



Elijah & another v Langat & 4 others (Environment & Land Case 68 of 2018) [2023] KEELC 16635 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16635 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 68 OF 2018**

**MC OUNDO, J
MARCH 27, 2023**

BETWEEN

RUTH CHEROTICH ELIJAH 1ST APPLICANT

DAVID KIPRONO LANGAT (SUING AS REPRESENTATIVES OF THE ESTATE OF ELIJAH KIPKURUI CHERUIYOT) 2ND APPLICANT

AND

ESTHER CHEROTICH LANGAT 1ST RESPONDENT

BETTY CHERET 2ND RESPONDENT

LAND REGISTRAR, KERICHO 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

LETSHEGO KENYA LIMITED 5TH RESPONDENT

RULING

1. Via an Originating Summons dated August 29, 2018 which was brought pursuant to the provisions of Section 26 of the *Land Registration Act*, and Order 37 Rule 8 of the *Civil Procedure Rules*, the Applicants herein sought for the following orders;
 - i. That the Applicants are the children and beneficiaries of the Estate of Elijah Kipkurui Cheruiyot (deceased) the original registered owner of the suit property No Kericho/Kabartegan/340.
 - ii. That the entry on the title deed for parcel No Kericho/Kabartegan/340 in the name of Esther Cheruiyot Langat be declared null and void and the same to revert to the estate of Elijah Kipkirui Cheruiyot.



- iii. That the Land Registrar Kericho to effect the removal of Esther Cheruiyot Langat from the proprietorship section in No Kericho/Kabartegan/340.
 - iv. That the subsequent division of No Kericho/Kabartegan/340 to produce No Kericho/Kabartegan/1394 in the name of Esther Cheruiyot Langat be declared null and void.
 - v. That the charge effected on Parcel No Kericho/Kabartegan/1394 by the 5th Respondent to the land on behalf of Betty Chebet be declared null.
 - vi. That the Land Registrar Kericho to effect the removal of the encumbrances (charge) on the title deed of Parcel No Kericho/Kabartegan/1394.
2. Following the said application, the 5th Respondent raised a Preliminary Objection dated April 7, 2022 on the grounds that:
- i. Order 37, Rule 8 of the Civil Procedure Rules, 2010 provides that an Application under the *Land Registration Act*, 2012 other than under part V11 and VIII thereof shall be made by Originating Summons unless there is pending a suit involving the same land when the Application may be made in that suit. The orders sought herein fall under part VII & VIII of the *Land Registration Act*, 2012, the suit is therefore incompetent ab initio
 - ii. Order 51 presuppose the existence of a suit upon which an Application may be filed, as there is no suit properly before Court for determination, any orders issued in respect of the Notice of Motion dated August 29, 2018 are therefore null and void.
3. By consent, parties agreed to dispose of the Preliminary Objection in the first instance via written submissions. There was no response. From the 1st, 2nd and 3rd Respondents.

5th Respondents written submissions.

4. In discussing their submissions on the Preliminary Objection, the 5th Respondent framed their issues for determination as;
 - i. Whether the Applicants moved this honorable court in the right way.
 - ii. Whether the orders issued under the Notice of Motion application dated August 29, 2018 are valid.
5. On the first issue for determination, the 5th Respondent relied on the decision in *Mukisa Biscuits vs West End* [1969] EA 696 to submit that their Preliminary Objection was raised on a pure point of law which if successful, would dispose of the suit.
6. That the provisions of Order 37 Rule 8 of the Civil Procedure Rules expressly provided that an application under the *Land Registration Act*, 2012 other than under Part VII and VIII thereof shall be made by Originating Summons unless there was pending a suit involving the same land, when the application may be made in that suit.
7. That Part VII of the *Land Registration Act* provided for inhibitions, cautions and restrictions while Part VIII provided for rectification of lands instruments and indemnity.
8. That in their Originating Summons, the Applicants had sought, inter alia the orders as herein above stated wherein they ought to have filed a substantive suit and not an Originating Summons. Their submissions was buttressed by the holdings in *Cyril J. Haroo & Another vs. Uchumi services Ltd & 3 Others* [2014] eKLR and *Mukokinya M'arithi vs. Patrick Munkiri Kabundu* [2021] eKLR.



9. That the current suit was filed in contra-statute as it offended the provisions of Order 37 Rule 8(sic) hence a nullity ab initio. That further, the issues for determination were complex and contentious, and therefore could not be addressed by way of Originating Summons.
10. That the Applicants' allegation was that title to the suit property in favour of the 1st Respondent was obtained fraudulently. The cancellation of title on grounds of fraud was therefore a complex issue requiring the court to call evidence in support or opposition of the same. Additionally, the allegation had been controverted by the Respondents herein.
11. On the second issue for determination as to whether the orders issued under the Notice of Motion Application dated August 29 2018 were valid, the 5th Respondent submitted in the positive. That the provisions of Order 51 presupposed the existence of a suit upon which an application could be filed. That devoid of such a suit before the court, the Notice of Motion Application dated August 29, (sic) could not stand. The Respondent relied on the decision in *Ally Mohamed Hassan & Another vs Ismael Msamba Hassan & 2 others* [2021] eKLR.
12. That since the Originating Summons dated August 29, 2018 was fatally defective, the Notice of Motion Application dated August 29th (sic) was equally fatally defective and therefore the Originating Summons and the Notice of Motion Application, both dated August 29, 2018 ought to be struck out with costs to them. (5th Defendant.)

