



Miringu v Mukua; Mukua & another (Interested Parties) (Suing as the Administrators of the Estate of Margret Wairimu Mukua alias Margaret Mairanga Mukua (Deceased)) (Civil Case E137 of 2022) [2024] KEELC 5808 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5808 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL CASE E137 OF 2022
OA ANGOTE, J
JULY 31, 2024**

BETWEEN

DANSON KAMAU MIRINGU PLAINTIFF

AND

BETH WAMBUA MUKUA DEFENDANT

AND

BETH WAMBUA MUKUA INTERESTED PARTY

FRANCIS NJEGA MUKUA INTERESTED PARTY

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF MARGRET
WAIRIMU MUKUA ALIAS MARGARET MAIRANGA MUKUA (DECEASED)**

RULING

1. Before this Court for determination are two applications, being the Interested Parties' application dated 5th January, 2024 and the Plaintiff's application dated 10th January, 2024.
2. In the application dated 5th January, 2024 filed by the Interested Parties pursuant to the provisions of Section 3A and 63(c) of the *Civil Procedure Act*, Cap 21, Order 40 Rule 3(1) of the Civil Procedure Rules, and Rule 3(1) and (2) of the High Court (practice and procedure rules), they seek the following reliefs;
 - i. The officer commanding Kasarani Police Station and Kiwanja Police Station be directed to provide and offer security and supervision during the execution of the Eviction orders issued herein against the Plaintiff/ Respondent herein and to maintain law and order.



- ii. That this Honourable court be pleased to issue a declaration that the Plaintiff/Respondent is in contempt for lack of compliance with the Court order given on 19th October, 2023.
 - iii. That consequent upon the issuance of the prayer hereinabove, this Honourable Court be pleased to sentence the Danson Kamau Miringu, to imprisonment in jail for such a term that it may deem fit and /or to pay such fine as it may deem appropriate.
 - iv. The cost of this Application be borne by the Plaintiff/Respondent.
3. The Motion is based on the grounds thereon and supported by the Affidavit of the 1st Interested Party, Beth Wambui Mukua of an even date.
 4. She deponed that on the 19th October, 2023, the Court issued temporary injunctive orders barring the Plaintiff from interfering with the suit property by way of inter-alia trespassing, collecting rent or leasing pending the hearing and determination of the suit and that the Plaintiff was duly served with the said Court order and the same was read out to him by the OCS Kasarani.
 5. The 1st Interested Party deponed that despite the foregoing, the Plaintiff continues to trespass, lease out and collect rent from the suit property and that on 20th December, 2023, the Plaintiff accompanied by his nephew and niece, Mwangi and Wanjiku moved into the suit property and occupied one of the three (3) single rooms thereon.
 6. It was deposed that on 4th January, 2023[2024], the Plaintiff disconnected water and electricity on the suit premises with a view of forcing the tenant to pay him rent for January 2023[2024] and that on the same date, he threatened to lock the house belonging to the tenant who refused to pay him rent.
 7. She deponed that further, the Plaintiff has started issuing notices to vacate upon tenants who have refused to comply with his illegal demand for payment of rent; that he has further threatened to kill and or maim her and her brother Francis Njenga Mukua; that the Plaintiff's conduct aforesaid is in blatant contempt of the Court Order in force and that in the interests of justice and maintaining the dignity of the Court, Court orders should be obeyed.
 8. In response to the Motion, the Plaintiff filed a Replying Affidavit on 10th January, 2024. He deponed that pursuant to a memorandum of understanding dated 2nd July, 2019, his late Aunt Margaret Mairanga Mukua gifted him the suit property; that pursuant to the aforesaid memorandum of understanding, she executed a transfer in his favour on 24th September, 2019 and that pursuant thereto, he was issued with a Certificate of Lease on 24th September, 2019.
 9. He deposed that he is the confirmed registered proprietor of the suit property as evinced by several searches, the latest being one dated the 3rd January, 2024; that despite his ownership, he has never enjoyed peaceful and quiet possession of the property on account of threats and harassment by the 1st Defendant cum the 1st Interested Party and that the harassment aforesaid led to the filing of the present suit against her.
 10. According to the Plaintiff, the Defendant seems to be unable to get over the fact that his late Aunt left him with the property and is purely motivated by jealousy and ill will; that from the time of his Aunts' death in 2021, the Defendant has been attempting to take the property from him and that she alleged that he murdered his Aunt which claims were dismissed upon issuance of the post mortem report which concluded that their Aunt died of natural causes.
 11. It was deposed by the Plaintiff that this Court issued orders allowing the Interested Parties' Motion of 18th May, 2022 granting injunctive orders restraining interference with the property and that the



