



**Muchiri v Orbit Chemical Industries Limited (Environmental and Land Originating Summons E001 of 2023) [2024] KEELC 195 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 195 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023  
MD MWANGI, J  
JANUARY 25, 2024  
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA  
AND  
(IN THE MATTER OF LAND REGISTRATION ACT NO. 2 OF 2012)**

**BETWEEN  
CHARLES GACHUGU MUCHIRI ..... APPLICANT  
AND  
ORBIT CHEMICAL INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

**Background**

1. This ruling is in respect of the application dated 21<sup>st</sup> July 2023 filed by the Applicant in this matter. The Applicant seeks an order of interlocutory injunction against the Respondent barring it from interfering with his possession/occupation of the suit property pending hearing and determination of this suit. The application is premised on the grounds on the face of it and on the supporting affidavit of the Applicant sworn on the same date.
2. In a nutshell, the Applicant's case is that he has enjoyed quiet, peaceful, open and uninterrupted possession of the suit property for over 21 years and 6 months at the time of filing his suit. He has built a four storeyed residential and commercial building on the suit property. The Applicant is apprehensive that the Respondent, unless restrained by this court is likely to interfere with the Applicant's right over the suit property.
3. The Respondent's only response to the application was by way of a preliminary objection dated 18<sup>th</sup> September 2023 raising issues of sub judice and res judicata. The court will treat the preliminary objection as the response to the application and therefore consider it alongside the application.



### **Court's directions:**

4. The court granted the parties the liberty to file and exchange submissions. Only the Applicant filed submissions which I have had the opportunity to peruse.

### **Issues for determination**

5. The only issues for determination first and foremost are whether the preliminary objection by the Respondent is merited and secondly, whether the application for interlocutory injunction has met the threshold for the grant of the orders.

### **Analysis and Determination**

6. I will be frugal with my words considering that the main suit is pending for hearing in order not to make any comments or express opinions that may prejudice or embarrass the hearing.
7. I will begin with the preliminary objection.
8. On what constitutes a Preliminary Objection; the Supreme Court of Kenya in the case of *Hassan Ali Jobo & Another -Vs- Suleiman Said Shabal & 2 others* SCK Petition No. 12013[2014] eKLR, restated the definition in the case *Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd* (1969) E.A where the then Court of Appeal of East Africa stated that:

“...a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion.”
9. In the case of *Equity Bank Limited vs. Bryan Yongo & Another* [2014] eKLR the court held that:

“ Any true Preliminary Objection should not be entangled with factual issues.”
10. The Respondents contends that the instant suit is related to other matters some of which have been determined and another pending before another court raising similar issues directly and substantially in this matter.
11. Section 6 of the *Civil Procedure Act* provides 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.”
12. I find that in order to determine whether the rule of sub judice or res judicata has been offended, the court has to delve into the material facts of the other cases referred to by the Objector, call for pleadings, examine and/or interrogate them to help it determine if the facts in issue are similar to the facts in this case. This necessarily puts the matter outside the ambit of a Preliminary Objection. I rely on the case of *In Re Kibet Arap Kimarun (Deceased)* (2021) eKLR.



13. I agree with the decision in *Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another* (2014) eKLR, where the court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

14. I am further persuaded by the court’s holding in the case of *Margaret Wachu Karuri –vs- John Waweru Ribiro* (2021) eKLR, where the Court was faced with a similar question whether sub-judice can be raised as a preliminary point. It held as follows:

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.”

15. That is the position in this case. The issue of sub-judice or res judicata cannot be determined by way of the Preliminary Objection for reasons explained above.

16. I will now proceed to look at the application for a temporary injunction.

17. Ringera J (as he then was), in the case of *Airland Tours and Travel Ltd Vs National Industrial Credit Bank*, Nairobi (Milimani) HCCC 1234 of 2002, stated that in an interlocutory application, the court is not required to make any conclusive or definite findings of fact of law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law.

18. In the old English case of *Gilbert –vs- Eden* (1878) 9 ch. D, Cotton L.J defined interlocutory applications as those applications:

“which do not decide the rights of parties but are made for purposes of keeping things in status quo till the rights (of parties) can be decided or for purpose of obtaining some directions of the court as to how the cause is to be conducted, as to what is to be done in the progress of the cause for the purpose of enabling the court ultimately to decide upon the rights of the parties.”

19. The Court of Appeal in the case of *Nguruman Ltd Vs Jan Bonde Nielsen & 2 Others* (2014) eKLR, while embracing the above position stated that:

“... the party of whom the burden of proving prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained; the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that in the face of it, the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such



a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which on the face of it the applicant's case is more likely than not ultimately succeed.”

20. This being an interlocutory application, I am not at this point in time required to hold a mini trial or make any conclusive or definitive findings of fact or law; certainly not on the one-sided affidavit evidence presented before me.
21. I am for the purposes of this interlocutory application satisfied from the uncontroverted affidavit evidence that the Applicant has demonstrated that he is and has been in occupation of the suit property. Whether the occupation and or possession justifies his claim for adverse possession will be the issue to be determined after the trial.
22. Considering the circumstances of this case wholesomely, the Applicant has not only demonstrated a prima facie case but also the fact that he is likely to suffer irreparable loss unless the orders of an interlocutory injunction sought are granted. The balance of convenience tilts in favour of the Applicant.
23. Accordingly, the Applicant is hereby granted orders of interlocutory injunction restraining the Defendant by itself, servants, agents and or employees from interfering with the applicant's quiet possession and occupation of the suit property pending hearing and determination of this case.
24. The costs of the application shall be in the cause.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Mr. Karwanda for the Applicant

Mr. Omondi h/b for Mr. Kenyatta for the Respondent

Court Assistant – Yvette.

**M.D. MWANGI**

**JUDGE**

