



**Exclusive Living East Africa Ltd v Bulimu (Environment & Land Case
ELCLOM/002 of 2023) [2024] KEELC 320 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE ELCLOM/002 OF 2023**

**JA MOGENI, J
JANUARY 24, 2024**

BETWEEN
EXCLUSIVE LIVING EAST AFRICA LTD PLAINTIFF
AND
ANN MIDEVA BULIMU DEFENDANT

RULING

1. I have before me two applications, the plaintiff's application dated 9/10/2023 and the defendant's application dated 6/11/2023. The first application is filed by the plaintiff under Section 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya, Order 40 rules 1, 2, 3, 4 & 8 and Order 51 rule 1 of the [Civil Procedure Rules of 2010](#) and inherent powers of the court. Seeking the following orders:
 - a) Spent
 - b) A declaration that the defendant, his agents, employees and or servants, tenants have trespassed on the suit property causing damage to the plaintiff
 - c) An injunction compelling the defendant, either by themselves, agents, servants and or anyone claiming under the defendant from entering, trespassing or in any other manner dealing with the suit property and the developments therein referred to as Rivulet residences
 - d) An order of eviction be issued to the Defendant, their agents, servant and or employees to the tenants and any other occupants of rivulet residences who have no sale agreements with the plaintiff herein for the units they are occupying.
 - e) In the alternative of the order of eviction and pending hearing and determination of this application and suit, an order be issued given that all the tenants and occupants of Rivulet Residence therein be compelled to deposit their monthly rent and or any other monies owed to Rivulet residence to the Court.



- f) An order be issued directing the County Commander Nairobi, OCPD Ruaraka and OCS Pangani to provide security to the plaintiff or plaintiff's agent and ensure that the orders and or summons/notices are served to the trespassers.
 - g) General damages for trespassing by the Defendant be granted
 - h) That costs of this application be provided for
2. The applicant has listed 1-7 grounds of which are on the face of the application which include the claim that the applicant is the rightful owners of the suit property LR No 209/2389/16 and the defendant is a trespasser who continues to deny the plaintiff access to its rightful property among other grounds.
 3. The application is supported by an affidavit sworn by Marc Oliver Strack who states that he is one of the directors of the plaintiff company having authority as the co-director to swear the affidavit.
 4. This application is based upon the plaintiff's case brought by way of plaint dated 9/10/2023 seeking the following orders:
 - a) A declaration that the plaintiff is the rightful and registered owner of all that property situate in Pangani within Nairobi County known as LR No 209/23/89/16 and all the developments therein.
 - b) A declaration that the defendant's continued occupation of the suit property is irregular, illegal in bad faith and amounts to trespass.
 - c) An order of eviction do issue against the defendant and or their agents, all other occupant of the suit property apart from the eight (8) who purchased units in the suit property from using or accessing the suit property in any manner for the defendant to be ordered from using or accessing the suit property in any manner and for the defendant to be ordered to vacate the suit property and give back possession of the property to the plaintiff with immediate effect.
 - d) Mesne profits accrued from the suit property for over a span of 5 years that the defendant has been in occupation of the suit property, calculated at the current market rates.
 - e) Damages for trespass
 - f) Cost and interest of the suit
 - g) Any other remedy of the court
 5. The application is opposed by the defendant who filed replying affidavit sworn on 2/11/2023 and Grounds of Opposition dated 2/11/2023. In the replying affidavit she avers that she was a director and shareholder of the plaintiff company having been on boarded in 2015. Further that she is married to one Marc Oliver Strack who is a co-director of the plaintiff company also and who has instituted this suit.
 6. That it is only until 2020 that her estranged husband and co-director in the plaintiff company colluded with another co-director who was her estranged husband's childhood friend to remove her through what she called boardroom coup in the alleged collusion with the Registrar of Companies. Those mentioned are not parties to this suit except for the plaintiff co-director Marc Oliver Strack.
 7. It is her contention that the issues raised in the current suit are issues in a suit already filed in the commercial court HCCOM/E453/2020 where the plaintiff through co-director Marc Oliver Strack has sought for a permanent injunction against her from masquerading a director of the plaintiff, a mandatory injunction an eviction order, a prohibition order, an eviction order and refund of rent