Court however denied the prayer by the Interested Party seeking to have rental income deposited into her account, 070176688511 Equity Bank, Githurai Branch.

12. He posits that in disregard of the Court Orders, the Defendant has now instructed tenants to deposit rent into her account alleging authority from the limited ad litem and that the Defendant does not have the authority to collect income on behalf of the Estate on the basis of a grant ad litem.
13. It is the Plaintiff's assertion that the Defendant has maliciously misinterpreted the Court orders and has in that regard issued eviction orders to him and his tenants; that the Court did not order eviction of the tenants from the properties in its orders of 19th October, 2023 and he has resisted attempts to do so based on the aforesaid orders and that due to the constant harassment, the tenants have started vacating the property denying him crucial income necessary to maintain the property.
14. Mr Miringu deponed that due to his inability to collect rent, he is unable to pay the electricity bill to Kenya Power Limited, taxes to the Kenya Revenue Authority and rates and rent to the County Government of Nairobi; that he has entered into lease agreements with tenants and will be forced to refund rent and security should the Court fail to review its orders and that he has not disobeyed any Court Orders.
15. In response to the Replying Affidavit, the Interested Parties swore a Supplementary Affidavit on the 31st January, 2023[2024]. They deponed that the Plaintiff's registration of the suit property was procured through fraud, the same not having been transferred by its previous registered owner; that the properties' previous owner was in actual possession and occupation of the suit property until her demise and that all the documents, to wit, the memorandum of understanding, consent and transfer of lease are forged.
16. The Interested Parties state that vide a Motion dated 8th April, 2022, the Plaintiff sought for a temporary injunctive orders against them but the same was dismissed and no appeal preferred; that due to persistent trespass, they moved the Court on 18th May, 2022 seeking temporary injunction; that they were granted temporary injunctive orders which they extracted and served upon the Plaintiff and the OCS Kasarani and that after service, the Plaintiff and his nephew trespassed onto the suit property and occupied three single rooms of the premises.
17. The Deponents assert that at the time of the issuance of the orders restraining their interference in the property, neither the Plaintiff nor any person under him was in occupation of the suit property and that if the contrary was true, he would have informed the Court through his reply of 3rd June, 2022.
18. They urge that the Plaintiff's contention that he is dealing with the land amounts to an admission that he is in contempt; that the Plaintiff has no business collecting rent, paying utility bills or involving himself in the property in any manner whatsoever and that the Plaintiff should be punished accordingly and the Motion allowed.
19. The Motion dated 10th January, 2024 has been brought by the Plaintiff pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Orders 45 Rule (1) and (2) and Order 40 Rule 6 of the Civil Procedure Rules. It seeks the following reliefs;
 - i. Spent
 - ii. That this Honourable Court be pleased to set aside and vary its orders given on the 19th October, 2023.
 - iii. Spent-That this Honourable Court be pleased to issue an order of temporary injunction barring the Defendant and the Interested Party herein whether by themselves, agents,



employees or any person acting through them or on their instructions from evicting the Plaintiff and all the tenants or collecting rent from all that parcel of land known as Land Reference Number Nairobi Block 117/509 pending the hearing and determination of the Application.

