent moved the tribunal for further orders seeking status quo order allowing the school to reopen and operate pending the hearing and determination of the dispute inter partes. The tribunal granted the status quo order on 20/5/24.
18. The court disagreed with the appellant regarding whether there was a controlled tenancy on the premises. It held that since the respondent was offering educational services for money or its worth, the tenancy

qualified as a shop under the definition in section 2 of CAP 301, which states that a shop means premises occupied wholly or mainly for a retail or wholesale trade or business, or for the purpose of providing services for money or its worth. Furthermore, the court noted that because the ruling and proceedings in MCELC No 103 of 2024 were not furnished, it could not determine that the suit was sub judice or res judicata. The court allowed the respondents' applications dated 3/5/24 and 13/5/24, and dismissed the preliminary objection.

19. I have already found that this reference was subjudice to the suit filed at CMELC121/2024 and should not have been filed.

20. With respect to resjudicata, section 7 of the Civil Procedure Act provides as follows;

“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.

21. In the case of **HENDERSON V HENDERSON (1843) 67 ER 313** as it summarizes res judicata:

“ ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res

judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

22. I agree with the appellant that the decision in MCELC 103 of 2023, rendered on 30/4/2024, was between the same parties and involved similar subject matter; identical in the cause of action and therefore falls under all four elements of the doctrine of res judicata. The decision has not been appealed, set aside, or vacated. I therefore have no difficulty in holding that the tribunal's decision was res judicata in light of an earlier decision of the Chief Magistrate's Court. For this reason, the reference is hereby struck out/dismissed altogether.

23. Are the references and the applications an abuse of the process of the court? Black's Law Dictionary defines abuse of the process of the court as anything contrary to the good order established by usage, amounting to a complete departure from reasonable use. An abuse occurs when one makes an excessive or improper use of a thing, or employs it in a manner contrary to the natural legal rules for its use.

24. In the case of **Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** the court held that ;

“The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the

judicial process to the irritation and annoyance of his opponents.

23. The situations that may give rise to an abuse of court process are indeed exhaustive; they involve situations where the process of the court has not been or resorted to fairly, properly, or honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations: -

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.

25. In the same case, the court while quoting the case of **Agwusin vs Ojichie** stated as follows;

“that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process.”

26. Without belabouring the point, I find that this reference is a classic case of an abuse of the court's process. Courts have held that when their processes are abused, they must exercise their inherent power to prevent it. If parties are allowed to forum shop, moving from one court to another in the hope of securing a victory, chaos will ensue in the administration of justice.

27. To prevent the abuse of the court process, I have no hesitation in dismissing the reference in its entirety.

28. For the above reason, I allow the appeal, set aside the ruling of the tribunal and dismiss the reference in its entirety to allow the parties to ventilate their grievances in MCELC E103 of 2024.

29. The costs of the appeal and the reference in the tribunal shall be borne by the respondent

30. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY
OF APRIL 2026 VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**

Delivered Online in the presence of:

1. Mr Kamencu for the Appellant
2. N/A for the Respondent
3. CA - Ms Elizabeth