



**Realty Brokers Limited v Mwadi Women Entrepreneurs Ltd & 4 others (Environment & Land Case E009 of 2023) [2024] KEELC 3804 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3804 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E009 OF 2023  
OA ANGOTE, J  
APRIL 22, 2024**

**BETWEEN**

**REALTY BROKERS LIMITED ..... PLAINTIFF**

**AND**

**MWADI WOMEN ENTREPRENUERS LTD ..... 1<sup>ST</sup> DEFENDANT**

**NAIROBI CENTRAL LAND REGISTRY ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**AL-HAIEE INVESTMENTS LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff has filed an application dated 17<sup>th</sup> July 2023, in which it has sought for the following orders:
  - a. Spent
  - b. The Provincial Police Office (PPO) Nairobi Area, the Officer Commanding Police Division (OCPD) Langata and the Officer Commanding Station Akila Police Station, to provide security to the Plaintiff/Applicant and/or their agents in order to enforce this Honourable Court orders issued on 13<sup>th</sup> July, 2023 to evict the 1<sup>st</sup> Defendant/ Respondent, their servants, representatives and/or agents from the suit property.
  - c. The Plaintiff/ Applicant herein together with the Police Officers executing the Order be allowed to enter into the parcel of land L.R. No. 209/10211 I.R. No. 231055 and evict the 1<sup>st</sup> Defendant/ Respondent, their servants, representatives and/or agents from the said parcel



of land and restore the Plaintiff/Applicant's possession in compliance with this Honourable Court's orders issued on 13<sup>th</sup> July 2023.

- d. Charles Mwangi Waithaka, Joseph Njoroge Kimani, Gladys Wambui Mwangi, James Mbote, Gicheha, Diana Njeri Muiyuro and Joseph Gichohi Kinyanjui; the 1<sup>st</sup> Defendant/ Respondent's directors, do appear before this Honourable Court and show cause why they should not be cited for contempt of court for forcefully taking possession of the suit property contrary to the orders of this court issued on 13<sup>th</sup> July 2023.
  - e. Charles Mwangi Waithaka, Joseph Njoroge Kimani, Gladys Wambui Mwangi, James Mbote Gicheha, Diana Njeri Muiyuro and Joseph Gichohi Kinyanjui; the 1<sup>st</sup> Defendant/ Respondent's directors have disobeyed the order issued on 13<sup>th</sup> July 2023 and are in contempt.
  - f. Charles Mwangi Waithaka, Joseph Njoroge Kimani, Gladys Wambui Mwangi, James Mbote, Gicheha, Diana Njeri Muiyuro and Joseph Gichohi Kinyanjui; the 1<sup>st</sup> Defendant/ Respondent's directors, be punished for contempt of court and be committed to civil jail.
  - g. Costs of this Application be borne by the 1<sup>st</sup> Defendant/ Respondent.
  - h. Such further and or other orders be made as the court may deem fit and expedient.
2. The application is based on the grounds set out in the affidavits sworn by James Abiam Mugoya Isabirye and Biwott Samwel, who deposed that the Plaintiff/Applicant is the registered proprietor of land parcel number Nairobi LR 209/10211, the suit property, and has been in possession of the same.
  3. Mr. James Abiam Mugoya Isabirye, the director of the Plaintiff, deposed that the Plaintiff's ownership of the suit property is pursuant to an agreement dated 8<sup>th</sup> February 2006 between itself and Ecobank Limited (formerly the East African Building Society) and that on 19<sup>th</sup> July 2018, Ecobank Limited executed a deed of indemnity and lodged the same at the Lands Registry in Nairobi to facilitate reconstruction of the lost register.
  4. It was deposed that on 12<sup>th</sup> March 2019, Ecobank Limited and the Plaintiff executed a transfer instrument, in which Ecobank Limited transferred all the rights, title and interest in the suit property to the Plaintiff.
  5. According to the Plaintiff, the 1<sup>st</sup> Defendant is a beneficiary of an impugned judgement and decree issued in the Magistrates Court in Misc. No. E010 of 2022, which irregularly declared the 1<sup>st</sup> Defendant as the owner of the suit property; that the Plaintiff filed an application to review the said judgement and that the lower court issued interim orders pending its determination.
  6. They assert that vide a ruling dated 27<sup>th</sup> June 2023, Hon. A.N. Ogonda found that the lower court did not have the jurisdiction to entertain the said proceedings and immediately downed his tools and that and the impugned judgement therefore remained unenforceable.
  7. It is the Plaintiff's case that it thereafter moved this court through the instant suit and the Motion dated 7<sup>th</sup> July 2023 for a temporary stay of execution of the said judgement, and to secure its continued possession of the suit property pending the disposition of the said application.
  8. The Plaintiff's director deposed that this court, upon consideration of the application dated 7<sup>th</sup> July 2023, issued interim orders and granted stay of execution of the impugned judgement and a further temporary injunction restraining the Defendants from any dealings or interfering with the Plaintiff's ownership and quiet possession of the suit property until 25<sup>th</sup> July 2023.