- collected from the suit property. Which according to her makes the current suit offends section 6 of the *Civil Procedure Act* and that the interlocutory issue sought in the application is res judicata having been addressed by Justice Okwany in her ruling of 19/05/2020 in HCCOM/E453/2020
8. She avers that the plaintiff is economical with the truth and is guilty of material non-disclosure about the suits filed in other courts touching on the same suit property and against her as the defendant such as HCFOS/E13/2020, MCCHCC 831/2020, HCC CONST PET/355/2020, HCCOM/E678/2020, HCCOM431/2020, CMCMISC/E1118/2023 and HCCOM/E453/2020 .
 9. The defendant also filed grounds of opposition to the application and plaint wherein she sets out twenty grounds of opposition. In the grounds of opposition she argues, that, (i) the plaintiff has declined to disclose to the court that the ownership of the suit property is not in dispute, (ii) that there is no environmental nor land dispute in the matter filed in this court, (iii) that the dispute is about, directorship, management, ownership and control of the plaintiff limited liability company between the co-directors making the dispute a commercial one in nature which issues are already in consideration in HCCOM/E453/2020.
 10. Further (iv) the issue of rental income was deliberated and a ruling delivered on 19/05/2022 in HCCOM/E453/2020 making the prayer res judicata. That (v) that the issue of directorship of the plaintiff company is in court and it is the issue to be decided first since its resolution will provide clarity on the issue of trespass on the suit property. That (vi) among the multiple pending suits is the issue of matrimonial property and there is also a case in the family division concerning the child. Therefore, there is real danger of making contradictory decisions by the various courts.
 11. She avers that that the filing of multiplicity of cases is a blatant abuse of the court process and should be halted to allow proper utilization of the time of the court and for the interest of justice.
 12. At the same time, the defendant filed application dated 3/11/2023 hereinafter referred to as (“the 2nd Application”) seeking the following orders:
 - 1) Spent
 - 2) That this suit be stayed pending the hearing and determination of this application.
 - 3) That the instant suit and the application dated 9th October 2023 filed there with, offend the provisions of section 6 of the *Civil Procedure Act* which bares the institution of multiple suits, between the same parties, over the same subject matter, in multiple courts.
 - 4) That the instant suit does not disclose a festering environmental dispute and/or a festering land dispute between the plaintiff and the defendant as to warrant this honorable courts intervention and or adjudication.
 - 5) That the instant proceedings are an abuse of court process and are hereby struck out.
 - 6) Costs of this Application be provided for.
 13. The application is supported by the defendant’s affidavit and is based on the 38 grounds that are set out on the face of the notice of motion application. The defendant alleges that she is the wife of the Oliver Marc Strack who is a co-director of the plaintiff company together with one Alexander Joch who is not a party to the suit. She alleges to have been a director of the plaintiff company since 2015 until 2020 when according to her averments she was ousted through what she terms as a boardroom coup in 2020.
 14. She avers that Marc Oliver Strack who is a co-director is a co-plaintiff to the plaintiff herein in another suit HCCOM/E453/2020 and sought to have the defendant who is also the defendant herein evicted



from the pent house in the suit property, sought rental income from the suit property and sought to have.

15. Further that the ongoing dispute was summarized by Lady Justice Okwany in HCCOM/E453/2020 as being a suit that started as a matrimonial dispute which snowballed into a wrangle over the directorship and shareholding of the company in her ruling delivered on 19/05/2022.
16. The two applications were canvassed by way of written submissions
17. I will proceed and address the two applications concurrently, the application dated 9/10/2023 hereinafter referred to as (“1st application”) and the application dated 3/11/2023, the “2nd application”

