



REPUBLIC OF KENYA



**Acouth & another v Jasch Holdings & another (Environment & Land  
Case E397 of 2021) [2023] KEELC 911 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 911 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E397 OF 2021**

**J OMANGE, J  
FEBRUARY 9, 2023**

**BETWEEN**

**KUR PAUL KUOL ACOUTH ..... 1<sup>ST</sup> PLAINTIFF**

**CHAN ANDREA MOK CHAM ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JASCH HOLDINGS ..... 1<sup>ST</sup> DEFENDANT**

**MARKEM LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated November 14, 2022 brought under certificate of urgency is brought under order 13 rule 1, order 26 rule 1 order 51 rule 1 of the [Civil Procedure Rules 2010](#) and section 1A, 1B and 3A of the [Civil Procedure Act](#) cap 21 Laws of Kenya.
2. The application prays for the following reliefs;
  - a. Spent.
  - b. That pending hearing and determination of this application, the honourable court be pleased to direct that the 1<sup>st</sup> and 2<sup>nd</sup> respondents pay the applicant mesne profits for the period starting from November 2021 to October 2022, amounts which have stood outstanding for over 10 months.
  - c. That in the alternative, pending hearing and determination of this application, this honourable court be pleased to direct that the 1<sup>st</sup> and 2<sup>nd</sup> respondents to deposit in court mesne profits for the period starting from November, 2021 to October, 2022 as security.



- d. That pending hearing and determination of the suit filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent, the honourable court be pleased to direct that the 1<sup>st</sup> and 2<sup>nd</sup> respondents deposit in court mesne profits equivalent to one (1) year as security.
  - e. That the cost of the suit and this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
3. The application is supported by the affidavit of James Njuguna Ngururi.
  4. The plaintiffs have opposed the application. In a replying affidavit dated December 20, 2022 counsel for the applicant averred that the claim for mesne profits arises from a license agreement which is being forced on the plaintiffs. Counsel argues that the issues in the present application had been determined in an earlier application dated November 10, 2021. The court in the ruling delivered in that application had issued an order for injunction restraining the defendants from distressing for any rent or license.
  5. The court directed that the application be canvassed by way of written submissions.
  6. Counsel for the plaintiffs submitted that the applications and the suit herein are *res judicata* as the issues had been substantially determined in the earlier application dated November 10, 2021.
  7. The defendants had not complied with the courts directions on filing submissions as at the date of writing this ruling. I have not therefore considered the submissions of the defendants who are the applicants in this application.
  8. The issues that arise for the courts determination are;
    - a. Is this matter *res judicata*?
    - b. Are the defendants entitled to mesne profits?
  9. Section 6 of the [Civil Procedure Act](#) provides “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.
  10. As such in determining the issue of *res judicata* the court is called upon to determine the following issues;
    - a. Whether the issue was directly and substantially in issue in the former suit.
    - b. Whether suit was between the same parties or parties claiming under them.
    - c. The parties were litigating under the same title.
    - d. The issues were heard and finally determined in the former suit.
    - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.
  11. It is the contention of the plaintiffs that the issues in this matter were substantially and directly in issue in the earlier application which was between the same parties litigating under the same title.
  12. I have considered the pleadings and submissions in the earlier application. Paragraph 16 of the replying affidavit of James Njuguna Ngunjiri is telling. He states ‘that it is on the basis of the letter highlighted in the preceding paragraph above and the undisputed fact that the 1<sup>st</sup> plaintiff failed to comply with the 45 days granted to finalize the purchase price that the 1<sup>st</sup> defendant cancelled the long overdue



transaction *vide* its letter to the 1<sup>st</sup> plaintiff dated April 17, 2018. The 1<sup>st</sup> defendant further resorted to recover mesne profits of Kshs three million four hundred and ten thousand ( Kshs 3,410,000 )...”

13. It is evident that the issue of mesne profits was presented before the court in the earlier application. Having considered pleadings filed by all parties and their submissions the court issued an injunction restraining the defendants herein from distressing for rent or any license fees.
14. In view of the foregoing I find that I am satisfied that the issues raised in the current application had been considered and a determination made by a court of competent jurisdiction. Section 6 of the [Civil Procedure Act](#) bars this court from hearing the parties on the same issue.
15. The upshot of the foregoing is that I find that the application has no merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF FEBRUARY 2023.**

**JUDY OMANGE**

**JUDGE**

**In the presence of: -**

**No appearance for the Plaintiffs**

**No appearance for the Defendants**

**Steve - Court Assistant**