9. According to the Plaintiff, upon receipt of the order, they shared a copy of the same with the security personnel at the suit property; that the order was effectively served upon all the Defendants/ Respondents on 14<sup>th</sup> July 2023, as deponed in the Affidavit of Service of Augustine M. Nzive, a licensed process server.
10. The Plaintiff depones that the 1<sup>st</sup> Defendant has wilfully refused or neglected to obey the said order and that on 14<sup>th</sup> July 2023, at around 6pm, the 1<sup>st</sup> Defendant moved to the suit property with heavily armed goons and proceeded to violently evict the Plaintiff's security personnel.
11. It is the Plaintiff's case that the 1<sup>st</sup> Defendant took possession of the suit property by changing padlocks and erected a sign board on the suit property, alleging that the suit property belongs to the 1<sup>st</sup> Defendant.
12. Mr. Biwott Samwel, the Plaintiff's Head of Security deposed in his Affidavit that on 14<sup>th</sup> July 2023, the Senior Chief of the area, Mr. Ombati who is well known to him, two police officers and a man named Mohamed, a representative of Mwadi Women Entrepreneur Limited and other persons came to the suit property and presented him with the orders of the Magistrate's Court dated 1<sup>st</sup> April 2023.
13. Mr. Biwott Samuel deponed that he and his colleague, Mr. Patrick Katiwa were thereafter forcefully arrested and taken to the Area Chief's Office Langata; that upon being released, he reported the eviction at Akila Police Station under OB Number 44/14/07/2023 and that the police are reluctant to assist the Plaintiff because they claim that there are no orders directing them to assist in the enforcement of the orders of 13<sup>th</sup> July 2023.
14. It is the Plaintiff's case that the suit property, whose value is Kenya Shillings One Billion and sixty million (Kshs. 1,060,000,000/-), and the Plaintiff's improvements thereon, amounting to Kenya Shillings Ten Million (Kshs. 10,000,000/-), is at risk of being wasted by the 1<sup>st</sup> Defendant and that it is in the interest of justice that the Plaintiff's application be allowed to enable the Applicant to enforce the orders issued on 13<sup>th</sup> July 2023 and to curtail the further execution of the impugned judgement decreed by Hon. D.W. Mburu in Misc No. E010 of 2022.
15. The 1<sup>st</sup> Defendant opposed the application through a Preliminary Objection dated 24<sup>th</sup> July 2023 and a Replying Affidavit sworn by Diana Njeri Muiyuro dated 7<sup>th</sup> August 2023.
16. In the Replying Affidavit sworn by Diana Njeri Muiyuro, a Director of the 1<sup>st</sup> Defendant, she deponed that this suit should be dismissed on the grounds that it is an abuse of court process and that the suit is res judicata and the court lacks jurisdiction to deal with the subject matter, in light of the judgement by Hon. D.W. Mburu in CMCC Misc Application No. E010 of 2022 (O.S) Mwadi Women Entrepreneurs Ltd v Al-Haiee Investment Ltd & Others.
17. Ms. Muiyuro further asserted that the Plaintiff cannot approbate and reprobate and is estopped from presenting a fresh suit having exercised his right of review of the Judgement in CMCC Misc Application No. E010 of 2022 and that the Plaintiff ought to have filed an appeal to cloth this Honourable Court with jurisdiction to hear the subject matter and not deceive the court by filing a fresh suit and litigating under the same title.
18. Ms. Muiyuro deponed that the 1<sup>st</sup> Defendant is the registered and lawful proprietor of the suit property; that the 1<sup>st</sup> Defendant has been and is in possession of the suit premises; that the Plaintiff has no proprietary rights over the suit premises; and that the Plaintiff, in obtaining the orders of the court dated 14<sup>th</sup> July 2023, failed to disclose that the 1<sup>st</sup> Defendant is in occupation of the suit property.



