



**Kiberetu v Kibiti (Being Sued as the Administrator of the Estate of M'irura M'mungania alias Irura Mungania - Deceased) (Environment & Land Case E009 of 2023) [2025] KEELC 765 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 765 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E009 OF 2023  
JO MBOYA, J  
FEBRUARY 17, 2025**

**BETWEEN**

**SAMSON KIBERETU ..... PLAINTIFF**

**AND**

**SILAS KIBITI (BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF M'IRURA M'MUNGANIA ALIAS IRURA MUNGANIA - DECEASED) ..... DEFENDANT**

**RULING**

1. The Defendant/Applicant has approached the court vide the Application dated the 2<sup>nd</sup> December 2024; and in respect of which the applicant seeks for various orders *inter alia* on order of Eviction and Permanent Injunction as against the Plaintiff/Respondent herein.
2. Following the filing of the Application under reference, the Plaintiff/Respondent filed a Replying affidavit sworn on the 28<sup>th</sup> January 2025 and wherein the Plaintiff/Respondent has raised and canvassed various issues, namely; the doctrine of functus officio and also that the orders being sought for are precipitate/substantive orders and hence same [orders] cannot be issued/granted at the foot of an Application.
3. The application came up for hearing on the 17<sup>th</sup> of February 2025, when the same [application] was heard vide oral submissions. For coherence, I have read and examined the substratum of the submissions by and on behalf of the parties.
4. Having heard the parties and upon consideration of the Submission[s], the determination of the application before the court turns on three [3] issues namely; whether the court can grant the precipitate orders of eviction and permanent injunction albeit on the basis of the application; whether



- the court can invoke and deploy the inherent jurisdiction to grant the orders sought and finally whether the orders sought shall be tantamount to sitting on appeal on the judgment of the trial court [judge].
5. In addition, there is another consequential/incidental issue namely; whether a party or applicant herein not excepted, can be allowed to file an application seeking orders/ remedies that are contrary to and in contravention of the pleadings that were filed and which pleadings were never amended.
  6. First and foremost, I beg to start with the issue of granting precipitate and substantive orders of Eviction and Permanent injunction on the basis of an application. It is imperative to state that an eviction order is a precipitate order and by virtue of its very nature, the same can only be granted vide a substantive suit, which must be heard in the conventional way. In this regard, if the Defendant/Applicant was keen to procure and partake of an eviction order, then it behooved the Defendant/Applicant to file a counterclaim at the foot of the statement of defence.
  7. It is only upon the filing of the counterclaim, if same was deemed apposite by the Defendant/Applicant, that the trial court/Judge would have been seized of the jurisdiction to consider whether the basis had been laid to warrant the grant of an eviction order, or otherwise.
  8. Suffice to state that no counterclaim was filed by and on behalf of the Defendant/Applicant and because no counterclaim was filed, the Learned judge did not consider and/or engage with any prayer for [*sic*] eviction or at all.
  9. To the extent that the Judge did not grant an order of eviction, the Defendant/Applicant cannot now seek to procure an order of eviction vide an application, post Judgment. In my humble view, the prayer for eviction cannot be procured vide an application save for where the application is filed pursuant to the provisions of Order 36 of the [Civil Procedure Rules](#) 2010; which underpins the circumstances where summary Judgment can issue on or be granted.
  10. As concerns an order of permanent injunction, it is common ground that same can only issue/ be issued on the basis of a substantive suit. For coherence, an order of permanent injunction [which is also known as perpetual injunction] cannot issue on the basis of an application, whether the application is interlocutory or one made post-judgment and particularly, where no such order for permanent injunction had been sought for in the main suit [See the decision in the case of [Kenya power and lighting company Ltd v Shariff Molana Habib](#) (2018) eKLR on paragraphs 7 and 8 thereof; where Hon. Justice W. K Korir, Judge [as he then was] considered the dichotomy between a temporary injunction, mandatory injunction and permanent injunction and also highlighted the circumstances under which same can and often do issue.
  11. Next is the question of the inherent jurisdiction of the court. Suffice it to state that the inherent jurisdiction of the court, which is also referenced as the intrinsic/residual does apply in situations where the court is called upon to avert injustice and or achieve the ends of justice. [see Section 3 A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya], [see also the supreme court decision in [Narok County Government v Livingston Kunini Ntutu](#) (2018) eKLR, Paragraphs 98 and 99 thereof]
  12. Nevertheless, it is worthy to recall and reiterate that the inherent/residual/intrinsic jurisdiction of the court can only be deployed and used where there are no clear/express provisions of the law to provide for the situation at hand. However, there is no gainsaying that the inherent jurisdiction of the court cannot be deployed where there are clear and express provisions of the law. [See the decision of the Court of Appeal in the case of [Wilfred Kolosi T/A Konosi and Company Advocates v Flamco Ltd](#) [2019] eKLR.



13. I am afraid that the inherent jurisdiction of the Court be used/ deployed as a shortcut by the Defendant/Applicant herein who had the opportunity to file and prosecute a counterclaim, but spurned the opportunity to do so.
14. I now wish to venture forward and address the question as to whether the grant of the orders sought shall be tantamount to rewriting the judgment of the trial judge. Instructively, it is evident that the learned Judge did not grant any eviction orders or orders of permanent injunction.
15. Despite the foregoing, the Defendant/Applicant is now before the court and same is seeking for eviction orders and permanent injunction. In my humble view, the grant of such orders shall be tantamount to superseding the judgment of the court. Such an endeavor shall cause and or occasion anarchy to the rule of law and hence must not be countenanced by a conscientious court of law.
16. Finally, I wish to state that parties are bound by their pleadings and in this case, the Defendant/ Applicant is bound by the statement of defence that was filed and prosecuted before the court. [see Order 2 Rule [6] of the *Civil Procedure Rules*, 2010] [See also the decision of the Court of Appeal in the case of *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule and others* (2013) eKLR and *Dakianga Distributors Ltd v Kenya Seed Company Ltd* [2015] eKLR.
17. In a nutshell, the granting of the application beforehand shall essentially constitute and amount to a violation of the doctrine of departure. Furthermore, I am afraid that granting the subject application will be tantamount to superseding the Judgment of the Trial Judge, which is not only unacceptable but also prohibited under the Law. [See the decision of the Court of Appeal in *Bellenue Development Limited v Francis Gikonyo and Others*[2018]eKLR]
18. In short, I find and hold that the application beforehand [dated 2<sup>nd</sup> December 2024] is not only misconceived, but same is legally untenable.
19. Consequently, the same [application] be and is hereby dismissed albeit with no orders as to costs.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 17<sup>TH</sup> DAY OF FEBRUARY 2025.**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of:-

Mutuma Court Assistant.

Mr. Silas Kibiti – The Defendant/Applicant in person.

Miss. Ocholla for the Plaintiff/Respondent.