- iv. That this Honourable Court be pleased to issue an order of temporary injunction barring the Defendant and the Interested Party herein whether by themselves, agents, employees or any person acting through them or on their instructions from evicting the Plaintiff and all the tenants or collecting rent from all that parcel of land known as Land Reference Number Nairobi /Block 117/509 pending the hearing and determination of the suit.
 - v. That this Honourable Court be pleased to find that the Defendant and Interested Party herein Beth Wambui Mukua, is in contempt of its orders given on the 19th October, 2023 by unlawfully collecting rent from all that premise known as Land Reference Number Nairobi Block 117/509 and to commit her to jail for a period of six (6)months without the option of a fine.
 - vi. That the OCS Kasarani Police Station is hereby ordered to arrest and bring the Defendant and the Interested Party herein, Beth Wambui Mukua, to this Court in handcuffs for the purposes of being sentenced for disobeying the orders of this Court given on the 19th October, 2023.
 - vii. That this Honourable Court be pleased to grant such further orders as it shall deem fit and just in the unique circumstances of this case.
 - viii. That the costs of this Application be provided for.
20. The Motion is based on the grounds thereof and supported by the Affidavit of Danson Kamau Miringu of an even date. His deposition is identical to his response in response to the Motion of 5th January, 2024, to wit, that he was gifted the suit property by his late Aunt Margaret Wairimu pursuant to a memorandum of understanding dated the 2nd July, 2019 and that pursuant to the aforesaid memorandum of understanding, she executed a transfer dated 24th September, 2019 and was issued with a Certificate of Lease on 24th September, 2019.
 21. He deposed that several searches confirm him as the registered proprietor of the suit property and that despite his ownership, he has never enjoyed peaceful and quiet possession of the property on account of threats and harassment by the Defendant cum Interested Parties who have been attempting to take over the suit property from him.
 22. He stated that on 19th October, 2023, this Court issued orders allowing the Interested Parties' Motion of 18th May, 2022 granting injunctive orders restraining interference with the property and that the Court however denied the prayer by the Interested Parties seeking to have rental income deposited into her account, 070176688511 Equity Bank, Githurai Branch.
 23. He posits that in disregard of the Court Orders, the Defendant has now instructed tenants to deposit rent into her account and that the Defendant is wrongly using the limited ad litem to fraudulently obtain money from the tenants on the suit property under the false pretence that she is doing so on behalf of her Aunt;
 24. It is his assertion that the Defendant has maliciously misinterpreted the Court orders and has in that regard issued eviction orders to him and his tenants; that the Court did not order eviction of the tenants from the properties in its orders of 19th October, 2023 and that he has resisted attempts to have him and the tenants evicted on the basis of the aforesaid orders.



25. In response, the Defendant and the Interested Parties filed a Replying Affidavit and a Preliminary Objection. The Preliminary Objection dated 30th January, 2024 contends that;
- i. The Application herein is misconceived, misdirected, and bad in law and an abuse of the due process of this Honourable Court.
 - ii. Prayer 2 of the said Application falls short of the threshold set out in Order 45(1) of the Civil Procedure Rules. Hence it cannot be entertained by this Court.
 - iii. This Honourable Court is functus officio having conclusively pronounced itself with regard to the orders prayed especially prayer 3 and 4 of the said Application. The Plaintiff is attempting to sneak in orders via the backdoor by reframing issues that were already determined by this Court in order to steal a match from the Defendant.
 - iv. That further, the said prayers are res judicata, the issues having been previously determined, and constitute an invitation to this Court to sit on its own Appeal.
 - v. That this Honourable Court having pronounced itself on the issues lacks jurisdiction to entertain the said prayers and the only remedy available is on Appeal.
 - vi. That this Honourable Court lacks jurisdiction to hear, entertain and/or issue orders sought in prayer 3 and 4 of the said Application.
 - vii. That prayer 5 & 6 of the said Application dated 10th January, 2024 are not only misadvised and misguided but are also an abuse of Court process and cannot be entertained by this Court, the Applicant having failed to state precisely the orders purportedly breached and disobeyed.
 - viii. The Application is fatally and incurably defective and is bad in law.
 - ix. The Application is an abuse of the process of the Court.
 - x. The entire Application is frivolous, vexatious as the Applicant is shopping for justice.
26. Vide a Replying Affidavit sworn by the Interested Parties on the 29th January, 2023[2024], they deponed that prayer 2 of the Motion falls short of the provisions of Order 45 Rule 1 of the Civil Procedure Rules there being no new and important evidence, error apparent on the face of the record or sufficient reasons; that the prayer for review has further been made after inordinate delay and that the Plaintiff cannot seek to review lawful orders which he is in breach of.
27. They contend that prayer 3 and 4 are overtaken by events, the tenants having moved out of the property; that the aforesaid prayers are equally res judicata having been determined vide the Motions of 8th April, 2022 and 18th May, 2022 and that the Plaintiff entered the property on 20th December, 2023 after issuance of the Court Order and seeks to rectify the same.
28. They maintain that no Court orders were issued restraining their collection of the rent; that as Administrators/beneficiaries, they are obligated to manage the Estate of the deceased which includes the suit property and have due authority to do so and that the Plaintiff's title was acquired fraudulently and as such did not convey any interest to him.
29. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