19. Ms. Muiyoro denied that the 1<sup>st</sup> Defendant was served with the orders; that the 1<sup>st</sup> Defendant did not issue any instructions to Messrs Shaban Associates LLP to receive any pleadings in respect to this case and that the process server did not effect any personal service of the order on the company or on any of its directors.
20. The deponent stated that on 25<sup>th</sup> July 2023, the Plaintiff sought to evict the 1<sup>st</sup> Defendant after the court issued its directions; that the Plaintiff demolished the gates and property of the 1<sup>st</sup> Defendant but was repulsed by the 1<sup>st</sup> Defendant's guards and that the Plaintiff on 2<sup>nd</sup> August 2023 evicted the 1<sup>st</sup> Defendant from the suit property and their guards were arrested but were released on free bond after it emerged that there was need for further investigations.
21. In a further affidavit sworn on 11<sup>th</sup> October 2023, the Plaintiff's director, Mr. James Abiam Mugoya Isabirye, deponed that the Plaintiff was not a party to the lower court proceedings and that the cause of action in CMCC Misc E010 of 2022 was illegal occupation or trespass, while in this case, the cause of action is ownership of the suit property.
22. The Plaintiff's Director deposed that in a post-judgement ruling delivered on 27<sup>th</sup> June 2023, the magistrates' court held that it lacked jurisdiction to entertain the said suit ab initio and that this suit cannot therefore be said to have been finally adjudicated on and decided by a court of competent jurisdiction over the same subject matter between identical parties.
23. Mr. James Abiam deposed that the alleged Certificate of Title and Certificate of Lease produced by the 1<sup>st</sup> Respondent has since been found to be fraudulent, and was cancelled and expunged from the registry record by the 2<sup>nd</sup> Defendant, and a gazette notice was issued to that effect.
24. The 5<sup>th</sup> Defendant, on its part, filed Grounds of Opposition dated 7<sup>th</sup> August 2023. It opposed the application herein on the grounds that the application does not disclose a cause of action against the 5<sup>th</sup> Defendant; that the Plaintiff has not made any allegation of violation of its rights by the 5<sup>th</sup> Defendant; that the 5<sup>th</sup> Defendant has no legal or beneficial interest in the suit property; and that the 5<sup>th</sup> Defendant has been misjoined in the application contrary to the provisions of the Order 1 Rule 10 of the Civil Procedure Rules 2010.
25. Both parties filed written submissions and a bundle of authorities which I have considered.

### **Analysis and Determination**

26. This court has considered the application and responses by the parties. The following issues are for the determination of this court:
  - a. Whether this suit is res judicata.
  - b. Whether this court has the jurisdiction to determine this suit
  - c. Whether the 5<sup>th</sup> Defendant has been misjoined and offends the provisions of the Order 1 Rule 10 of the Civil Procedure Rules 2010.
  - d. Whether the 1<sup>st</sup> Defendant's directors should be cited for contempt.
  - e. Whether this court should order the police to effect the orders dated 13<sup>th</sup> July 2023
27. This application has been filed by the Plaintiff/ Applicant, pursuant to the orders of this court issued on 13<sup>th</sup> July 2023. The Plaintiff is seeking for orders that the police provide security to them to enable them to enforce the said orders to evict the 1<sup>st</sup> Defendant and their agents from the suit property. They



- have additionally sought that the directors of the 1<sup>st</sup> Defendant be cited for contempt of court for forcefully taking possession of the suit property.
28. The Plaintiff's claim is that they are the registered owner of the suit property and has been in actual possession of the suit property. They assert that on 14<sup>th</sup> July 2023, the 1<sup>st</sup> Defendant moved to the suit property with goons and violently evicted the Plaintiff's security personnel from the suit property.
  29. The 1<sup>st</sup> Defendant has opposed this application and asserts that this court lacks jurisdiction. The 1<sup>st</sup> Defendant claims that this suit is res judicata. They urge that this suit is an appeal in disguise as the issue of whether the subordinate court wrongly assumed jurisdiction was determined by the subordinate court when it dismissed the Plaintiff's application for review and setting aside.
  30. The 1<sup>st</sup> Defendant further asserted that the 1<sup>st</sup> Defendant is the registered proprietor of the suit property and has been in possession of the same. They claim that in obtaining the subject matter orders of the court, the Plaintiff failed to disclose that the 1<sup>st</sup> Defendant was in possession. They claim they were never served with the order and therefore the 1<sup>st</sup> Defendant is not in wilful disobedience of the order of this court.
  31. On their part, the 5<sup>th</sup> Defendant has opposed the application on the ground that there is no discernible cause of action against the 5<sup>th</sup> Defendant; and that the 5<sup>th</sup> Defendant has no legal or beneficial interest in the suit property and has been misjoined in this suit.
  32. This suit was filed by the Plaintiff pursuant to the judgement of the court in Nairobi Chief Magistrates Court Miscellaneous Application No. E010 of 2022 (O.S) Mwadi Women Entrepreneurs Ltd vs Al-Haiee Investment Limited & Others.
  33. It asserts that the 1<sup>st</sup> Defendant fraudulently and maliciously conducted this suit before the magistrates' court as it failed to disclose the value of the suit property, knowing the same to far exceed the jurisdiction of the magistrates court. They assert that the 1<sup>st</sup> Defendant also knowingly failed to enjoin the Plaintiff to the lower court's suit.
  34. The Plaintiff seeks that the judgement of the lower court in CMCC Misc No. E010 of 2022 be declared to be null and void ab initio and therefore invalid.
  35. The first issue for this court's consideration is whether the suit is res judicata. The 1<sup>st</sup> Defendant has asserted that the Plaintiff exercised the right of review of the judgement in CMCC Misc. Application No. E010 of 2022, therefore it cannot approbate and reprobate and is estopped from presenting a fresh suit.
  36. The legal framework of res judicata is set out in Section 7 of the [Civil Procedure Act](#) as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
  37. The Supreme Court case of *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR delimited the operation of the doctrine of res judicata as follows:

“We reaffirm our position as in the *Muiri Coffee* case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality



is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

38. The Supreme court further laid out the requisite elements to invoke res judicata in a civil suit:

“For res judicata to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
- d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 [2013] eKLR).”