Applicants' submissions**

13. The Applicants, in opposition to the Preliminary Objection filed their issues for determination as follows ;
 - i. Whether the suit offends the provisions of Order 37 Rule 8 of the Civil Procedure Rules, 2010?
 - ii. Whether the suit ought to be struck out?
14. The Applicants submitted that they were the children and beneficiaries of the Estate of Elijah Kipkurui Cheruiyot (Deceased) who was the original registered owner of the suit property Kericho/ Kabartegan/340. That the present suit was filed pursuant to the provisions of Order 37 Rule 8 of the Civil Procedure Rules which provides who may take out Originating Summons and in respect of what matter.
15. That they had brought the present suit as Administrators of the Estate of Elijah Kipkurui Cheruiyot (Deceased) wherein they had sought for declaratory orders to have the Respondents' dealings on title No. Kericho/Kabartegan/340 be declared null and void. That the issues therein were not as contentious as the Respondent would want the Court to believe, by reason that the Succession Cause over the Estate of Elijah Kipkurui Cheruiyot (Deceased), is yet to be concluded.
16. That the late Elijah Kipkurui Cheruiyot had passed away on September 15, 1995, whereas the illegality in the register had been effected on October 12, 1995 and November 14, 2003 respectively. That in addition, the circumstances under which the Respondents had acquired the parcel of land was questionable because the same had been effected through a Succession Cause that had no bearing to the Estate of Elijah Kipkurui Cheruiyot (Deceased).
17. That the Applicants in the present case were not seeking to be registered as proprietors of the suit properties, but for declaratory orders for the preservation of the Estate of Elijah Kipkurui Cheruiyot (Deceased), pending the determination of the Succession Cause to wit, Kericho High Court Succession Cause No 5 of 2018 in respect of the same. The current suit herein did not therefore offend the provisions of Order 37 Rule 8 of the Civil Procedure Rules, 2010.



18. On the second issue for determination, the Applicants submitted that in the majority of the cases where a Plaintiff instituted a claim by Originating Summons, the Courts invariably directed that the Originating Summons be deemed to be a Plaint and the Replying Affidavit a Defence and thereafter the suit is heard by way of viva voce evidence as per the provisions of Order 37, Rule 19 of the Civil Procedure Rules. That no prejudice would therefore be occasioned upon the Respondents were the Court to direct that the Originating Summons herein be deemed a Plaint and the Replying Affidavit a Defence. Reliance was placed on *Emily Chepkor Chepkwony vs Paul Arap Chandook* [2021] eKLR wherein the Court had held that striking out of the Plaintiff's suit based on a Preliminary Objection would amount to elevating reliance on procedural technicalities and ignoring the *Constitution* edict under Article 159 (2) (d).
19. That the court be guided by the provisions of Section 1A and 1B of the *Civil Procedure Act* and Section 3 of the *Environment and Land Act*, to find that in the interest of justice, the Preliminary Objection ought to be dismissed with costs

Determination.

20. A Preliminary Objection according to the decided case by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited* (1969) EA. 696 was stated to be thus:-

“So far as I am aware, 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.”
21. It is evident that a Preliminary Objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of *Quick Enterprises Ltd. vs. Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
22. In the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
23. In the present scenario, the 5th Respondent's Preliminary Objection is that from the orders sought by the Applicants herein, which orders were referred to at the beginning of this ruling, both the Applicants' Originating Summons and the Notice of Motion Application, dated August 29, 2018 ought to be struck out with costs being in contravention of the provisions of Order 37 Rule 8 of the Civil Procedure Rules which expressly provided that an application under the *Land Registration Act*, 2012 other than under Part VII and VIII thereof shall be made by Originating Summons unless there was pending a suit involving the same land, when the application may be made in that suit. That further Part VII of the *Land Registration Act* provided for inhibitions, cautions and restrictions while Part VIII provided for rectification of lands instruments and indemnity.



