



REPUBLIC OF KENYA



Mojaria v Ringsview Apartments Limited & 7 others (Environment & Land Case E023 of 2024) [2024] KEELC 7244 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E023 OF 2024
LN MBUGUA, J
OCTOBER 30, 2024**

BETWEEN

VIJAY MOJARIA PLAINTIFF

AND

RINGSVIEW APARTMENTS LIMITED 1ST DEFENDANT

JORAM MWAURA KIUNA 2ND DEFENDANT

THE REGISTRAR OF TITLES, NAIROBI 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

DR MBIRA GIKONYO 5TH DEFENDANT

LUCY WANJIKU MAINA 6TH DEFENDANT

WANGETHI MWANGI 7TH DEFENDANT

LIZZIE WANGUI WANGETHI 8TH DEFENDANT

RULING

1. The Plaintiff's Notice of Motion dated 25.1.2024 is for determination. He seeks orders restraining the 1st Defendant from disposing off or dealing with apartments known as A1, A2, A3, A5, A6, A7, A8, A9, B1, B2, C1, C3, C4, C5, C6, C7, C8, C12 located on LR No. 4858/11 (Rings view apartments) pending hearing and determination of the suit. He seeks similar orders against the 2nd Defendant in respect of apartment A4.
2. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit sworn on 24.1.2024. He has given an account of how the 1st Defendant sold to him apartment No. A4, C1 on LR No. 4858/11, but a dispute arose between him and the 1st Defendant regarding the sale of the



- aforementioned apartments culminating in the filing of the suit ELC Case No.782 of 2014 by the 1st defendant against him and the contractor where judgment was rendered in the matter on 9.2.2023.
3. That in the said judgment, the court directed that the 1st Defendant was to transfer ownership of apartments C1 and A4 to him upon him paying ksh.2.5 million but to his shock, the 1st Defendant irregularly and illegally caused a lease to be registered in favour of the 2nd Defendant on 29.4.2016.
 4. He also avers that there were valid subsisting court orders in the said matter barring the 1st defendant from disposing off the suit property.
 5. He contends that given the fact that the 1st Defendant is a special purpose vehicle incorporated specifically to develop parcel LR No. 4858/11, he is apprehensive that if the orders sought are not granted, there is a likelihood that the 1st Defendant will dispose off its own assets making execution impossible.
 6. In his supplementary affidavit sworn on 27.5.2024, the plaintiff avers that a ruling on his application for review filed in ELC Case No. 782 of 2014 was delivered on 19.2.2024.
 7. In his submissions dated 27.5.2024, the plaintiff contends that this suit is not res judicata for reasons that the sale and transfer of the suit property to the 2nd Defendant is a new cause of action founded on the doctrine of lis pendens, which is entirely different from the cause of action in Milimani ELC No. 782 of 2014. To this end, reference was made to the cases of Edward Monge Lengusuranga v James Lanaiyara & Another [2019] eKLR as well as the case of Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR.
 8. It is argued that the Plaintiff has established the threshold for grant of the orders sought as set in Nguruman Limited v Jan Bonde Nielsen & 2 others CA No. 77 of 2012 [2014] eKLR. Other cases relied upon by the plaintiff include Pius Kipchirchir Kogo v Frank Kimeli Teenai [2018] eKLR, Xtranet Communications Limited v Westlands Skye Development Limited [2019] eKLR and Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another [2015] eKLR.
 9. The application is opposed by the 1st, 2nd, 5th, 6th, 7th and 8th Defendants vide grounds of opposition dated 28.2.2024, and the replying affidavits of the 2nd and the 5th Defendants both dated 5.4.2024. They contend that the application contravenes the provisions of Section 7 of the [Civil Procedure Act](#) as matters in issue were directly and substantially in issue in Milimani ELC 782 of 2014 in which the plaintiff filed a Notice of Motion dated 16.3.2023 seeking a review of the judgment issued in the matter and that he had also sought injunctive orders.
 10. It is also contended that the Plaintiff does not have any legal/equitable interest in the suit properties as the same belong to other purchasers who are not parties to this suit and the said apartments are subject of litigation in other suits.
 11. They contend that after the delivery of the judgment on 9.2.2023 in the case 782 of 2014, the 1st Respondent lodged a Notice of Appeal dated 22.2.2023.
 12. They further contend that the Plaintiff ought to execute the said decree and not file a new suit over the same subject matter.
 13. It is further argued that the 2nd defendant purchased apartment A4 vide a mortgage loan facility by Standard Chartered Bank Kenya Limited. Subsequently, he received a sublease dated 22.3.2016 from the 1st Defendant which was registered on 29.4.2016. He avers that the apartment was sold and transferred legally following due process and there were no court orders restraining the 1st Defendant from alienating its property.



