



REPUBLIC OF KENYA



**Munyao v Maluki & another (Environment and Land Appeal
E018 of 2024) [2025] KEELC 889 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E018 OF 2024
LG KIMANI, J
FEBRUARY 27, 2025**

BETWEEN

SHADRACK MUNYAO PLAINTIFF

AND

KENNY MUTHOKA MALUKI 1ST RESPONDENT

KENYA WOMEN MICROFINANCE BANK (K) LTD 2ND RESPONDENT

RULING

1. The Appellant/Applicant filed the Notice of Motion dated 21st June 2024 seeking the following ORDERS:
 1. Spent
 2. Spent
 3. Spent
 4. That, pending the hearing and the final determination of the appeal herein, there be preservative orders stopping any further attempts to sale by public auction or any other dealings of any kind which may prejudice the rights and interests of the applicant in respect of a section of Kitui Municipality/Block III/290.
 5. That this Court be pleased to issue any further orders or directions in relation to the rights and interests of the parties to the property.
 6. That the Respondents be ordered to meet the costs of the Application.
2. The application is supported by the affidavit of the Applicant where he stated that the respondents in this appeal were the defendants before the trial court in Kitui CMCC No. E001 of 2024 while he was the plaintiff. The applicant brought the suit in the lower court claiming rights and interests to a



portion, space or section, comprised in the property known as Kitui Municipality/Block III/290. The Applicant claimed declaratory rights as an occupier, possessor and tenant of an office space comprised in the aforesaid property.

3. The Applicant claimed that the 1st and the 2nd respondents have had yet to be resolved disputes as chargor and chargee arising from which. He was issued with several threats of eviction, or ejection, or dispossession from the 2nd respondent. He moved to court to protect his rights and interests, even as the 1st and 2nd respondents sort out their own issues.
4. He stated that, at the first instance, he was granted by the trial court *ex parte* orders, securing his proprietary rights and interests. The Respondents raised a preliminary point of law on jurisdiction of the court, among other issues. The trial court upheld the Preliminary Objection on jurisdiction through its impugned ruling dated 15th May 2024.
5. It is the Applicant's contention that the trial court did not properly appreciate the case he had presented before it; the nature and/or kind of rights and interests he was claiming, which are specific, definite, identifiable issues of right and interests in relation to the section, portion, or area, he occupies, possesses and operates from, which, if, it were isolated from the issue, as between the 1st and 2nd respondents, were determinable by the court.
6. The Applicant claims that the intended sale by public auction of the entire property on 27.6.2024 without caring or preserving his rights or interests in a section of the property be stopped forthwith.
7. The Applicant believes that, the court had the necessary powers and jurisdiction to hear and determine his case.

The 2nd Respondent's Response

8. The 2nd Respondent raised a Notice of Preliminary Objection dated 25th June 2024 on the following grounds:
 1. That the Appeal is a non-starter as it has been brought outside the statutorily limited time of 30 Days allowed by the *Civil Procedure Act*. The Ruling appealed against was delivered on 15th May 2024 while the Memorandum of Appeal was filed on 21st June 2024.
 2. That this Honorable Court has no jurisdiction to entertain this application and the entire appeal as it pertains to Charges and exercise of a Chargee's Statutory Power of Sale. The jurisdiction in this suit exclusively lies with the High Court.
 3. The Appellant lacks locus standi to seek the reliefs against the 2nd Respondent who is the Chargee as they are not recognized in law as one of the persons to seek relief under Section 103 of the *Land Act*, 2012.
 4. The Appellant's Application and Suit are fatally defective as they offend the doctrine of *subjudice*.
 5. The application and suit offend the doctrine of *res-judicata*.
9. The 2nd Respondent prays that the instant application and entire suit be dismissed for the above stated reasons.
10. Marion Wasike, the 2nd Respondent's head of legal services swore a replying affidavit giving the background to the dispute herein. She stated that the 1st Respondent together with Stellar Kavutha Muthoka sought a financial facility at the 2nd Respondent bank for Seventy Million Shillings



