



**Da Costa v Maina (Environment & Land Case E177 of 2023)  
[2024] KEELC 1375 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1375 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E177 OF 2023**

**MD MWANGI, J**

**MARCH 12, 2024**

**BETWEEN**

**SHERIFFA ANGELO DA COSTA ..... PLAINTIFF**

**AND**

**DORCAS WANGUI MAINA ..... DEFENDANT**

**RULING**

(In respect to the Defendant’s application dated 26<sup>th</sup> January, 2024 seeking to review the court’s orders of 15<sup>th</sup> January 2024 and the Plaintiff’s application dated 12<sup>th</sup> February 2024 seeking to join additional parties as Defendants)

**Background**

1. On 15<sup>th</sup> January, 2024, this Court after considering two applications; one by either side, issued an order of temporary injunction restraining the Defendant by herself, servants, agents and or employees from interfering with the Plaintiff’s quiet possession and occupation of the suit property pending hearing and determination of this case. At the same time, the Court dismissed the Defendant’s application dated 11<sup>th</sup> December, 2023.
2. The Defendant on 26<sup>th</sup> January, 2024 filed yet another application under the provisions of Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 & Order 51, Rule 1 of the *Civil Procedure Rules* this time round seeking orders that:
  - i. This Court be pleased to review, vary or set aside its orders made on 15<sup>th</sup> January, 2024.
  - ii. This Court be pleased to issue an injunction order restraining the Plaintiff/Respondent whether by herself or her representative, servants, agents and or any other person authorized by her from howsoever selling, transferring ownership, alienating, trespassing onto, or interfering



with the Defendant's quiet enjoyment of the suit property L.R. No. 209/3271/54, now known as Nrb/Block 42/119 pending hearing and determination of this suit.

- iii. In the alternative to prayer No. 5 above, the Honourable Court be pleased to issue an order restraining all parties to this suit being the Plaintiff and the Defendant including Wareysi Tech Limited and its directors therein; Sheriffa Angelo Dacosta and Abdullahi Musdaf Hussein, whether by themselves or their representatives, servants, agents and or any other person authorized by them from howsoever, transferring ownership, dealing with, alienating, trespassing on to, interfering with the suit property L.R No. 209/3271/54 now known as Nrb/Block 42/119 pending hearing and determination of this application.
  - iv. The OCS Pangani Police Station to ensure compliance with the above orders.
  - v. The Honourable Court grants any further orders as it deems fit to safeguard the subject property.
  - vi. The Costs of this application be borne by the Plaintiff.
3. The Defendant/Applicant in her supporting affidavit averred that she had established from the Chief Lands Officer in Nairobi that the Plaintiff had transferred her "unknown" title to a company known as Wareysi Tech Ltd on 31<sup>st</sup> July, 2023. As such, the Plaintiff was not 'the owner' of the subject property as she had alleged. The Defendant asserted that the Plaintiff had therefore misrepresented the facts of her ownership of the property to the Court in her application of 16<sup>th</sup> November, 2023. The implication of that discovery as stated by the Defendant was that the Plaintiff had no prima facie case to warrant the grant of the orders issued in her favour on 15<sup>th</sup> January, 2024.
  4. The Defendant further alleged that she had conducted a search at the Companies' Registry and established that the Plaintiff is one of the Directors of the company known as Wareysi Tech Ltd while the other Director is one Abdullahi Musdaf Hussein, the Advocate who had signed the certificate of urgency in support of the Plaintiff's application and the pleadings.
  5. The Defendant asserts that the Plaintiff deliberately misrepresented the issues to the Court by failing to disclose the transfer of the title to the Company yet she had filed this suit on 16<sup>th</sup> November, 2023 long after the transfer to the above Company. This was material non-disclosure on the part of the Plaintiff aimed at hoodwinking the court to issue the orders as it did.
  6. The Defendant avers that the orders of 15<sup>th</sup> January, 2024 have exposed her to great risk of losing the suit property as there are no equivalent orders in place injuncting the Plaintiff from either selling, or transferring the suit property or wasting it. She reiterated that the Plaintiff has never been in occupation of the suit property at any one time or at all.
  7. The Defendant stated that on the night of 25<sup>th</sup> January, 2024, the Plaintiff and her representatives including the directors of Wareysi Tech Ltd forcefully demolished the structures that were on the suit property. The Defendant deposed that she had since established that there are plans by the Plaintiff and Wareysi Tech Ltd to sell the subject property. It is therefore fair and just that the orders sought be granted.
  8. The affirmations by the Defendant were reiterated in her supplementary affidavit subsequently filed with leave of the court in response to the replying affidavit filed by the Plaintiff. She further deposed that she had since made a complaint on the demolition to the police.



