



Gituru v Kinyua & another (Environment and Land Miscellaneous Application E013 of 2023) [2024] KEELC 4079 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4079 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E013 OF 2023**

JO OLOLA, J

MAY 9, 2024

BETWEEN

WILSON GATHIRWA GITURU APPLICANT

AND

MICAHEL MWANGI KINYUA 1ST RESPONDENT

ANN WAIRIMU MWANGI 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 14th June 2023, Wilson Gathirwa Gituru (the Applicant) prays for orders set out as follows:
 3. That this Court do issue eviction orders against the 1st and 2nd Respondents being that they are trespassing on the Applicant's land and delivery of vacant possession thereof on L.R No. 7623/4 (I.R Number 21615) hereinafter referred to as the "suit land" situated at Mweiga Township, Kieni Sub-County, Nyeri County to the Plaintiff/Applicant;
 4. That the 1st and 2nd respondents, their servants, agents or any other occupants be forcefully evicted from the subject premises should they fail to deliver vacant possession within seven (7) days from the date of the order of this Honourable Court.
 5. That the Officer, Mweiga Police Station, do provide security to ensure that Order (2), (3) and (4) hereinabove are complied with;
 6. That the costs of this application be provided for; and
 7. That the Court do make such orders or further orders as it may deem fair and just.
2. The Application is supported by an Affidavit sworn by the Applicant and is premised on the grounds inter alia:



- (i) That the 1st Respondent and Consolidated Bank of Kenya Limited entered into an agreement where the suit land was charged to the Bank for a loan of Kshs.9,500,000/- on 7th September, 2011;
 - (ii) That due to the failure on the part of the 1st Respondent to service the loan, the suit land has been the subject of litigation between the 1st Respondent and the Bank since the year 2014;
 - (iii) That having lost the case in the Magistrates Court, the 1st Respondent instituted Nyeri High Court Civil Case No. 16 of 2018 challenging any proposed sale of the suit land by the Bank but the application for stay of execution was dismissed;
 - (iv) That the 2nd Respondent then instituted Nyeri CMCC No. 289 of 2022 also challenging the sale of the suit property by the Bank;
 - (v) That on 25th August 2022, the Applicant came across an advertisement in the Nation Newspaper indicating that the subject land would be sold by public auction on 9th September, 2022 by Messrs Philips International Auctioneers at Nyeri Town.
 - (vi) That the Applicant attended the auction and emerged as the highest bidder after placing a bid of Kshs.21,800,000/- which he subsequently paid to the Bank in full; and
 - (vii) That when the Applicant went to the suit land to take possession the 1st and 2nd Respondents refused to vacate the same and have to-date remained thereon unlawfully.
3. In response to the Application the Respondents filed a Notice of Preliminary Objection dated 17th July, 2023 wherein they urged the Court to strike out the suit on the grounds:
1. There exists an order to maintain the status quo of the suit property in Civil Appeal No. 14 of 2023;
 2. That there exists a consent between the Applicant and the 1st Respondent in Rent Restriction Case No. E079 of 2023 to collect rent over the suit property in a Joint Account pending the hearing and determination of Nyeri CMCC No. 289 of 2022;
 3. That the application is sub-judice as the suit property is under litigation in Nyeri CMCC No. 289 of 2022 and Civil Appeal No. 14 of 2023; and
 4. That the entire Application is premature, misconceived, incompetent and fatally defective.
4. In addition to the Preliminary Objection, Ann Wairimu Mwangi (the 2nd Respondent herein) swore a lengthy Replying Affidavit wherein she asserts that she is the spouse of the 1st Respondent who according to her is the legal owner of the suit property.
5. The 2nd Respondent accused the Applicant of fraudulently transferring the suit property to himself with the collusion of the Consolidated Bank of Kenya Limited and Philips International Auctioneers. It is further her case that owing to the said fraud, she sued both the Bank and the Auctioneers in Nyeri CMCC No. 289 of 2022 but her Application to preserve the property was dismissed by the Court.
6. The 2nd Respondent avers that upon dismissal of the Application she proceeded to the High Court where she instituted Nyeri HCCA No. 14 of 2023 and was granted preservatory orders on 23rd March, 2023. The 2nd Respondent accuses the Bank of proceeding to transfer the suit property to the Applicant despite the existence of the said orders.