- (Kshs.70,000,000). They were under a duty to facilitate the 2nd Respondent with a duly executed rental assignment which assigned all rental income from the charged property to the bank. They charged the suit property herein Kitui Municipality/Block III/290 and Kitui Municipality Block 1/90.
11. The said chargors defaulted on the loan which was outstanding at Ksh. 117,356, 053.61/= as at September 2021. Injunctive orders were issued in Kitui High Court case E010 of 2021 after the auction was scheduled to take place. However, the auction was unsuccessful as no bids were placed. The said suit was withdrawn with costs to the 2nd Respondent.
 12. She further stated that there is another suit filed by the 2nd Respondent for enforcement of the Chargee's rights at the Kitui High Court E007 of 2023.
 13. The 2nd Respondent's position is that the appeal is a non-starter for being filed out of the statutorily limited time of 30 days allowed by section 79G the *Civil Procedure Act*. Further, the 2nd Respondent states that this Court does not have the jurisdiction to hear and determine this matter as it pertains to the exercise of a Chargee's power of sale, which jurisdiction exclusively lies with the High Court. They also submit that the lower court lacked the pecuniary jurisdiction to handle the matter.
 14. The 2nd Respondent argues that the Applicant has no locus standi, as he has no legal interest in the suit property under section 103 of the *Land Act*, 2012. They also faulted the lease exhibited for not being signed by the landlord and not being registered and there being no evidence of payment for the same and no definitive details. They therefore pray that the instant application and entire appeal be dismissed.

The Applicant's Supplementary Affidavit

15. Regarding the application being time barred, he deposed that the 2nd Respondent has not factored in and excluded weekends and public holidays.

The Applicant's Notice of Preliminary Objection

16. The Applicant also filed a Notice of Preliminary Objection dated 27th June 2024 on the points in summary that the 2nd Respondent's replying affidavit at paragraphs 15, 16, 17, 18 and 19 are deposing on matters of law and not fact and contain legal arguments, therefore offend Order 19 rule 3 of the Civil Procedure Rules and ought to be struck out.

Applicant's Written Submissions

17. Counsel for the Appellant/Applicant submitted that the Applicant had filed a suit seeking a declaration of proprietary rights and interests as an occupier in possession of a definite section of the suit property, even as the 1st and 2nd Respondent continue to resolve their dispute.
18. In pursuit of an interlocutory injunction, the Applicant relied on the case of *Bonde vs. Steyn & others*(2013)2EA 8 where it was held that the Court should not decide a case with finality on a balance of probabilities at this stage.
19. On the Preliminary Objection that the Appeal is time barred, he states that the impugned ruling was delivered on 15th June 2024 and this appeal was filed on 21st June 2014. Excluding 1st of June which was a public holiday and fell on a Saturday, he states that the next time computation fell on 2nd June 2024.
20. The Applicant dismissed the point on lack of jurisdiction of the Environment and Land Court as the lower court had found itself to have jurisdiction, save for pecuniary jurisdiction.



21. With regard to the preliminary point that the Applicant lacks locus standi, the Applicant highlighted that this was not a point that was addressed by the lower court and terms it as a dead issue in this appeal.
22. Acknowledging that there are other suits between the 1st and the 2nd Respondent, it was submitted that the Applicant is not joined to those suits and has a right of hearing on his issues. On the matters of sub-judice and res judicata, the Applicant submits that the trial court did not address those issues and that they should not arise in the appeal as the 2nd Respondent did not appeal against this.
23. Relying on the Sekazira and Bonde cases (Supra) earlier quoted, it was submitted that the principle of preservation of the right of hearing is what is important at this stage and that he should be allowed to ventilate his case
24. The 1st Respondent though represented did not file a reply to the application. His counsel stated that he did not oppose the application and that he associated himself with the Appellant's submissions.