30. Upon consideration of the two applications, the affidavits in response to the applications, the preliminary objection and submissions, the issues that arise for determination are as follows:



- i. Whether the Plaintiff or the Defendant/Interested Parties are in contempt of the Court Orders issued on the 19th October, 2023 and if so; what are the appropriate orders to issue?
 - ii. Whether the Preliminary Objection dated 30th January, 2024 is competent and if so, whether it is merited?
 - iii. Whether the Court should review its orders of 19th October, 2023; and
31. As aforesaid, before the Court for determination are two Motions dated 5th and 10th January, 2024. Vide both Motions, the parties claim contempt of Court Orders against each other. It is trite that a Court is well within its rights to deny a contemnor audience before the contempt is purged.
 32. While a preliminary objection has been raised, it is in response to a Motion and the Court will decide whether to admit the same pursuant to its determination on contempt. Ultimately, the questions relating to the contempt of the orders of 19th October 2023 will be addressed as the first issue.
 33. The Black's Law Dictionary (Ninth Edition) defines contempt of Court as;

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”
 34. The Supreme Court of Kenya in *Republic vs Ahmad Abolfathi Mohammed & Another* [2018] eKLR held that:

“There is no doubt that an act in contempt of the Court constitutes an affront to judicial authority; and the Court has the liberty and empowerment to mete out penalty for such conduct, in a proper case. The object is, firstly, to vindicate the Court's authority; secondly, to uphold honourable conduct among Advocates, in their standing as officers of the Court; and thirdly, to safeguard its processes for assuring compliance, so as to sustain the rule of law and the administration of justice.”
 35. Similarly, the Court of Appeal in *Shimmers Plaza Limited vs National Bank of Kenya Limited* [2015] eKLR stated thus:

“We reiterate here that court orders must be obeyed. Parties against whom such orders are made cannot be allowed to trash them with impunity. Obedience of Court orders is not optional, rather, it is mandatory and a person does not choose whether to obey a court order or not.....

The courts should not fold their hands in helplessness and watch as their orders are disobeyed with impunity left, right and centre. This would amount to abdication of our sacrosanct duty bestowed on us by *the Constitution*. The dignity, and authority of the Court must be protected, and that is why those who flagrantly disobey them must be punished, lest they lead us all to a state of anarchy.”
 36. Section 19(2) of the *Environment and Land Court Act* provides that:

“The Court shall be bound by the procedure laid down by the *Civil Procedure Act*.”



37. Whereas Section 63(c) of the *Civil Procedure Act* provides that:

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed — grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”

38. Finally, Order 40 Rule 3(1) of the Civil Procedure Rules provides:

“In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.”

39. Both parties contend that the other has breached the orders of this court of 19th October 2023. For avoidance of doubt, the orders which each of the contenders is alleging to have been breached provided that:

“A temporary injunction be and is hereby issued restraining the Plaintiff/Respondent whether by himself, his legal representatives, agents and/or servants from trespassing, collecting rent proceeds, leasing out, charging, selling, transferring, wasting, constructing on, further construction, alienating or otherwise interfering or dealing or in any manner interfering with the Applicants’ peaceful occupation of the parcel of land known as LR. No. Nairobi/Block 117/509 (hereinafter the suit property) pending the hearing and determination of the suit.”