39. It is essential to consider the facts and details of the suit that was before the magistrates’ court. In Misc. Civil Application No. E010 of 2022, whose pleadings Ms. Muiyuro has annexed to her affidavit, the 1<sup>st</sup> Defendant filed an Originating Summons against Al-Haiee Investment Ltd, Nairobi County Government and Attorney General.

40. The 1<sup>st</sup> Defendant herein sought the determination of the following questions: whether the Applicant is the registered proprietor of the suit property; whether the Applicant is entitled to orders for eviction and permanent injunction against Al-Haiee Investment Ltd; and whether a permanent injunction order can be issued against Al-Haiee Investment Ltd and their agents from interfering with the quiet and peaceful enjoyment of the suit property by the Applicant.

41. In the Judgement delivered by Hon. D.W. Mburu on 1<sup>st</sup> April 2022, the subordinate court noted that neither Al-Haiee Investments Ltd nor the Attorney General entered appearance. While the Nairobi County Government entered appearance, it did not call any witnesses and the Applicant’s suit was therefore uncontroverted.

42. The Court found that the Applicant’s suit had succeeded and issued the following orders:

- a. A declaration that the Applicant is the registered proprietor of the suit property;
- b. The 1<sup>st</sup> Respondent, by itself, its agents and whomsoever claiming under it to vacate suit land within 60 days and in default, eviction to issue in accordance with the law.
- c. That a permanent injunction to issue against the 1<sup>st</sup> Respondent, its employees and/or agents restraining it from interfering with the Applicant’s quiet and peaceful enjoyment of the suit property.
- d. That the 1<sup>st</sup> Respondent shall bear the Applicants and the 2<sup>nd</sup> Respondent’s costs for these proceedings.



43. There is no dispute that the Plaintiff was not a party in CMCC Misc. No. E010 of 2022. Further, save for the first order which declared that the Applicant/1<sup>st</sup> Respondent is the registered proprietor of the suit property, the other orders do not apply to the Plaintiff.
44. The Plaintiff thereafter filed an application for review against the magistrate's judgement dated 27<sup>th</sup> April 2022. In the ruling dated 27<sup>th</sup> June 2023, Hon. A.N. Ogonda, reached the finding that the suit property is valued at Kenya Shillings One Billion, a fact which was conceded by the 1<sup>st</sup> Defendant herein. Hon. Ogonda therefore concluded that the magistrates' court lacked the jurisdiction to make a determination in the matter. At that point, Hon. Ogonda downed his tools and declined to allow the application.
45. It is therefore apparent that the Defendant's application for review was not determined on its merits, as the court found that it lacked the jurisdiction to determine the review application itself.
46. As to the jurisdiction of the magistrates' court, the Plaintiff has averred that the value of the suit property is about Kenya Shillings One Billion, which far exceeds the pecuniary jurisdiction of the Magistrates Court. Hon. A. N. Ogonda noted that the value of the suit property was not opposed by the 1<sup>st</sup> Defendant. While indeed the question of the value of the property is a matter of evidence to be adduced during hearing, this court is satisfied that the magistrates' court lacked the jurisdiction to hear and determine this dispute as the value of the suit property was beyond the pecuniary jurisdiction of the lower court.
47. Finally, as properly argued by the Plaintiff, the cause of action in CMCC Misc E010 of 2022 concerned illegal occupation or trespass, while in this case, the cause of action is ownership of the suit property and the validity of the 2<sup>nd</sup> Defendant's Gazette Notice dated 22<sup>nd</sup> September 2022.
48. On this basis, it is clear that the parties in the Magistrates' Case and in this case are not the same, and that the court lacked jurisdiction to enter its judgement. The 1<sup>st</sup> Defendant has therefore failed to establish that this suit is res judicata.
49. The 1<sup>st</sup> Respondent has asserted that the Plaintiff ought to have pursued an appeal against the decision of the lower court. As the Plaintiff was not a party to the lower court's proceedings, the question is whether the Plaintiff indeed had a right to file an appeal against the said judgement. On one part, the Court of Appeal in Attorney General v Bala [2023] eKLR was of the view that a non-party may file an appeal with the leave of the court. It stated:

“The right to appeal was a creature of statute and an appeal could be presented, only;

- a. by a party in the suit if he was aggrieved by the judgment; or
- b. by a person who was not a party but who was aggrieved by the judgment if he sought and got leave of the court to prefer an appeal against the judgment. Unless a right of appeal was clearly and expressly given by statute, it did not exist. Whereas a litigant had a right to institute any suit of a civil nature in some court or another, no right of appeal could be given except by express words. In other words, a right of appeal inferred in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which was a statutory right, could be conditional or qualified.