2nd Respondent's Submissions

25. Counsel for the 2nd Respondent submitted that for the Applicant to succeed in the quest for an injunction, he must first surmount their preliminary objection, satisfy the principles for the grant of injunction and satisfy the principles for stay pending appeal.
26. On jurisdiction, it was submitted that this court is lacking on two fronts. One, that the appeal has been filed out of time and two, that this Court has no jurisdiction over a Chargee Bank's power of sale. On the point of limitation of time, Counsel quoted section 79G of the *Civil Procedure Act* and the cases of: Nicholas Kiptoo arap Korir Sallat v. Independent Electoral and Boundaries Commission & 7 others (2014)eKLR. Nickson v. Collins & 3 others(2024) KEELC 1797(KLR)
27. Regarding the jurisdiction of this court to deal with matters concerning the statutory power of sale, Counsel submitted that the injunction sought is to stop the 2nd Respondent from exercising its statutory power of sale, which the Environment and Land Court has no jurisdiction to do. He relied on the authorities in the cases of: Bank of Africa Kenya Limited & Another vs. TSS Investment Limited & 2 others-Civil Appeal No. E055 of 2022 Joel Kyatha Mabaluka t/a Mbaluka & Associates Advocates v. Daniel Ochieng Ogola & Co. Advocates(2019)eKLR and Co-operative Bank of Kenya Limited vs. Patrick Kangether Njuguna & 5 others(2017)eKLR.
28. Highlighting that the Applicant is only interested in a portion of the suit property but seeks an injunction against the sale of the whole of it, the 2nd Respondent submitted that he lacks locus standi in law since he is not the Chargor and has no recognized interest as per the Section 24 of the *Land Registration Act* and Sections 103(1) and (2) of the *Land Act*, 2012. On this point, Counsel cited the decisions in the following cases: Caneland Limited v. Africa Banking Corporation Limited(2016)eKLR where the Court quoted in Nairobi Mamba Village v. National Bank of Kenya(2002)1 EA 197
29. The other issue that counsel for the 2nd Respondent raised is that the suit is res-judicata as it was dealt with in a similar application before the High Court Kitui HCCC No.E10 of 2021 by a ruling delivered by Limo J exhibited by their replying affidavit annexures pages 51-79.They cited section 7 of the *Civil Procedure Act* CAP 21 and the cases of Uhuru Highway Development Ltd-vs-Central Bank of Kenya, Exchange Bank Ltd and Kamlesh Mansukal Pattni as quoted in Kennedy Mokua Ongiri v John Nyansende Mosioma & Florence Nyamoita Nyasende(2022)eKLR.
30. They also submit that the suit herein is sub-judice as there is currently another suit Kitui HCCC No. E007 of 2023 filed by the 2nd Respondent still pending. They quoted Section 6 of the *Civil*



Procedure Act on this point and relied on the definition of sub-judice as given in the case of Kenya National Commission on Human Rights v. Attorney General; Independent Electoral and Boundaries Commission & 16 others(Interested Parties)(2020)eKLR.

31. On matters of the prayer for injunction, Counsel submitted that the Applicant does not have a prima facie case because as it was held by the trial magistrate, the suit had been filed in that court that lacked the pecuniary jurisdiction to handle the matter. Further, that the issue of the injunction was already dismissed by Limo J in the High Court case.
32. It was further submitted that the Applicant has not met the principles warranting a stay pending appeal and relied on the Court of Appeal's holding in the case of Vishram Rvji Hlai vs. Thornton & Turpin(1990)KLR 365.
33. It was concluded by Counsel for the 2nd Respondent that for the above submitted reasons, the instant Application and entire appeal lack merit and should be struck out.