## Response by the Plaintiff

9. The Plaintiff responded to the Defendant's application by way of a replying affidavit deposed on 12<sup>th</sup> February, 2024.
10. In the replying affidavit, the Plaintiff denies the averments by the Defendant and prays for the dismissal of the application by the Defendant terming it frivolous. She further states that the application is brought in bad faith with a view to defeating justice.
11. On the allegation that the Plaintiff had already transferred the title of the suit property to the Company known as Wareysi Tech Ltd, the Plaintiff deposes that,

“the Defendant has not furnished this Honourable Court with any shred of evidence to the effect that indeed Abdullahi Musdaf Hussein's directorship in the afore-mentioned Company (Wareysi Tech Ltd) is/was pegged on the alleged ownership of the suit property.”
12. The Plaintiff asserts that the Defendant has not provided any evidence before the Court on the allegation that she (the Plaintiff) intends to sell the suit property. She therefore terms the allegation by the Defendant baseless and lacking any evidential backing or foundation.
13. On the alleged demolition of the suit property, the Plaintiff confirms the same, but accuses the Defendant of being responsible for it in a bid to forcefully evict her from the suit property. She alleges that the Defendant had in fact, prior to the demolition, actually given notices to tenants whereby she had communicated that the suit property was scheduled for demolition with effect from 1<sup>st</sup> December, 2023 for purposes of redevelopment.
14. The Plaintiff avers that the Defendant had always harboured the intentions of demolishing the suit property, which she had finally executed on the night of 25<sup>th</sup> January 2024. The Plaintiff averred that she had indeed made a complaint of malicious demolition to property against the Defendant at the Pangani Police Station, on 26<sup>th</sup> January, 2024 under O.B. No. 54/26/01/2024,
15. The Plaintiff further deposed that the suit property was currently enclosed with iron sheets by the Nairobi City County Government bearing the label,

“this property has been secured by the Nairobi County Government.”

That, according to the Plaintiff, is what informed her decision to file an application to join the Nairobi City County Government and the National Land Commission as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively vide her application dated 12<sup>th</sup> February 2024 for them to shed light on the historical background of the suit property, renewal of the lease, and whether the same was done procedurally as well as the current ownership status of the suit property.
16. The Plaintiff in her further affidavit sworn on 16<sup>th</sup> February, 2024 reiterated her earlier averments and denied the Defendant's allegations in her supporting and supplementary affidavits.
17. The Defendant is opposed to the application by the to join the additional parties as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. She states that the intended Defendants are not necessary parties to these proceedings. Their joinder, according to the Defendant will unnecessarily complicate this matter.



**Court's directions:**

18. The Court's Directions were that the two applications be orally heard contemporaneously. The hearing was on 19<sup>th</sup> February, 2024. The oral submissions by the parties form part of the record of this Court. I need not replicate them verbatim in this ruling.

**Issues for Determination**

19. The issues for determination in this matter are rather straightforward. In my opinion, the issues are;
- a. Whether the Defendant's application meets the threshold for review under the law.
  - b. Dependent on the outcome of (a), above, what orders should issue, if at all.
  - c. Whether the intended 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are necessary parties in these proceedings.

**Determination:**

20. Justice J. R. Midha of Delhi High Court in India in his farewell speech in the year 2021 upon retirement as a Judge after 13 years of service, stated that,
- “in the Court of Justice, both the Parties know the truth, it is the Judge who is on trial.”
21. That is my feeling as I write this ruling. The Parties herein are counter-accusing each other of all kinds of wrongdoings. Whereas the Defendant has accused the Plaintiff of demolishing the structures on the suit property, the Plaintiff has reiterated in kind counter-accusing the Defendant as the one responsible for the demolition. Both claim to have made complaints to the Police over the demolition.
22. The responsibility of the Court in an intricate matter as this one, is to sift through the debris thrown at it by the parties in a bid to decipher the truth. This onerous task is almost always impossible at the interim stage, when the rival allegations by the parties have yet to be subjected to scrutiny. That is the reason why, as this Court stated, in its earlier ruling in this matter and placing reliance on a number of decided cases, that it is not required at this stage of the case to make any conclusive or definitive findings.
23. Be that as it may, a critical development has been brought to the attention of the Court by the Defendant/Applicant; the demolition of the structures that were on the suit property, after the issuance of the Court Orders of 15<sup>th</sup> January, 2024. The fact of the demolition has been verified by the Plaintiff, who in her replying affidavit, and as noted earlier on, confirms the demolition but insists that the Defendant was responsible for it.
24. Secondly, it has also been pointed out by the Defendant that the disputed title relied on by the Plaintiff is not actually in the name of the Plaintiff, yet the Plaintiff filed this suit in her own name. The Defendant alleged and submitted that a search had disclosed that the Plaintiff had transferred the title on 31<sup>st</sup> July, 2023 to a Company known as Wareysi Tech Ltd where she was one of the directors. This essentially implies that the Plaintiff is not the 'legal owner' of the suit property as alleged in her case since a Company is a separate legal entity independent of its shareholders and directors and capable of suing and being sued in its own name.
25. The Defendant's application seeks the review, variation and or setting aside of this Court's orders of 15<sup>th</sup> January, 2024.



26. As was held in the case of Republic -vs- Public Procurement Administrative Board & 2 others [2018] eKLR, Section 80 of the [Civil Procedure Act](#) provides for the Power of review whereas Order 45 of the [Civil Procedure Rules](#) sets out the rules for review. The Court in the above cited case held that:

“The rules restrict the grounds for review. The Rules lay down the jurisdiction and the scope of review limiting it to the following grounds:

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of applicant or could not be produced by him at the time when the decree was passed or the order made; or
- (b) on account of some mistake or error apparent on the face of the records, or
- (c) for any other sufficient reason;

and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.”

27. Section 80 of the [Civil Procedure Act](#) gives a pre-condition for review; review is only allowable where no appeal has been preferred or where none is allowed.

28. In the case of *Tokesi Mabili & others -vs- Simion Litsanga* (Civil Appeal No. 90 of 2001) the Court held that:

“In order to obtain a review, an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order was made. An Applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. Where the application is based on sufficient reason, it is for the Court to exercise its discretion.”

29. I find the holding by the Supreme Court of India in the case of *Ajit Kumar Rath -vs- Estate of Orisa & others*, 9 Supreme Court Cases 596 at page 608 relevant in this matter. The Court expressed itself on review in the following words:

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of Law or fact which stares in the face without any elaborate argument being need for stabling it. It may be pointed out that the expression, “any other sufficient reason” ... means a reason sufficiently analogous to those specified in the rules.”

30. In this case, the demolition of the structures on the suit property and the involvement of a 3<sup>rd</sup> Party (Nairobi City County Government), coming after the orders of this Court is a significant development and qualifies as a sufficient reason for this Court to relook into the matter. As I pointed out earlier, the Defendant accuses the Plaintiff of being responsible for the demolition but the Plaintiff denies the allegation counter-accusing the Defendant of demolishing the structures. Apparently, the Nairobi



- City County Government has taken over the suit property and secured it by placing a fence around it. The Plaintiff in her submissions informed the court that she is no longer in control of the suit property.
31. The other reason by the Defendant of discovery of new and important matter or evidence is also germane. This is information that was at the disposal of the Plaintiff and which for her own reason was withheld from the Court.
  32. It means that the Plaintiff did not exhibit the ‘whole’ title document she was relying on in her application. I have keenly studied the response by the Plaintiff to the Defendant’s application and note that she did not unequivocally deny the averment that the title she is relying on was transferred to the Company known as Wareysi Tech Limited where she is a director. Her response was somewhat non-committal. She deposed that, “the Defendant had not furnished this Court with any shred of evidence to the effect that the directorship of Abdullahi Musdaf, Hussein’s directorship in the aforementioned Company was pegged on the alleged ownership of the suit property.”
  33. Considering all the foregoing issues, this Court is persuaded that the Defendant has made a case for review of the orders of this Court issued on 15<sup>th</sup> January, 2024.
  34. In reviewing its orders of 15<sup>th</sup> January, 2024, this Court is also alive to the doctrine of ‘Lis Pendens’. The Black’s Law Dictionary, 9<sup>th</sup> Edition defines ‘Lis Pendens’ as the jurisdictional power or control acquired by a court over property while a legal action is pending.
  35. The Court of Appeal in the case of *Ruth Kinyua –vs- Patrick Thuita Gichure & Another* [2015] eKLR cited with approval the holding by Turner L. J in the case of *Bellamy –vs- Sabine* [1857] 1 DEJ. 566 where he stated that:

“(Lis Pendens) is a doctrine common to the courts both of law and equity and rests as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated, by the Defendants alienating before the Judgment or decree, and would be driven to commence his proceedings de novo subject again to defeat by the same course of proceedings.”
  36. Madan J (as he then was) in the case of *Mawji vs US International University and another* (1976) KLR 185, stated that,

“The doctrine *Lis Pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice.”
  37. Nambuye J (as she then was) in the case of *Bernadette Wangare Muriu –vs- NSSF Board of Trustees & 2 others* (2012) eKLR, also affirmed the necessity of the doctrine of *Lis Pendens* in adjudication of Land matters in the following words:

“The necessity of the doctrine of *Lis Pendens* in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency as well as the orderly and efficacious disposal of justice.”
  38. Though the doctrine of *Lis Pendens* is not presently expressly provided for in the land statutes of this country after the repeal of the Indian Transfer of Property Act (ITPA), the Court of Appeal in the case of *Ruth Kinyua –vs- Patrick Thuita Gichure & Another* (*supra*), held that *Lis Pendens* being a common



law principle was still applicable in Kenya by virtue of the provisions of section 3(1) of the Judicature Act, Cap 8 Laws of Kenya which provides that: -

“The jurisdiction of the High Court, the Court of Appeal and all Subordinate Courts shall be exercised in conformity with-

- a. The Constitution.
- b. Subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in part 1 of the schedule to this Act, modified in accordance with part II of that schedule.
- c. Subject thereto and so far as those written laws do not extend or apply, the substance of the Common Law, the Doctrines of Equity and the Statutes of general application in force in England on the 12<sup>th</sup> August 1897 and the procedure and practice observed in Courts of Justice in England at that date;

Provided that the Common Law, Doctrines of Equity and Statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”

39. The ELC Practice Directions of 2014 enjoin this court in exercising its authority and jurisdiction, to, at all stages of any trial be guided by Article 159 of the Constitution, Sections 1A & 1B of the Civil Procedure Act and Section 13 of the Environment and Land Court Act so as to facilitate: -

- a. Fast;
- b. Expeditious
- c. Proportionate; and
- d. Accessible resolution of disputes.

40. In the instant case, considering the unique circumstances of this matter; and having in mind the nature of this case and the subsequent developments after the issuance of the court orders of 15<sup>th</sup> January 2024; further applying the principle of lis pendens, and guided by the provisions of Article 159 of the Constitution and Clause 32 of the ELC Directions 2014, I am of the considered view that the appropriate order in this matter is an order of status quo to preserve the suit property, pending the hearing and final determination of this suit. The situation to remain as it is. No party should have undue advantage awaiting the final determination of this case.

41. Accordingly, the court reviews its ruling and orders of 15<sup>th</sup> January 2024 and substitutes the said orders with an order of status quo pending the hearing and final determination of this suit. No party should access, build, construct, interfere, sell, transfer, charge or otherwise deal in any manner with the suit property pending the hearing and final determination of this suit.

42. As I earlier stated, this court will endeavor to expedite the hearing of this suit.

43. In regard to the application by the Plaintiff to join the Nairobi City County and the National Land Commission, the Plaintiff has sufficiently explained her reasons why they should be joined as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. I earlier pointed out that the Nairobi City County Government has already joined the fray.

44. I am persuaded that the intended Defendants are necessary parties in this case.



45. Nairobi City County is not a legal entity capable of suing and being sued. Under the Provisions of Article 176 of *the Constitution* and Section 6 of the *County Governments Act*, the legal entity that is capable of suing and being sued is the County Government. So the Plaintiff should join as the 2<sup>nd</sup> Defendant, the Nairobi City County Government.
46. Additionally, and considering the issues raised in this matter, the court finds that in addition to the two entities that the Plaintiff seeks to join as additional Defendants into this case, the Chief Land Registrar too is a necessary party. The Court therefore, exercising its authority under the Provisions of Order 1 rule 10 of the *Civil Procedure Rules* directs that the Chief Land Registrar be joined as the 4<sup>th</sup> Defendant in this matter.
47. The Plaintiff shall therefore amend her plaint accordingly, join the three additional Defendants, take out summons to enter appearance and serve the same upon the said Defendants in the next 21 days from the date hereon.

### **Conclusion**

48. The conclusion is that the court reviews its ruling and orders of 15<sup>th</sup> January 2024 and substitutes the said orders with an order of status quo pending the hearing and final determination of this suit. No party should access, build, construct, interfere, sell, transfer, charge or otherwise deal in any manner with the suit property pending the hearing and final determination of this suit.
49. The Plaintiff is granted leave to add the Nairobi City County Government and the National Land Commission as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. The Court further directs the Plaintiff to add the Chief Land Registrar as the 4<sup>th</sup> Defendant in this matter. The Plaintiff shall amend her plaint accordingly, join the three additional Defendants, take out summons to enter appearance and serve the same upon the said Defendants in the next 21 days from the date of this ruling.

It is so ordered.

**RULING DATE, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF MARCH, 2024.**

**D. M. MWANGI**

**JUDGE**

In the virtual presence of:

Ms Khisa holding brief for Mr. Otieno for the Plaintiff

Mr. Mugo holding brief for Ms Kaguri for the Defendant

Court Assistant: Yvette