40. It is at once evident that the orders were directed at the Plaintiff and not the Defendant or the Interested Parties. It is not plausible to, therefore, find the Defendant or the Interested Parties in breach of orders which did not direct or prevent them from doing anything over and concerning the suit property.

41. On the other hand, the orders specifically restrained the Plaintiff from, among others, trespassing, leasing out and collecting rent proceeds over and concerning the suit property.

42. For the Plaintiff to be found to be in contempt of these orders, the Interested Parties must demonstrate that: (i) the terms of the order were clear, unambiguous and binding on the Respondent; (ii) knowledge of these terms by the Respondent; (iii) failure by the Respondent to comply with the terms of the order; and (iv) deliberate conduct by the Respondent to disobey the said orders.

43. In the cases of *North Tetu Farmers Co. Ltd vs Joseph Nderitu Wanjohi* (2016) eKLR and *Republic vs Attorney General & another Exparte Mike Maina Kamau* [2020] eKLR Justice Mativo, dealing with the question of contempt relied on the exposition by the learned authors of the book “Contempt in Modern New Zealand”¹ who succinctly stated as follows:

“There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-

- (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.”

44. It is trite that contempt proceedings are quasi-criminal in nature due to the severe consequences they attract. Consequently, the standard of proof in such proceedings is higher than the balance of probabilities in civil cases, although not as high as beyond reasonable doubt. As stated by the Supreme Court in the case Ahmad Abolfathi Mohammed (*supra*):

“The standard of proof in cases of contempt of Court is well established. 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.”

45. On the first requirement, the terms of the order were clear. The order prohibited the Plaintiff from trespassing, collecting rent proceeds, leasing out, charging, selling, transferring, wasting, constructing on, further construction, alienating or otherwise interfering or dealing or in any manner interfering with the Applicants' peaceful occupation of suit property.

46. Additionally, the Plaintiff has not stated that the orders were vague or incapable of being understood. The first requirement has, therefore, been met.

47. The second consideration is whether the Plaintiff had knowledge of the orders. The Court record indicates that the Ruling of 19th October 2023 was issued in the absence of the Plaintiff and his advocate. While stating that they served the orders, the Interested Parties have not disclosed the date of service.

48. Be that as it may, the Plaintiff vide his Replying Affidavit of 10th January 2024 and at paragraph 17 thereof, acknowledges knowledge of the said orders. The second consideration has therefor been established by the Plaintiff's admission that he was aware of the orders.

49. Third, for the Interested Parties to succeed in the application for contempt, they must establish that the Plaintiff, while having knowledge of the Court orders, acted in breach of the orders and that his conduct was deliberate.

50. The Plaintiff at paragraph 36 of his Replying Affidavit confirms that he has entered into leases with tenants. An examination of the agreements produced as annexure “DKM-16” discloses that all the agreements were entered into before the orders of 19th October 2023 were issued and/or served. On this account, it cannot be said that the Plaintiff leased out the suit property in contravention of the said orders.



51. On collection of rent, the Plaintiff deponed in his Replying Affidavit that he has been unable to collect rent. On the other hand, the Interested Parties contend that the Plaintiff is collecting rent. It is trite law that whosoever alleges must prove, a position codified under sections 107 and 109 of the Evidence Act.
52. Considering that the Interested Parties positively averred that the Plaintiff has been collecting rent as from 19th October 2023, then it fell upon them to lead evidence to establish the claim.
53. Having keenly examined the annexures in both the application of 5th January 2024 and the supplementary affidavit of 31st January 2023[2024], the Court did not find any evidence to show that the Plaintiff has been collecting rent post 19th October 2023. Contempt on the allegation of collection of rent is, therefore, not established.
54. According to the Interested Parties, the Plaintiff moved into the suit property sometime on 20th December 2023, after service of the orders of this Court. The Plaintiff however maintains that it has not disobeyed any Court Orders.
55. It is noted that while alleging that the Plaintiff entered into the property after issuance of the orders, vide paragraph 5 of their response to the Motion of 10th January, 2024, they state that the Plaintiff and all persons under him voluntarily vacated the property upon issuance of the orders.
56. Considering the differing positions put forth vis the strict parameters for proof of contempt, the Court is unable to make a positive finding on contempt.
57. The next issue to deal with is whether the preliminary objection dated 30th January, 2024 is competent and if so, whether it is merited? The threshold of a preliminary objection was set out by the Court of Appeal in the locus classicus case of Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors (1969) EA 696 at 700 wherein Law, JA stated that:

“...a ‘preliminary objection’ consists of a 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

58. Newbold, P further held as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

59. The Supreme Court in the case of Hassan Ali Joho & Another vs Suleiman Said Shabbal & 2 Others, Petition NO. 10 OF 2013, [2014] eKLR re-affirmed the principle as set out in the Mukisa case stating as follows:

“A preliminary objection consists of a 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 submission 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

60. What is clear from the foregoing is that the character and nature of a preliminary objection is one that should only raise a point of law which is argued on the assumption that the facts raised are undisputed. The objection raised should not be one that calls for proof or seeks to adduce evidence for its authentication. The objection once argued should be capable of disposing of the suit.
61. The Defendant and the Interested Parties have raised a Preliminary Objection to the Plaintiff’s Motion dated the 10th January, 2024. The Defendant asserts that the orders sought in Prayer 2 of the falls short of the threshold set out in Order 45(1) of the Civil Procedure Rules.
62. According to the Defendant, prayers 3 and 4 are res judicata and/or the Court is functus with regard to the said prayers and that prayers 5 and 6 constitute an abuse of Court process and cannot be entertained by this Court, the Plaintiff having failed to state precisely the orders purportedly breached and disobeyed.
63. Beginning with the claim that prayer 2 falls short of the requirements for review as set out under Order 45 of the Civil Procedure Rules, the Court posits that the same is not a question of law as expressed above, but a matter of fact subject to the determination of the Court.
64. In a similar vein, what constitutes abuse of Court is a question of fact which the Court must interrogate, Indeed the Court has already addressed itself on the claim of contempt above.
65. As to the arguments that prayers 3 and 4 are res judicata and the Court is subsequently functus, the Court notes that the aforesaid pleas touch on the jurisdiction of the Court. The doctrine of res judicata as premised on Section 7 of the Civil Procedure Act prevents the Court from re-determining a matter/issue that has been finally determined by a competent Court.
66. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act, which provides that:

“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”
67. In the case of John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion on the concept of res judicata thus:

“... The essence of the res judicata doctrine is further explicated by Wigram, V-C in Henderson v Henderson (1843) 67 ER 313, as follows:... where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form



an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” [emphasis supplied].

Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case^{3/4}to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision.”

68. Res judicata does not apply to suits only, but also to applications. This legal position was stated in the case of Mburu Kinyua vs Gachini Tuti [1978] KLR 69 at 81 and reiterated by the Court of Appeal in Uhuru Highway Development Limited vs Central Bank of Kenya & 2 others [1996] eKLR as follows:

“That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

69. In this case, the Defendant asserts that prayer 3 and 4 of the Motion of 10th January, 2024 are res judicata the Court’s determination of the Plaintiff’s Motion dated 8th April 2022, and Interested Parties Motion dated 18th May, 2022. The issue alleged to be res judicata is a previous Motion within this suit and as such no extraneous evidence is required. The Court find this to be a proper objection.

70. Vide the Motion of 8th April, 2022, the Plaintiff sought inter-alia an injunction restraining the Defendant from interfering with the suit property pending determination of the suit. It sought, among others:

“2. That there be a Temporary Injunction restraining the Respondent/Defendant, her servants or agents from harassing the plaintiff or illegal entering land parcel no Nairobi Block117/509 pending hearing of the application interpartes and determination of the suit herein.”

71. Vide the Motion of 18th May, 2022, the Interested Parties on their part equally sought, among others, injunctive orders restraining the Plaintiff from interfering with the suit property.