Analysis and Determination

34. The court has considered the application herein, the replies thereto, the Preliminary Objection filed and submissions by counsel. The court will first deal with the 2nd Respondent's preliminary objection dated 25/6/2024.
35. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
36. The above legal position was cemented in the now famous case of Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696. The Court then held that:-

“A preliminary Objection is in the nature of what used to be a demurer 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 has to be ascertained or if what is sought in the exercise of judicial discretion.”
37. The first point in the preliminary objection is that the Appeal has been brought outside the statutorily limited time of 30 days allowed by the Civil Procedure Act. The ruling of the trial court appealed from was delivered on 15th May 2024 while the Memorandum of Appeal was filed on 21st June 2024. This was certainly outside of thirty days from the date of the ruling.
38. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
39. The above section is couched in mandatory terms and the Applicant herein had a legal obligation to file the Appeal within a period of thirty days from the date of the ruling. Contrary to the argument raised



by the Applicant, Section 79G of Civil Procedure Act does not mention exclusion of Public holidays or weekends.

40. Further, the court finds that under the above section the Appellant/Applicant had the option of filing a certificate of delay from the lower court showing the time it took for the preparation and delivery to the appellant of a copy of the decree or order if at all this was the reason for delay in filing the Appeal.
41. The Applicant also had the option of making an application seeking to have the Appeal admitted out of time by satisfying the court that he had good and sufficient cause for not filing the appeal in time. The Appellant did not do the above but chose to file the Appeal on 21st June 2024.
42. The Applicant claims that the appeal was not filed out of time if one takes into account weekends and public holidays. Computation of time is provided for under Section 57 of The Interpretation and General Provisions Act Chapter 2 Laws of Kenya which states that;

In computing time for the purposes of a written law, unless the contrary intention appears -

- a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
 - b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
 - c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the nextday afterwards, not being an excluded day;
 - d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.
43. Section 57 (d) of The Interpretation and General Provisions Act is repeated under Order 50 rule 2 of the Civil Procedure Rules which provides that:

“Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day and Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of such limited time.”
 44. The court notes that the time given for filing the appeal under Section 79G of the Civil Procedure Act is 30 days from the date of ruling or judgment. The said days are not less than six days as provided above and thus the exclusion of public holidays and weekends does not apply. The time for filing the appeal ran out on 14th June 2024 and the Appeal was filed on 21st June 2024, which was out of time without an application for extension of time.



45. The Court further relies on the provisions of Order 50 Rule 1 of the Civil Procedure Rules which provides for computation of time and states that when time relates to a month the same means calendar month. The rule states that;

“Where by these Rules or by any judgment or order given or made, time for doing any act or taking any proceedings is limited by months, and where the word “month” occurs in any document which is part of any legal procedure under these Rules, such time shall be computed by calendar months unless otherwise expressed.

46. The Supreme Court of Kenya held as follows in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR that was relied on by Counsel for the 2nd Respondent, where an appeal was filed out of time without leave of the Court:

“What we hear the applicant telling the Court is that he is acknowledging having filed a ‘document’ he calls ‘an appeal’ out of time without leave of the Court. Pursuant to rule 33(1) of the Court’s Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court’s Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do”

47. This Court finds that it cannot entertain the instant application for the reason that the Appeal herein was filed outside the period of the time provided in law. Even if the court were to be persuaded on the merits of the application, there is no foundation upon which the application would be premised since the Appeal itself is incompetent.

48. The court thus finds that in the instant case here is no valid or competent Memorandum of Appeal on record on which the Applicant could premise the Notice of Motion dated 21st June 2024.

49. Having found that there is no competent appeal on record the court finds it unnecessary to consider the other grounds set out in the Notice of Preliminary Objection or the merits of the Notice of Motion dated 21st June 2024.

50. The court finds that ground 1 of the 2nd Respondent’s Notice of Preliminary Objection dated 25th June 2024 has merit and makes the following orders;

1. The Notice of Preliminary Objection dated 21/6/2024 is upheld.
2. The Memorandum of Appeal dated 20th June 2024 and the Notice of Motion dated 21st June 2024 are hereby struck out.
3. Costs of the appeal and the application are awarded to the 2nd Respondent.

RULING READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF FEBRUARY 2025.

In the presence of:

Ongeri for the 2nd Respondent.

Ms. Mwikali holding brief for Mwalimu for 1st Respondent.



No appearance for Applicant.

Court Assistant: Kendi

HON. LADY JUSTICE L. G. KIMANI

JUDGE