7. The 2nd Respondent avers further that the Applicant instituted Rent Restriction Tribunal Case No. E079 of 2023 seeking eviction orders against the tenants on the suit property wherein the Applicant and herself filed a consent on 3rd July, 2023 to have a joint account in their respective Advocates' names for collection and preservation of rent. The 2nd Respondent is therefore surprised that the Applicant has come to this Court seeking vacant possession of the suit property by concealing material facts from this Court.
8. The 2nd Respondent asserts that no auction was conducted on 9th September 2022, no bid numbers were issued and that the Applicant was never present at the bid and he was not therefore declared the winner. In the alternative, the 2nd Respondent avers that the said auction was done barely two months from the date of another failed auction dated 24th June, 2022 and that the same was an indication that no notices were given to the Respondents.
9. I have carefully perused and considered both the Application as well as the responses thereto. I have similarly perused and considered the submissions and authorities placed before the Court by the Learned Advocates representing the Parties herein.
10. By his Application before the Court, the Applicant urges the Court to issue an eviction order against the two Respondents whom he accused of trespassing upon the parcel of land known as L.R No. 7623/4 (IR Number 21615) situated at Mweiga Township within Nyeri County.
11. It is the Applicant's case that he did purchase the suit property which was initially registered in the name of the 1st Respondent at a Public Auction conducted by Consolidated Bank of Kenya Limited on 9th September, 2022 having emerged as the highest bidder for the suit property which had been charged to the Bank. It is further the Applicant's case that after he acquired the property for the sum of Kshs.21,800,000/- he proceeded thereto in order to take over possession but the two Respondents, their servants and/or agents have to-date refused to vacate and that they continue to occupy the suit land unlawfully.
12. In response to the Application, the Respondents have filed a Preliminary Objection dated 17th July, 2023 by way of which they urge the Court to strike out the "suit" on a number of grounds. It is the Respondents' contention that there exists an order to maintain the status quo of the suit property in Nyeri High Court Civil Appeal No. 14 of 2023 and that there is also a consent between the Applicant and the 1st Respondent in Nyeri Rent Restriction Case No. 79 of 2023 requiring rent collected from the suit property to be deposited in a joint account pending the hearing and determination of Nyeri CMCC No. 289 of 2022 that was earlier instituted by the 2nd Respondent.
13. In addition, the Respondents assert that the Application herein is sub-judice as the suit property is under litigation in the said Nyeri CMCC No. 289 of 2022 as well as Nyeri HCCA No. 14 of 2023. On those grounds, the Respondents have urged the Court to strike out the Application with costs to themselves.
14. As Sir Charles Newbold P stated in the celebrated case of Mukhisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited (1969) EA 696:

“A Preliminary Objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... A preliminary objection is in the nature of what used to be a demurrer. 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

15. Arising from that definition, I was unable to see how Grounds 1 and 2 of the Respondents’ objection could be construed as a preliminary objection to warrant the striking out the Application herein. On the first ground, the Respondents contend that there exists an order to maintain the status quo which was granted in Nyeri HCCA No. 14 of 2023. From a perusal of the documents produced by the Respondents themselves, it is apparent that the order of status quo was issued on 17th March, 2023. That was about six (6) months from the 9th of September, 2022 when the Applicant is said to have purchased the suit property and the process of transferring the same to his name commenced.
16. That status quo was ordered after the Respondent lost an Application to stay the sale in the lower Court and in my considered view, the same could only mean that the matters were to remain as they were and not vice versa.
17. On the existence of a consent order between the Applicant and the 2nd Respondent, I was with respect unable to find from the volumes of documents annexed to the 2nd Respondent’s Replying Affidavit a copy of any consent order that was adopted in Court between the Parties. What has been annexed as “AWM 10” appears to me to be a proposal made by the Parties on rent collection from the suit properties pending the determination of the ownership of the property. The consent alluded to was therefore not a point of law on which this Court could rely to strike out the matter before it.
18. Perhaps the main ground raised in the Preliminary Objection was the assertion by the Respondents that the suit is sub-judice. Section 6 of the Civil Procedure Act captures the doctrine of sub-judice as follows:

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
19. Considering the doctrine in Kenya National Commission of Human Rights -vs- The Attorney General, the Independent Electoral & Boundaries Commission & 16 Others (2020) eKLR, the Supreme Court of Kenya held as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary, 9th Edition as “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of Courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before the Court with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before Courts of competent jurisdiction and lastly, that the suits are between the same parties or their representatives.”
20. In the matter before me, it was not clear to me if indeed the Applicant was a party in the said Nyeri CMCC No. 289 of 2022 and the resultant appeal being Nyeri HCCA No. 14 of 2023. From the 2nd



Respondent's Replying Affidavit, it was apparent that she filed the said Nyeri CMCC No. 289 of 2022 against Consolidated Bank Limited and a party known as Philips International Auctioneers for what she stated was fraud in transferring the suit property to the Applicant. In regard to the Applicant, the 2nd Respondent deposes at Paragraph 7 of the Replying Affidavit as follows:

"7. That noting that the Applicant was now the registered owner of the suit property, I immediately made an Application to enjoin him in the suit CMCC No. 289 of 2022 owing to his part in the fraud, an Application which is pending determination (annexed hereto and marked "AWM-4" is a copy of the Application dated 9th May, 2023)."

21. Arising from the foregoing, it was evident that as at the time the objection on the ground of sub-judice was made, the Applicant was not a party to the proceedings alluded to. As was correctly stated by the Court in Margaret Wachu Karori -vs- John Waweru Ribiro (2021) eKLR:

"For the court to determine whether the issues herein were directly and substantially in issue with the other suit, it is the Court's considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is "sub-judice", facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this Court holds and finds what has been raised by the defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited."

22. That being the case, it was clear that a Preliminary Objection cannot deal with disputed facts and that it must not derive its foundation as has been done herein from factual information which stands to be tested by rules of evidence. It follows that the Respondents' Preliminary Objection dated 17th June, 2023 was filed without any basis and that the same must be dismissed.

23. Having dismissed the Objection, I must now turn my attention back to the Motion dated 14th June, 2023. By the said Motion, the Applicant urges this Court to issue eviction orders against the two Respondents on the account that they are trespassers to the suit property.

24. From the material placed before the Court it was apparent that the suit property was initially registered in the name of the 1st Respondent and that on 7th September, 2011, the 1st Respondent charged the same to Consolidated Bank of Kenya Limited for an initial loan of Kshs.9,500,000/-. It was also apparent from the annexures attached to the Applicant's Supporting Affidavit that on 8th November 2017, the Bank issued a 90 day Statutory Demand Notice to the 1st Respondent on account that his account had fallen in arrears of Kshs.8,618,796.05.

25. It was evident that subsequent to the demand, the Bank made an attempt to auction the suit property thereby prompting the 1st Respondent to institute Nyeri High Court Civil Case No. 16 of 2018. By a Notice of Motion Application dated 24th October 2018, the 1st Respondent sought an order restraining the Bank from selling the suit property in a public auction that was scheduled for 31st October, 2018. By an order issued by the High Court on 30th October 2018, the sale was suspended and the parties thereafter agreed to resolve the matter of the loan outstanding and the mode of payment by way of mediation.

26. From the material placed before the Court, it was clear that the Bank and the 1st Respondent held negotiations following which a Mediation Settlement Agreement dated 11th September, 2019 was filed



in Court. That Agreement which was adopted as an order of the Court on 11th October, 2019 specified that the outstanding loan balance was Kshs.14,596,913.15 and that the same would be repayable at a monthly instalment of Kshs.265,546.51 for some 84 months.