72. Whereas the Motion of 8th April 2022 was dismissed on 19th May 2022 for want of prosecution, the Motion of 18th April 2022 was allowed on 19th October, 2023. The Court restrained the Defendant from inter-alia trespassing, collecting rent proceeds, leasing out, charging, selling, transferring, wasting, constructing on, further construction, alienating or otherwise interfering or dealing or in any manner interfering with the Applicants’ peaceful occupation of the parcel of land known as LR. No. Nairobi/Block 117/509 (hereinafter the suit property) pending the hearing and determination of the suit.



73. Vide prayer 3 and 4 herein, the Plaintiff herein seeks:

“That this Honourable Court be pleased to issue an order of temporary injunction barring the Defendant and the Interested Party herein whether by themselves, agents, employees or any person acting through them or on their instructions from evicting the Plaintiff and all the tenants or collecting rent from all that parcel of land known as Land Reference Number Nairobi Block 117/509 pending the hearing and determination of the Application; and

That this Honourable Court be pleased to issue an order of temporary injunction barring the Defendant and the Interested Party herein whether by themselves, agents, employees or any person acting through them or on their instructions from evicting the Plaintiff and all the tenants or collecting rent from all that parcel of land known as Land Reference Number Nairobi Block 117/509 pending the hearing and determination of the suit.”

74. The question then is whether the said prayers in the Motion of 10th January 2024 are res judicata the previous applications of 8th April 2022 and 18th April 2022.

75. The application of 8th April 2022 was dismissed for want of prosecution. It was therefore not determined on merit. Therefore, prayers 3 and 4 in the Application of 10th January 2024 are not res judicata the application of 8th April 2022.

76. Regarding the Motion of 18th April 2022 vis a vis the application of 10th January 2024, it is evident that both applications involve the question of injunction, and who should benefit therefrom. That is, who should be restrained from interfering with the suit property and in what manner.

77. The concept of res judicata recognizes not only issues raised but issues that should have been raised. In view of the foregoing, the Court finds that the answer to the question of whether the Court made a determination on injunction must be answered in the affirmative.

78. The question of injunction has already been determined with finality. Prayers 3 and 4 of the application of 10th January 2024 are, thus, res judicata the decision of the Court of 19th October 2023. This Court is, therefore, functus officio in as far as it relates to any question of who should benefit from an order of injunction.

79. Should the court review the orders of 19th October 2023? The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act*, Cap 21 and Order 45, Rule 1(1) of the Civil Procedure Rules, 2010. Section 80 of the Act provides as follows:

“Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

80. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:

“Any person considering himself aggrieved-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



(b) By a decree or order from which no appeal is hereby allowed, and who from 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 decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”

81. A reading of the above provisions makes it is clear that while Section 80 of the *Civil Procedure Act* grants the Court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting it to discovery of new and important matters or evidence, mistake or error on the face of the record or any other sufficient reason.

82. This position was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR where the court observed that:

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”

83. In *Ajit Kumar Rath vs State of Orisa & Others*, on 2 November, 1999, the Indian Supreme Court in discussing the scope of review had this to say:

“...the power of review available to the Tribunal is the same as has been given to a court under Section 114 read with Order 47 CPC. The power is not absolute and is hedged in by the restrictions indicated in Order 47. 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 for 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 needed for stabling it...”

84. In the Plaintiff’s omnibus application, and concerning the prayer for review, the Plaintiff seeks that this Court sets aside the orders of 19th October 2023 because he has entered into lease agreements with tenants and that he is likely to suffer prejudice if the orders are not varied and/or set aside.

85. According to the Plaintiff, he cannot collect rent owing to the incessant disturbance of his tenants by the Defendant and the Interested Parties. The purpose of the review, as per the Plaintiff’s application, is to enable him collect rent and deal with the suit property as the owner of the same.

86. Both the Defendant and the Interested Parties have opposed the said application, contending that it is bereft of merit, the delay in filing it is inordinate and an afterthought, and the threshold set by Order 45 of the Civil Procedure Rules has not been met.