If the statute did not create any right of appeal, no appeal could be filed.”

50. This court is however bound by the decision of the Supreme Court in *Law Society of Kenya v Communications Authority of Kenya & 10 Others* [2023] eKLR, in which the court interpreted the term ‘a person seeking to file an appeal’ as provided in Section 36 of the Supreme Court Rules. The Supreme Court held that:

“The definition of a person seeking to file an appeal only extended to a party who was aggrieved by a decision issued against him by the Court of Appeal and wished to prefer an appeal to the Supreme Court. The definition did not open the door for any passer-by who was disgruntled with a decision delivered by the appellate court to approach the court. That also extended to matters relating to public interest. There was difficulty in granting relief at the appellate stage to a party who did not litigate those issues before the Superior Courts. A person in that context should therefore be a party with locus standi in the matter.

A proper party was one who had a designed subsisting direct and substantive interest in the issues arising in the litigation which interest would be recognisable in the court of law being an interest, which the court would enforce.”

51. Guided by the Supreme Court’s decision, it cannot be said that the Plaintiff in this case could appeal the judgement of a suit to which it was not a party to.
52. In any case, as the Plaintiff pursued the remedy of review rather than appeal. The courts have held that these two remedies are mutually exclusive, and can neither be pursued concurrently or sequentially. The Court of Appeal in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR addressing itself on the provisions of review under Order 45 of the *Civil Procedure Act* stated that:

“It has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

53. The Court of Appeal in *William Karani & 47 Others v Wamalwa Kijana & 2 Others* [1987] eKLR reached a similar finding, and stated that:

“Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors when an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order



XLIV both procedures cannot be adopted at once. Hence, supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

54. In the circumstances herein, while the Plaintiff indeed pursued the remedy of review, the said application was not determined on its merits, as the lower court held that it had no jurisdiction over the subject matter. Hon. Ogonda in fact stated that any relief sought by the Applicant can only be granted by the High Court.
55. Having found that it lacked jurisdiction, the lower court ought to have declared that it lacked jurisdiction and that the judgement in CMCC Misc. No. E010 of 2022 was null and void ab initio. The consequence of the lower court’s refrain is that the challenged judgement remained in force, despite glaring deficits in the court’s jurisdiction.
56. It would however be unjust to leave the Plaintiff without a remedy in law. This court is bound by the principle that equity will not suffer a wrong to be without a remedy. It therefore invokes its inherent jurisdiction, reserved under Sections 1, 1A, 3 and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*, and finds that it has the jurisdiction to hear and determine this suit.
57. The Court of Appeal in the case of Kenya Power & Lighting Company Ltd v Benzene Holdings Ltd t/a Wyco Paints [2016] eKLR, described the inherent jurisdiction of the court as a residual intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice.
58. The court in Rev. Madara Evans Okanga v Housing Finance Company of Kenya [2005] eKLR quoted Halsbury’s Laws of England, 4<sup>th</sup> Edition Volume 37 Para 14 under the heading “Inherent Jurisdiction of the Court” at Page 23 as follows: -

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

59. Lastly, this court undoubtedly has wide subject matter jurisdiction, as provided under Article 162(2)(b) Of *the Constitution* and Section 13 (2) of the Environment and Land Court, to hear



and determine disputes with respect to land and the environment. This court consequently has the jurisdiction to determine this suit on its merits.

60. The next issue herein is whether the 5<sup>th</sup> Defendant is properly joined in this suit, and whether its presence is necessary to enable the court to effectively adjudicate and settle all the questions in this suit. In other words, whether it is a proper party in this matter.
61. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that the court may at any stage, upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
62. The term ‘proper party’ was defined in *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Maztagaro & Ezekiel Misango Mutisya* [2014] eKLR, by F. Gikonyo J. as follows: -

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”
63. In the case of *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others* [1998] eKLR as quoted in *Boniface Omondi v Mathare Youth Sports Association & Another* [2021] eKLR, the court laid out two tests to determine the question of who is a necessary party:

“For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”
64. This test was reiterated in *Kizito M. Lubano v KEMRI Board of Management & 8 Others* [2015] eKLR as follows:

“The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein...”
65. In the Plaint that instituted this case, the Plaintiff has not sought any remedy against the 5<sup>th</sup> Defendant, which is the Nairobi County Government. The subject matter of this suit concerns the ownership of the suit property as claimed by the Plaintiff and the 1<sup>st</sup> Defendant; the validity



of the title documents issued to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant; and the effect of the gazette notice issued by the 2<sup>nd</sup> Defendant.

66. As aptly defined by the Plaintiff in its Plaint, the 5<sup>th</sup> Defendant is in charge of the management of public land. The subject matter in this case is however not characterised as public land. Further, no action of the 5<sup>th</sup> Defendant has been challenged in this suit nor would any action be required of it, in the event that the Plaintiff's suit succeeds. Therefore, an effective decree can be passed in the absence of the 5<sup>th</sup> Defendant.
67. Upon consideration of the Plaintiff's claim, this court finds that the 5<sup>th</sup> Defendant is misjoined in this case and is accordingly struck out from this case.
68. The power of a court to hold a party in contempt is for the purpose of upholding the rule of law. That is what was stated in *Teachers Service Commission v Kenya National Union of Teachers & 2 Others* [2013] eKLR:

“The reasons why the Courts will punish for contempt of Court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the Court or even the personal ego of the presiding judge...it is about preserving and safeguarding the rule of law.”

69. Under Section 29 of the *Environment and Land Court Act*, the Environment and Land Court has been expressly clothed with jurisdiction to punish for contempt of court. This is in concurrence with Section 5 (1) of the *Judicature Act* that vests in the superior courts the power, like those of the High Court of Justice in England, to punish any party who violates its orders.
70. Section 29 of the *Environment and Land Court Act* prescribes that it is an offence to refuse, fail or neglect to obey an order or direction of the court given under the Act. The section reads as follows:

“Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both.”

71. It is critical to note that the standard of proof in contempt matters is higher than that of ordinary civil matters. In the case of *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature. The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”



72. This then means that the violation for which an alleged contemnor is cited must not only be precisely defined, but also be proved to a standard which is higher than proof on a balance of probabilities, but not as high as proof beyond reasonable doubt.
73. The Plaintiff and the 1<sup>st</sup> Defendant have both relied on the case of Samuel M.N. Mweru & Others vs National Land Commission & 2 Others [2020] eKLR which set out the four essential elements for proof of a civil contempt which is higher than civil cases. They are as follows:
- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - b. The defendant had knowledge of or proper notice of the terms of the order;
  - c. The defendant has acted in breach of the terms of the order; and
  - d. The defendant's conduct was deliberate.
74. The Plaintiff has also relied on Gatharia K. Mutikika v Baharini Farm Limited [1985] KLR 227, which stated that:

“The Courts take the view that where the liberty of the subject is, or might be involved, the breach for which the alleged contemnor is cited must be precisely defined. A contempt of court is an offence of a criminal character. A man may be sent to prison. It must be satisfactorily proved... I must be higher than proof on a balance of probabilities, almost, but not exactly, beyond reasonable doubt. The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to offence, which can be said to be quasi-criminal in nature. However, the guilt has to be proved with such strictness of proof as is consistent with the gravity of the charge... Recourse ought not be had to process of contempt of court in aid of a civil remedy where there is any other method of doing justice. The jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched and exercised with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. A judge must be careful to see that the cause cannot be mode of dealing with persons brought before him. Necessary though the jurisdiction may be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found... Applying the test that the standard of proof should be consistent with the gravity of the alleged contempt... it is competent for the court where a contempt is threatened or has been committed, and on an application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, whether the offender is a party to the proceedings or not.”

75. This court is duly guided by the above precedents. The subject orders in this case, dated 13<sup>th</sup> July 2023, read as follows:
1. That the application dated 7<sup>th</sup> July 2023 to be heard on 25<sup>th</sup> July 2023.



2. That a temporary injunction be and is hereby issued until 25<sup>th</sup> July 2023, restraining the Defendants herein, themselves, servants, agents, and or whomsoever claiming through them from alienating, offering for sale, selling, charging, transferring, and or in any manner whatsoever interfering with the Plaintiff's ownership and peaceful and quiet possession and occupation of Land Parcel number LR No. 209/10211.
  3. That there be a stay of execution of the Judgement by Hon. D.W. Mburu delivered on 1<sup>st</sup> April 2022 in Miscellaneous Application Number E010 of 2022; Mwadi Women Entrepreneurs Ltd v Al-Haiee Investment Ltd & 2 others until 25<sup>th</sup> July 2023.
76. These orders are undoubtedly clear and unambiguous and were binding on the Defendants, their servants, agents and anyone else claiming through them. The 1<sup>st</sup> Defendant has asserted that that the Plaintiff failed to cite the 1<sup>st</sup> Defendant company for contempt and neglected to lift the corporate veil and punish the company's directors in place of the Defendant.
77. The court in *Africa Management Communication International Limited v Joseph Mathenge Mugo & another* [2013] eKLR, was of the view that in order to cite officials of a company for contempt, an applicant ought to show proof of personal service on directors of a corporation. It stated as follows:
- “To my mind, in order to hold a corporation with liability for contempt, it is necessary to show that the corporation has been properly served or that service has been dispensed with on the basis that an appropriate officer of the company had knowledge of the order. In the same way, in order to hold the directors of such a corporation personally liable for breach of an order, such directors should be served with the order or it must be shown that they had personal knowledge of the same. See the case of *Payless Car Hire and Tours Limited v Imperial Bank Ltd* [2012]eKLR.”
78. The 1<sup>st</sup> Defendant has aptly referred to the Court of Appeal decision in *Geoffrey Kathuri Kison & 10 others v East Africa Portland Cement Co. Ltd & 5 others* [2021] eKLR, which this court is bound by. In this case, the court held that a party must first apply to lift the corporate veil before citing the director of a company. It stated as follows;
- “In the persuasive authority of *Katsuri Limited v Kapurchand Deepar Shah* [2016] eKLR, the High Court (Mativo, J.) in considering contempt by a director of a company observed and rightly so in our view that:
- “The alleged contemnor is a director of the company. He is not a party to these proceedings in his personal capacity. The company is a legal entity. The proper procedure for the applicant was first to apply to lift the corporate veil then go for the directors in their personal capacities.”
- It follows therefore that failure by the applicants cite the 1<sup>st</sup> respondent for contempt and to lift the corporate veil of the 1<sup>st</sup> respondent denied them the chance to cite the 2<sup>nd</sup> to 6<sup>th</sup> respondents for contempt as directors or accounting officers of the 1<sup>st</sup> respondent.”
79. As the Plaintiff has neglected to apply to lift the corporate veil, it cannot therefore not cite the 1<sup>st</sup> Defendant's directors for contempt.