Determination and Analysis

18. On my part I have finally had opportunity to consider the two application filed before me and the grounds of opposition filed by the defendant in the 1st and 2nd application as well as the well-researched submissions the authorities cited by both parties and the relevant provisions of the laws governing the issues raises by the parties in the applications.
19. I have noted that the plaintiff on their part filed a multiplicity of suits which I have enumerated hereabove. It seems that the strategy is frustrate the legal processes through these multiple cases. Parties should learn that disagreements will always be there but two parties who have shared such good times together and worked so hard together need not go their separate ways acrimoniously. A time may come for parties to go separate ways but this can be done harmoniously.
20. I note that the defendant has stated that the issue of ownership of the suit property is not in contest, meaning she is not contesting that the plaintiff company owns the suit property and so one is at a loss as to why the plaintiff wants to be declared to be the owner of a suit property where there is no contest. Actually the contention is about the share-holding in the plaintiff company where both the plaintiff co-director and the defendant claim to be shareholders. The other contention is the rent accruing from the suit property.
21. The plaintiff company has filed multiple suits but has not disclosed in the pleadings the multiple suits and the various prayers or orders they are seeking before court for the myriad of suits filed. In fact my perusal of all the suits point to the fact that both the plaintiff and the defendant have filed the multiple suits.
22. The issue of rent was addressed through the ruling for Justice Okwany on 19/05/2022 the same issues was raised in the same suit HCCOMM/E453/2020 before Justice Dorah Chepkwony on 10/01/2023 an order was issued which seem to contradict what Justice Okwany had ordered.
23. I take it that the applicant March Oliver Strack and Exclusive East Africa Limited did not disclose that there were earlier orders issued relating to the issue of rent. This for sure is an abuse of the court process and should be discouraged.
24. Be as it may, and following my perusal of all documents filed I have narrowed down on the following to be the issues I need to determine:
 - a) Whether the Plaintiff meets the requirement of being granted temporary injunction under the provision of Order 40 Rule 1 & 2 of the *Civil Procedure Rules*.
 - b) Which court has jurisdiction to determine issues of the directorship and shares of the Plaintiff's Company vis-à-vis the defendant's claim?



- c) Whether there is any conflict created by the interim orders granted by HCCOM No 453 of 2020 and the prayers sought by the plaintiff regarding rent *vis-à-vis* the principle of “*res judicata*” as founded under the provisions of section 6 of the [Civil Procedure Act](#) Cap 21 of Laws of Kenya.
- d) Who will bear the costs to these applications?
25. At this juncture, in relation to the first issue, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set down in the precedent setting case of [Giella v Cassman Brown & Co. Ltd](#) [1973] EA 358. In the case of [Mrao Ltd v First American Bank of Kenya Limited and 2 others](#) [2003] KLR 125, the Court of Appeal stated what amounts to a *prima facie* case.
26. In the case of [Kenleb Cons Ltd v New Gatitu Services Station Ltd & another](#) 1990 KLR 557 Bosire J (as he then was) held that: -
- “to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”
27. Now, the defendant in this case claims to have been married to the plaintiff’s co-director Marc Oliver Strack and they have a child who is 8 years old and that they stayed on the suit property which is their matrimonial home. The plaintiff did not dispute this fact; no evidence has been presented to controvert this fact. I will therefore issue *status quo* orders to preserve the suit property until this matter is heard and determined.
28. This is one of those matters that I would implore the parties with the assistance of their counsels to try court annexed mediation as opposed to an adversarial approach to resolving the dispute – mediation will ensure both parties land on even ground which is soft.
29. I have seen from the documents placed on record, that the plaintiff company has a certificate of title but the ownership of the plaintiff company is a matter not settled. That is why this dispute is in court. It is imperative that the issue of ownership of plaintiff company is resolved but this is not the right forum to address the issue of directorship and therefore I will not deal with that issue. The prayers sought by the plaintiff are issues to be adjudicated during the full trial.
30. Having found that the suit property should be preserved and not dealt with in any way by way of sale, alienation, transfer, eviction but the status quo to be observed strictly until the hearing of this suit, I will not consider the second and third conditions articulated for issuance of an injunction in [Giella v Cassman Brown & Co Ltd](#) (*supra*). When court is in doubt, it examines on which side the balance of convenience tilts to. In this case, the balance of convenience tilts in favour of preserving the suit property during the hearing and determination of the suit.
31. On the second issue, I hold that these are matters to be heard and rightfully determined before the High Court and Environment Land Court. These courts have proper jurisdiction to deal accordingly. There is no conflict since the issues presented before the two courts are distinct and separate subject matters. The only issue to ponder upon is for the parties to seriously consider resolving these matters amicably or in the alternative consolidate them. I am aware that the plaintiff has brought to this court the issue of ownership which I repeat is not in contest at all. The parties will do themselves justice if they chose to either consolidate the many matters field in various courts or to amicably resolve them.