87. The Court has painstakingly gone through the Motion and considered all the grounds for review and setting aside advanced therein. To begin with, despite the Plaintiff having knowledge of the orders of this Court sometime in October 2023, he did not seek to challenge the same until the 10th January 2024, after he was served with the contempt application of 5th January 2024.
88. Indeed, it appears that this is what triggered the present Motion. Nonetheless, three months is not so inordinate as to disentitle the Plaintiff from approaching the Court for review orders.
89. The Court however agrees with the Defendant and the Interested Parties that the Plaintiff has not demonstrated any new fact which was not within his knowledge as at the time of the hearing and determination of the application of 18th May 2022, which gave rise to the orders of 19th October 2023. The application is, therefore, not tenable under the ground of “new evidence.”
90. The Court equally agrees with the Defendant and the Interested Parties that the Plaintiff has not shown any error apparent on the face of the record. In the entirety of the application, there is not a single mention of any error apparent on the face of the record.
91. The Plaintiff contends that the Court refused to grant the Interested Parties the authority to collect rent and, therefore, the Defendant and the Interested Parties do not have authority to collect rent. On the other hand, it is the Plaintiff’s case that he should be allowed to collect rent as he is the owner of the suit property.
92. In the application of 18th May 2022, the Interested Parties asked the Court for orders, among others, that:
- “The Court be pleased to order that all the rental proceeds of the houses erected on the suit property be collected by the Applicants and deposited to Equity Bank Account No. 0710xxxxxx-Margaret Wairimu Mukua, Githurai Branch pending the hearing and determination of the suit.”
93. On the proposition that the Court declined to allow the Interested Parties to collect rent, the Court in its decision of 19th October 2023 stated as follows at paragraph 23:
- “In view of the foregoing, I find that the application is meritorious. The issue of collection of rental income from the houses on the suit property was not addressed at all by the court (parties). The same will not be considered.”
94. The Court did not, as put forth by the Plaintiff, direct that the Interested Parties should not collect rent. Neither did the Court direct that the Interested Parties should collect rent proceeds. As the parties did not address the Court to the contention as to who should collect the rental proceeds from the suit property, the Court did not consider it and did not make dispositive finding on the issue.
95. What the Court directed was that the Plaintiff should not, inter alia, collect rent proceeds from the suit property.
96. It is evident that the position created relating to collection of rent is open to different interpretations, as far as it relates to the collection of rent by the Interested Parties.
97. There is, therefore, a likelihood of wastage of the proceeds of rent owing to the current position. This situation presents this Court with sufficient cause warranting the limited review of the orders of 19th October 2023.



98. The phrase “sufficient cause” was defined by the Supreme Court of India in the case of Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011) as being:

“Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man.”

99. What is sufficient cause was defined in the Court of Appeal in the case of the Hon. *Attorney General vs the Law Society of Kenya & Another Civil Appeal (Application) No. 133 of 2011*:

“Sufficient cause or good cause in law means:-

The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Blacks Law Dictionary, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”

100. And the Court of Appeal in *The Official Receiver and Liquidator vs Freight Forwarders Kenya Ltd (2000)* eKLR on what sufficient cause is stated that:

“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

101. It is the Court’s finding that to prevent wastage of the suit property and further contention as to the right to collect rent, the orders of 19th October 2023 should be reviewed to the limited extent of allowing the collection of rent.

102. Considering that it’s the Defendant who moved the court in respect to the application for injunction, and the Plaintiff having been restrained from dealing or in any manner interfering with the Applicants’ peaceful occupation of the parcel of land known as LR. No. Nairobi/Block 117/509 (hereinafter the suit property) pending the hearing and determination of the suit, it follows that it is the Defendant/ Interested Parties who should conduct all permissible activities on the suit land, including, but not limited to collecting the rent.

103. In the end the Court makes the following final determination:

- i. The Motion dated 5th January, 2024 be and is hereby dismissed.
- ii. The rent proceeds from the suit property to be collected by the Defendant/Interested Parties pending the hearing and determination of the suit.
- iii. Costs of the application to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE



In the presence of;

Mr. Omondi for Kenyatta for Plaintiff

Mr. Mugo for Defendant/Interested Party

Court Assistant - Tracy