80. In any case, the Plaintiff has claimed that it only effected service upon Ms. Diana Muiyuro, who is a Director of the 1<sup>st</sup> Defendant. It can therefore not seek to cite the other directors of the 1<sup>st</sup> Defendant for contempt, as they have not been personally served with the said orders.
81. As to whether Ms. Diana Muiyuro was properly served with the subject matter orders, the Plaintiff has averred that they served the Director vide email and WhatsApp. In support of this claim, the Plaintiff has adduced the Affidavit of Service dated 18<sup>th</sup> July 2023 and sworn by Mr. Augustine Nzive, a process server. He attached a copy of the email conversation, as well as screenshots of the message and the Order sent on WhatsApp to the Affidavit of Service. Ms. Muiyuro in her affidavit, denied that the 1<sup>st</sup> Defendant had been served with the said Orders.
82. Order 5 Rule 3(a) of the Civil Procedure Rules provides that where a suit is against a corporation, service shall be made to the secretary, director or other principal officer of the corporation. In this matter, Ms. Muiyuro is a Director of the 1<sup>st</sup> Defendant company.
83. Under Order 5 Rule 22B Civil Procedure Rules, service can be effected through electronic mail (Email). It provides as follows:

“22B. Electronic Mail Services (E-mail) [Order 5, rule 22B]

- (1) Summons sent by Electronic Mail Service shall be sent to the defendant's last confirmed and used E-mail address.
- (2) Service shall be deemed to have been effected when the Sender receives a delivery receipt.
- (3) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the Electronic Mail Service delivery receipt confirming service.”

84. Order 5 Rule 22C of the *Civil Procedure Act* also provides for service through mobile-enabled messaging applications such as Whatsapp. It provides that:

“22C. Mobile-enabled messaging Applications [Order 5, rule 22C]

- (1) Summons may be sent by mobile-enabled messaging Applications to the defendant's last known and used telephone number.
- (2) Summons shall be deemed served on the day which it is sent; if it is sent within the official business hours on a business day in the jurisdiction sent, or and if it is sent outside of the business hours and on a day that is not a business day it shall be considered to have been served on the business day subsequent.
- (3) Service shall be deemed to have been effected when mobile-enabled messaging services when the Sender receives a delivery receipt.



(4) An officer of the court who is duly authorized to effect service shall file an Affidavit of Service attaching the delivery receipt confirming service.”

85. The sections above equally require a process server to attach a delivery receipt confirming service through email or mobile messaging application. In this case, the process server only attached a copy of the sent email and the sent message via WhatsApp.

86. With respect to service via email, courts have held that there is a difference between an email sent and a delivery receipt. This court is persuaded by the court in *Sifuna & Sifuna Advocates v Patrick Simiyu Khaemba* [2021] eKLR where it held that a sent email must be accompanied by evidence that the email was duly received. The court held that:

“The Court takes judicial notice that constant access to and use of emails is not as common in Kenya for individual users as mobile-enabled text messaging and WhatsApp or other Applications through which users get quick notifications real time as long as the phone is on. Thus, although it is not a legal requirement, it then must require that a person who serves process through email should do more than just sending the email. He may need to notify or draw the attention of the recipient of the fact that an email has been sent to his address.

20. Again, if Rule 22C (3) requires evidence of delivery receipt where service is effected via mobile-enabled messaging Applications, less cannot be required where an E-mail (address) is used to serve. Otherwise failure to require that would give two standards of treatment of the same thing - proof of service - and would amount to an injustice on the part of users of emails. Therefore, the drafters of Sub-rule 4 of Order 5 Rule 22B decided in their wisdom to include the requirement that “a delivery receipt” has to be filed with the Affidavit of Service by the authorized process server. I reiterate that a sent email is not the same as a delivery receipt.