32. On the third issue, which was regarding the statutory issue of “*res judicata*” as founded under the provisions of Section 6 of the [Civil Procedure Act](#) Cap 21 of Laws of Kenya by the defendant in the filing of this case by the plaintiff. The defendant has stated that there is need for Stay of the suit pending the hearing and determination of this application and that section 6 bars the filing of multiple suits.
33. Now section 6 of the [Civil Procedure Act](#) Cap 21 provides as follows:
- “6. 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”.
34. It therefore follows that for one to get a stay of proceedings in a suit they must satisfy the following conditions: -
- a) There has to be a matter pending or previously heard in court;
 - b) The matter involved a subject in issue which was directly and substantially in issue in a previously instituted suit or proceeding.
 - c) The matter must have been between the same parties, or between parties under whom they or any of them claim, litigating under the same title;
 - d) The matter must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
35. These provisions are a bar to parallel prosecution of cases in two forums of equal jurisdiction. Now from my reading of the provisions of the law provided above, for the doctrine of *res judicata* to be achievable, the following ingredients must be seen in the parallel forums:-
- a) The suit or issue was directly and substantially in issue in the former case.
 - b) The former suit was between the same parties or parties under whom they or any of them claim;
 - c) Those parties were litigating under the same title;
 - d) The issue was heard and finally determined in the former suit.
 - e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
36. The court in the case of [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 others](#) (2015) eKLR stated as thus:
- “The rationale behind *Res Judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter, *res judicata* ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgements by reducing the possibility of inconsistency in Judgements of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential



ingredients in maintaining respect for justice and the rule of law. Without res judicata, very essence of the rule of law would be in danger of unravelling uncontrollably”

37. Indeed, the above are matters of pure law from a face value but nonetheless, in as much as they involve the same parties, but the matters are still pending determination and not as yet concluded. As provided for under article 162 (b) of the [Constitution of Kenya](#) and section 3 of the [Environment and Land Court Act](#) No 19 of 2012, vests all matters of the use and occupation of title to the original and unlimited jurisdiction of the ELC and not any other court. It is evident that there exist more than two matters spread out and filed by the same parties in different courts which calls for staying of the current suit because the defendant does not contest the ownership of the suit property by the plaintiff but the directorship is the one is question and this must be decided first.
38. In particular, I am aware that the matter pending hearing and determination before the High Court HCCOM No E453 of 2020 is solely on the ownership of the plaintiff company. It is just fair and prudent that the High Court proceeds to handle it in the spirit of the Court of Appeal case of CA No 83 of 2016 (Mombasa) [Co-operative Bank v Patrick Njuguna Kangethe](#) (2017) eKLR on mixed grill cases.ercial nature.
39. In the case of [Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others](#) [2020] eKLR the supreme court developed the test of “appropriate reliefs or appropriate remedies”, focusing on the need to avoid shutting litigants out of the seat of justice in mixed grill disputes. The supreme court rendered itself in the [Kibos Distillers case](#) as follows:
- “The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the Petition. However, once it had established that the Environment & Land Court did not have the jurisdiction to hear and determine the Petition, the appellate court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the Environment & Land Court did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void *ab initio*, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”
40. In conclusion on this issue, therefore, its noted that the subject matters and issues are substantially distinct. These are matters to be heard and rightfully determined before the High Court and Environment Land Court. There is no conflict as they are very distinct and separate subject matters.
41. On the issue of costs which is the last issue for determination, the provisions of section 27 (1) of the [Civil Procedure Act](#), dictate that Costs follow the events. But noting that the suit is between alleged husband and wife the two are family and therefore I direct that each party for the time being bears their costs of their applications.

DISPOSAL

42. Based on the fore going analysis, I do proceed to make the following directions/orders: -
- a) THAT the Notice of Motion dated 9/10/2023 by the Plaintiff/Applicant is dismissed.
 - b) THAT the Notice of Motion application dated 3/11/2023 by the Defendant is found to be unmeritorious and hence dismissed.



- c) This suit is stayed until High Court HCCOM No E453 of 2020 is heard and determined.
- d) Status quo presently prevailing on the suit property be maintained.
- e) THAT each party to bear their own costs of the application filed hereof.

Any party is at liberty to apply.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2024.

MOGENI J

JUDGE

In the virtual presence of:

Mr. Nahkone for the Defendant /Respondent /Applicant

Mr Kanyi Mwangi for the Plaintiff/Applicant

Caroline Sagina: Court Assistant

MOGENI J

JUDGE