14. The 3rd and 4th Defendants did not file responses to the application.
15. The 1st, 2nd, 5th, 7th and 8th Defendants' submissions are dated 21.8.2024 where they argue that the suit is res judicata to the case Milimani ELC 782 of 2024. It is pointed out that the Plaintiff's prayer 1 on the plaint dated 25.1.2024 seeks that Apartment No. A4 be declared to be rightfully his, yet he has not met the conditions set out in the decree in the older case.
16. It is further submitted that the appropriate court to determine issues raised herein is the court that issued the decree dated 3.4.2023 and not this court. To this end, the cases of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR and Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] eKLR are relied upon. The case of Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (k) Ltd (Formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR is cited to submit that the Plaintiff is attempting to conjure up a new cause of action in order to avoid the doctrine of res judicata.
17. It is their submission that the applicant has attempted to sue the current and former directors of the 1st Defendant which action is contrary to the principles of separate corporate personality as enunciated in Salomon V Salomon & co (1987) AC 22 and applied in several cases including Ukwala Supermarket v Jaideep Shah & Another [2022] eKLR, Mugenyi & Company Advocates v The Attorney General [1999] 2 EA 1999.
18. I have considered the pleadings so far filed, as well as the arguments raised herein including the rival submissions. What the Plaintiff seeks in the main suit among other orders is that apartment No. A4 be declared to belong to him.
19. Vide its judgment issued on 9.2.2023 in Milimani ELC 782 of 2014, the court issued orders inter alia;

“An injunction is issued restraining the plaintiff from charging, selling, transferring or dealing in any other manner with apartments B3 and, with apartments A12(A9), A11(A10), B6(B5), C1, A4 and C10 for a period of 45 days from the date hereof within which the 2nd defendant and his associates shall pay the balance of the purchase price due in respect.”
20. I find that this suit is intended to pursue the effectuation of the above orders. Thus it is a question of whether the said conditional order was complied with or not. Section 34 of the [Civil Procedure Act](#) provides that questions arising between parties to the suit in which the decree was passed, and relating to the execution, discharge or satisfaction of decree, shall be determined by the court executing the decree and not by a separate suit.
21. In the case of South Nyanza Sugar Co Ltd v Alfred Sagwa Mdeizi t/a Pave Auctioneers [2010] eKLR, the court stated that;

“Section 34 of the [Civil Procedure Act](#) strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit.”
22. An argument has been proffered by the plaintiff that this suit relates to a new cause of action as the apartment A4 was sold to the 2nd defendant in year 2016 during the pendency of the older suit. However, it is pertinent to note that judgment in the older suit was delivered on 9.2.2023. Thus the plaintiff had an opportunity spanning 7 years to bring his entire case before the court in case No. 782 of 2014.



23. In Republic v City Council of Nairobi & 2 others [2014] eKLR, the court stated that;
- “The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties.....”
24. It is clear beyond peradventure that the orders sought in this suit have the net effect of scuttling the judgment delivered in the case No. 782 of 2014, a situation which is not only untenable, but it amounts to an abuse of the court processes.
25. The definition of ABUSE in The Black’s Law Dictionary Sixth edition is outlined as follows;
- “Everything which is contrary to good order established by usage that is a complete departure from reasonable use”..
26. In Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR, it was stated that;
- “Abuse of court process creates a factual scenario where a party is pursuing the same matter by two-court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process.....
- litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of court/legal process”.
27. It is noted that this is not the only suit filed by the applicant. He has also filed a similar suit LC E025 of 2024.
28. Having made a pronouncement that this suit is an abuse of the court process, then I proceed to give the following orders;
1. The application dated 25.1. 2024 is hereby dismissed.
 2. The entire suit is hereby struck out with costs to the 1st, 2nd, 5th - 8th defendants.
 3. The orders given herin to apply in the case LC E025/2024.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30th DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Maritime holdng brief for Dr. Mutubwa for Plaintiff

Muthali Kinuthia for 1st, 2nd, 5th – 8th Defendants

Court assistant: Vena