27. It would however appear that the 1st Respondent's account subsequently fell in arrears again. By a demand letter issued on 24th December, 2020 (Annexure WGG13 of the Applicant's Affidavit), the bank issued another notice requiring the 1st Respondent to make good the account failure to which the suit property would be sold through a public auction.
28. It is evident that when the Bank again tried to auction the property, the 1st Respondent abandoned the suit in the High Court and on 6th September, 2021 filed Nyeri Chief Magistrates Civil Case No. 269 of 2021 seeking to stop the sale. When that attempt failed, the 1st Respondent went back to the High Court and by an Application dated 16th December, 2021 sought to set aside the Mediation Settlement Agreement dated 11th September, 2019 on account that he had discovered that he had already paid the principal sum owing to the Bank and that therefore the Agreement did not reflect the correct outstanding amount. That Application was found to be lacking in merit and was dismissed by the Honourable Lady Justice Muchemi on 2nd June, 2022.
29. Evidently, upon the realization that her husband had run out of options to stop the sale of the suit property, the 2nd Respondent waded in and filed Nyeri CMCC No. 289 of 2022 where again she sought to restrain Messrs Consolidated Bank of Kenya Limited together with the said Philips International Auctioneers from selling or alienating the suit property. It was apparent that upto the time they were sued herein, she was yet to get any restraining orders.
30. In her Replying Affidavit filed herein, the 2nd Respondent does not deny that the suit property was advertised for sale in the Nation Newspaper on 25th August, 2022 as shown in Annexure "WGG 18" of the Applicant's Supporting Affidavit. Her claim that no auction was conducted on 9th September, 2022 pursuant to the advertisement and that the Applicant was never present at the public auction is hollow and unsupported by any evidence.
31. The Applicant on the other hand has demonstrated that he participated in the sale by first depositing a bankers cheque in the sum of Kshs.5,000,000/- with Messrs Philips International Auctioneers and that he was declared the highest bidder having successfully placed a bid of Kshs.21,800,000/- for the property. The Applicant has further annexed documents that he executed the necessary transfer forms pursuant to a sale by a chargee (Annexure "WGG 21") and that the property was subsequently registered in his name on 11th April, 2023.
32. As it were, on acceptance of the Applicant's bid of Kshs.21,800,000/- at the auction, there was an immediate sale binding upon the 1st Respondent. The Applicant herein forthwith became the legal owner of the suit property and was entitled to the immediate possession thereof.
33. In respect of a person who acquires land in such circumstances, Section 99 of the Land Act, No. 6 of 2012 provides as follows:

“99(1) This Section applies to:

- (a) a person who purchases charged land from the chargee or receiver except where the chargee is the purchaser; or
- (b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the



person so claiming obtained the charged land in good faith and for value

- (2) A person to whom this Section applies-
- (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land.
 - (b) is not obliged to see the application of the purchase price.
 - (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been given or whether the sale is otherwise necessary, proper or regular.”

34. In the circumstances herein, there was no duty cast upon the Applicant in law to inquire into the soundness or legality of the auction as advertised by the chargee. In that respect, Section 99(3) of the Land Act aforesaid provides as follows:

“99(3) A person to whom this Section applies is protected even if at any time before the completion of the sale the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice.”

35. While in the matter before me the 2nd Respondent alleges in the Replying Affidavit that there was collusion and fraud between the Bank, the Auctioneer and the Applicant, no evidence of such collusion or fraud was placed before the Court. As it were, once a property has been knocked down and sold in the exercise of chargee’s statutory power of sale, the equity of redemption of the chargor is immediately extinguished. In such circumstances the only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.

36. In the premises, I was satisfied that the balance of convenience herein inclines in favour of the Applicant who has invested his financial resources in the suit property but has been unable to enjoy the use of the same. In my considered view, it will be inequitable to keep the Applicant away from his property on the basis that the Respondents are aggrieved by the manner in which the chargee had exercised its statutory power of sale. If there was any irregularity in the sale, the 1st Respondent as the chargor has a remedy in filing a suit against the chargee and claiming for general or special damages.

37. Accordingly, I make the following orders:

- (a) The Respondent’s Preliminary Objection dated 17th July, 2023 is hereby dismissed.
- (b) The Applicant’s Notice of Motion dated 14th June, 2023 is hereby allowed in terms of Prayer No. 3, 4 and 5 thereof.
- (c) The Applicant shall have the costs of the Application.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MAY, 2024.

In the presence of:

Mr. Wachira Muturi for the Applicant



Mr. Muchangi for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE

