



Chacha & another v Orbit Chemicals Industries Limited & another (Environment & Land Miscellaneous Case E003 of 2023) [2024] KEELC 3278 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 3278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E003 OF 2023**

JA MOGENI, J

MARCH 7, 2024

BETWEEN

JAMES MUKURA CHACHA 1ST APPLICANT

EDWIN MUKORA MAINGI 2ND APPLICANT

AND

ORBIT CHEMICALS INDUSTRIES LIMITED 1ST RESPONDENT

GARAM INVESTMENT AUCTIONEERS 2ND RESPONDENT

RULING

1. This Ruling is in respect of the Respondents' Preliminary Objection dated 17/07/2023 and the Applicants' Application dated 5/07/2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. THAT this Honourable Court do grant an injunction to restrain the Respondents and their agents and/or employees from selling the properties known as LR No. Nairobi Block 263/1076, 1077, 1075, 1080 and 1010 situate in Mukuru kwa Njenga Area through a public auction scheduled for the 11/07/2023.
 4. THAT this Honourable court be pleased to make any such further orders) and issue any other relief it may deem just to grant in the interest of justice.
 5. THAT the costs of this Application be in cause.
2. The Respondents filed a Notice of Preliminary Objection dated 17/07/2023 which seeks to strike out the Applicants' Application dated 5/07/2023 on the following grounds:



1. THAT the Applicant is seeking substantive interim orders on the basis of a Notice of Motion without any underlying suit or claim.
 2. THAT the suit in so far as it has been instituted by way of a Notice of Motion is therefore fatally defective, and an abuse of the court process and is therefore liable to be struck out in limine.
 3. THAT this Honorable Court, therefore, lacks the requisite jurisdiction to determine “the suit” as drawn and filed.
3. The Application is brought pursuant to Sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, Order 40 & Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavits of James Mukura Chacha and Edwin Mukora Maingi, the Applicants herein, both sworn on 5/07/2023.
 4. The Application is opposed through a Replying Affidavit sworn by Sanchen Chandaria, the director of the 1st Respondent on 20/07/2023.
 5. The Court gave directions that both the Notice of Preliminary Objection and the Application be canvassed by way of written submissions. The Respondent filed his written submissions dated 30/10/2023 and the Applicant filed his written submissions dated 29/09/2023. A Ruling date was scheduled.

Issues for determination

6. Having considered the present Application, Preliminary Objection together with the rival submissions and the authorities cited to me, the following arise as the issues for determination before this court.
 - a. Whether the preliminary objection raised is merited.
 - b. Whether the application dated 5/07/2023 is merited.

Analysis and Determination

SUBDIVISION - Whether the Preliminary Objection raised is merited.

7. Considering the fact that the Preliminary Objection challenges the jurisdiction of this court to entertain the suit, I will consider it first and depending on its outcome, proceed to tackle the application dated 5/07/2023.
8. It is trite law that any preliminary objection should be filtered, weighed and balanced on the measurements of the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) 1 EA 696* where Law J. stated as follows:

“.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.....”
9. The Respondents have claimed that the Applicants’ suit is fatally and incurably defective as it has been instituted by way of a Notice of Motion which is not a legally recognized means of instituting a suit.
10. Section 19 of the *Civil Procedure Act* states that: -

“Every suit shall be instituted in such manner as may be prescribed by Rules.”



11. Likewise Order 3 Rule (i) (ii) of the Civil Procedure Rules 2010 provides that:-

“Every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule a suit can only be instituted by way of a Plaint, petition or an Originating summons.”
12. Both Section 19 and Order 3 use the word shall. This makes the filing of a plaint a mandatory provision of law. It is not a discretionary directive. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicant did not file any plaint in this matter.
13. In Geoffrey Ndungu Theuri vs Law Society of Kenya [1988] eKLR, the Court stated as follows: -

“..... the order specifically refers to a suit which is defined under section 2 of the Civil Procedure Act in these terms; ‘suit’ means all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 30 of the Civil Procure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the Civil Procedure Act does not give the court the power to act without jurisdiction.”
14. In Photo Energy Limited Vs Hashi Energy Limited Misc 180 of 2018 the Court stated as follows: -

“Order 3 Rule (i) (ii) of the Civil Procedure Rules provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.”
15. It was the Applicants submission that they seek interim relief to halt an auction scheduled for 11/07/2023, claiming they developed the parcels and the 1st Respondent agreed to transfer them upon payment of an agreed consideration. These facts are admitted by the 1st Respondent. They argue they seek only interim relief, not a substantive determination of rights, so an underlying suit is unnecessary. They assert there’s no prejudice to the Respondents as their rights to the land parcels haven’t been questioned. They argue that within the Civil Procedure Rules, there’s no framework for seeking interim relief when there’s no substantive issue, so invoking the court’s discretion and the overriding interests of justice is necessary. They cite precedent and the court’s inherent powers and constitutional duty to administer justice without undue regard to technicalities, urging the court to hear and determine the application despite the lack of an underlying suit. The Applicants relied on Joseph Kibowen Chemjor Vs William C. Kiseru [2013] eKLR. And Article 159(2) (d) of the Constitution of Kenya.
16. They relied on Section 19 of the Civil Procedure Act, Order 3 Rule 1 of the Civil Procedure Rules, Article 50 of the Constitution, Order 40 Rule 1 (b) of the Civil Procedure Rules. They also relied on the case of Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others (2018) eKLR and Wanja & another v Roothaert (Miscellaneous Application E193 of 2021) [2022] KEHC 10255 (KLR) (3 June 2022) among others.
17. The Respondents submitted that by proceeding via a Notice of Motion without an underlying suit, the Applicants are seeking permanent injunctive orders at an interlocutory stage, precluding a full hearing



as required by Article 50 of *the Constitution*. They assert that the law cited by the Applicants doesn't grant the court jurisdiction to grant permanent injunctive orders at an interlocutory stage without a full hearing. They reference Order 40 Rule 1(b) of the Civil Procedure Rules, stating the court only has jurisdiction to grant temporary injunctive orders pending the disposal of the main suit. They cite cases where similar applications were dismissed for lack of an underlying suit, emphasizing that the determination of rights requires a substantive dispute, not a mere application without a suit. They conclude that the Application lacks a foundation and cannot proceed without a substantive suit.

18. The Application was brought under the provisions of Order 40 of the Civil Procedure Rules among others. The Applicants sought for an order "THAT this Honourable Court do grant an injunction to restrain the Respondents and their agents and/or employees from selling the properties known as LR No. Nairobi Block 263/1076, 1077, 1075, 1080 and 1010 situate in Mukuru kwa Njenga Area through a public auction scheduled for the 11/07/2023." Essentially, the Applicants herein have filed the subject application wherein they are principally seeking for orders of temporary injunction. For convenience, I shall reproduce the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010. Hereunder;

19. Order 40 Rule 1 of the Civil Procedure Rules provides as follows:

"Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

20. My reading of the foregoing provisions connotes that the only person who can apply for or seek to procure an order of temporary injunction is the person who has originated or commenced the suit. In this regard, if the Applicants are keen to procure and obtain any Temporary Relief or intervention in the nature of temporary injunction, then it behooves the Applicants to file a suit whereby the same is seeking substantive orders against the Respondents. Only then can the Applicants file an application for temporary injunction pending the determination of the suit. the orders of temporary injunction or even a permanent injunction can only be anchored on some foundation. For clarity, the foundation would be a substantive suit filed by the Applicants and in respect of which the same has inter-alia sought for orders of permanent injunction or appropriate declaratory reliefs.

21. For coherence, in the absence of a suit, to anchor the application for temporary/permanent injunction, the application for temporary/permanent injunction herein has certainly been made and mounted in vacuum.



22. The Applicants also placed reliance on places reliance on Article 159 (2) (d) of *the Constitution* which provides that: -

“(d) Justice shall be administered without undue regard to procedural technicality.”

23. In this matter the Applicants did not anchor their Notice of Motion in a suit. They do not have a competent suit before the court. The application is not anchored in any pleading to give it validity.

24. Not every procedural blunder can be excused as a ‘mere technicality’. The filing of a suit is a mandatory statutory provision which the court cannot simply wish away. In the case of Dishon Ochieng v Sda Church [2012] eKLR the court held that an application must be anchored in a plaint and that failure to comply renders the said application fatally defective.

25. The failure/omission of the Applicants to file substantive suit cannot be overlooked as a “mere technicality.”

26. Article 159(d) cannot be used to excuse glaring omissions in adhering to statutory provisions. In Scope Telmatics International Sales Limited v Stoic Company & Another [2017] eKLR, it was held that -

“Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure”

27. Based on the foregoing, I find that the omission/failure by the Applicants to file a suit by way of a plaint on which to anchor their application renders the said application fatally defective and therefore a non-starter. I find that the Preliminary Objection is merited. The application dated 5/07/2023 is hereby struck out.

28. Costs to be met by the Applicants.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF MARCH, 2024.

.....

MOGENI J

JUDGE

In the virtual presence of: -

Ms. Moturi for the Applicants

Mr. Kenyatta for the Respondents

C. Sagina: Court Assistant