21. The Sub-rule 4 abovementioned provides that a sent email must be accompanied by evidence that the email was duly received. The Respondent did not attach the delivery receipt herein. It therefore leaves doubt as to whether or not the Applicant actually received the email that was sent on 28/9/2021 to his email at 11.46 am. Perhaps, the Respondent should have gone ahead to immediately bring to the notice of the Applicant though other means that an email had been sent to his address and it required attention. That would have supplemented the service effected to confirm receipt of the email.”

87. The Plaintiff’s process server failed to attach delivery receipts to confirm that the email was duly served upon the 1<sup>st</sup> Defendant’s Director. In the absence of such proof, this court must find that the Defendant and the alleged contemnors were not properly served by email.

88. With respect to the service by WhatsApp, the process server annexed a screenshot of the message sent to Diana Muiyuro’s number. The court in *Oyunge Barnabus & 3 others (Suing as Administrators of the estate of Mathayo Ratemo Mayaka (deceased)) v Charles Oteki Rioba*



[2021] eKLR opined that delivery via WhatsApp tends to be confirmed by double ticks which turn blue immediately the recipient views the message sent.

89. This court however takes judicial notice that the feature of ticks turning blue on Whatsapp can easily be disabled and is therefore an unreliable indication for delivery.
90. Further, Whatsapp is a messaging application which is reliant on the internet. It is therefore critical that the deponent produce evidence that the message was indeed delivered and received. As the process server failed to attach proof of delivery receipts on Whatsapp, this court must therefore find that the Applicant has failed to establish that the 1<sup>st</sup> Defendant had knowledge of the Orders of the court.
91. The third element is whether there was breach of the said orders and whether such breach was delivered. The Plaintiff's Head of Security, Mr. Biwott Samuel has sworn an affidavit in which he alleges that the 1<sup>st</sup> Defendant illegally evicted the Plaintiff from the suit property on 14<sup>th</sup> July 2023. He supports these assertions with photographs of a gate and of a board erected by the 1<sup>st</sup> Defendant, which board indicates that the suit property belongs to the 1<sup>st</sup> Defendant. There is however no indication as to the date on which these photographs were taken, and whether the property photographed is indeed the suit property.
92. The 1<sup>st</sup> Defendant has opposed these assertions and claimed that it was at all times in possession of the suit property. It further asserts that on 25<sup>th</sup> July 2023, the Plaintiff sought to evict the 1<sup>st</sup> Defendant after the court issued its directions and that the Plaintiff demolished its gates and property but was repulsed by its guards. Ms. Muiyoro attached photographs depicting the destructions and an OB extract of the incident.
93. As proof of the purported demolition, the 1<sup>st</sup> Defendant's Director annexed photographs of a gate, a wall and a board showing that the 1<sup>st</sup> Defendant owns the land, and photographs of demolished ironsheets. It is critical to note that the wall in the photographs is a permanent stone wall. However, similar to the Plaintiff's evidence, the 1<sup>st</sup> Defendant has not established when the photographs were taken and their relation to the suit property. This evidence therefore falls short.
94. On this basis, the Plaintiff has failed to satisfy the required elements to prove contempt of court in toto. The Orders which they have sought against the 1<sup>st</sup> Defendant's directors and officials are hereby dismissed.
95. The Applicant/Plaintiff has sought that this court issue orders that the Provincial Police Office (PPO) Nairobi Area, the Officer Commanding Police Division (OCPD) Langata and the Officer Commanding Station Akila Police Station, to provide security to the Plaintiff/Applicant and/or their agents in order to enforce this Honourable Court orders issued on 13<sup>th</sup> July, 2023 to evict the 1<sup>st</sup> Defendant/Respondent, their servants, representatives and/or agents from the suit property.
96. The orders of this court dated 13<sup>th</sup> July 2023 were however not eviction orders, but were temporary injunction orders restraining the 1<sup>st</sup> Defendant from interfering with the Plaintiff's occupation of the suit property. Further, this court has already found that the Plaintiff and the 1<sup>st</sup> Defendant have presented insufficient evidence as to the party who was in possession of the suit property as at the time this court issued interim orders of injunction.



97. In these circumstances, the court shall refrain from issuing any orders of eviction, until the parties satisfy the court as to the party in possession of the suit property, and ownership. The prayer sought for security to enforce the orders of the court is therefore disallowed.
98. In conclusion, this court dismisses the Plaintiff's application dated 17<sup>th</sup> July 2023, and issues the following orders:
- a. The 5th Respondent is hereby struck out from this suit with costs.
  - b. The Plaintiff shall bear the costs of the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF APRIL, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**Mr. Moriasi holding brief Diro for Plaintiffs/Applicants**

**Ms Migele for 5<sup>th</sup> Defendant/Respondent.**

**Court Assistant – Tracy**