24. I have considered the said Preliminary Objection, the submissions for and against, the authorities' herein cited and I find the issues for determination as being whether the said Preliminary Objection should be upheld.
25. It is not in dispute from the orders sought by the Applicants in their Originating Summons dated August 29, 2018 that they are challenging the dealings on title No Kericho/Kabartegan/340 by the Respondents herein seeking that the said dealings be declared null and void on allegations that the title to the suit land herein in favour of the 1st Respondent, had been obtained fraudulently and therefore the same should be cancelled.
26. In response to the Preliminary Objection, the Applicants herein submitted that they had brought the present suit as administrators of the Estate of Elijah Kipkurui Cheruiyot (Deceased) seeking for declaratory orders to have the Respondent's dealings on title No. Kericho/Kabartegan/340 be declared null and void. That they were not seeking to be registered as proprietors of the suit properties, but for declaratory orders for the preservation of the Estate of Elijah Kipkurui Cheruiyot (Deceased), pending the determination of the Succession Cause to wit, Kericho High Court Succession Cause No. 5 of 2018 in respect of the same, and therefore the current suit herein did not offend the provisions of Order 37 Rule 8 of the Civil Procedure Rules, 2010.
27. Order 37 rule 8 Civil Procedure Rules provides instances when the court may be moved by way of Originating Summons in relation to registered land unless there is a pending suit involving the same land in which case, such an application has to be made in such a suit. The provisions of Order 37 Rule 8 of the Civil Procedure Rules provide as follows:
- “An application under the *Land Registration Act*, 2012 other than under Part VII and Part VIII thereof shall be made by Originating Summons unless there is pending a suit involving the same lands when the application may be made in that suit.”
28. Whereas Part VII of the *Land Registration Act* provided for inhibitions, cautions and restrictions, Part VIII provided for rectification of lands instruments and indemnity.
29. It is not in dispute that the subject land herein is registered under the Registered Land Act Cap 300 now repealed and although the Applicants defence is that they were seeking for preservative orders, yet paragraphs ii to vi of the orders they sought in their Originating Summons as well as the grounds in support thereof and supporting affidavit are all clear that the Applicants were seeking cancellation of title to the suit land on the allegation that the registration of the same in favour of the 1st Respondent was null and void.
30. Indeed matters of fraud, cancellation and rectification of the register by all means are complex and require detailed evidence at a full hearing which is trite, is outside the scope of an originating summons.
31. In *Kibatiri vs Kibutiri* (1983) KLR 1, it had been held as follows;
- “The scope of an inquiry which could be made on an Originating Summons and the ability to deal with a contested case was very limited. When it becomes obvious that the issues raised are complex and contentious questions of facts and law a judge should dismiss the summons and leave the parties to pursue their claim by ordinary suit”.
32. The Applicants have opined that since Order 37 rule 19 (1) of the Civil Procedure Rules gives the court the discretion on the manner of proceeding with a matter by way of conversion into a plaint that their Originating Summons be deemed as a Plaint and the Replying Affidavit a Defence and thereafter the suit be heard by way of viva voice evidence as the Respondents will not suffer prejudice, yet the holding



- of the court is that Applicants must move within the law so as to seek courts orders of cancellation of the title to the suit land as seeking the said orders via an Originating Summons is the wrong procedure.
33. The Court of Appeal in *John W Wepbukhulu vs Secretary Board of Governors, Burn School* (2005) eKLR held thus;
- “The procedure of Originating Summons is designed for the summary or ad hoc determination of points of law, construction of certain specific facts or obtaining of specific directions of the court such as trustees, administrators or court execution officers. The procedure should not be used for determination of matters that involve a serious question or determination of disputed questions of facts”.
34. Further in *Mukesh Manchana Sbar & Another vs. Priyat Shah & Another* (2015) eKLR the Court of Appeal reversed a High court ruling declining jurisdiction and held thus;
- “Before we consider how these provisions apply to the question before us, we held to emphasize that it is perfectly well settled and indeed engrained in practice as repeatedly stated by legions of judicial authorities that unrestricted use of Originating Summons procedure is discouraged. It follows that the application by Originating Summons has never been a substitute for initiating claims involving contentious issues of facts looking at the history of its evolution.....”.
35. To move the court for cancellation of title on account of fraud or illegality can only be done by the court after evidence has been tendered to show that the same was procured fraudulently, or by mistake. To prove fraud, one has to examine in detail the documents that led to the acquisition of the said title, examination and cross-examination of the people involved in the processing of the title and sometimes the calling of expert witnesses or the officials from the Ministry of Lands and other relevant institutions. In the circumstances of this case I find and hold the proceedings before this court offends the provisions of Order 37 of the Civil Procedure Rules.
36. Interestingly I have also looked at the Limited letters of Administration Ad Litem issued on May 17, 2018 in the Kericho High Court in Succession Cause No 5 of 2018 in respect of the Estate of Elijah Kipkurui Cheruiyot (Deceased), and I note that the same was granted to the Applicants herein and;
- “limited to the purpose only of securing and protecting the deceased’s assets.”
37. The purpose of the Letters of Administration *Ad Litem* having been limited as herein noted, it cannot be said that the filing of the present suit fell within that ambit.
38. It is thus clear that at the time the Originating Summons as well as the Application by way of Notice of Motion both dated August 29, 2018 were initiated, the Applicants herein did not have a Grant of Representation to defend the suit and/or be sued on behalf of Estate of Elijah Kipkurui Cheruiyot (Deceased) in regard to the suit land No Kericho/Kabartegan/340 and therefore had no *locus standi*.
39. The issue of locus standi was defined in the case of *Alfred Njau & 5 Others vs. City Council of Nairobi* [1983] eKLR to mean- “the right to appear in Court.” Indeed the Court of Appeal in this case had held as follows:
- “.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”



40. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* (1982-99) 1 KAR, *Morjaria v Abdalla* [1984] KLR 490 and in *Trouistik Union International & Another v Jane Mbeyu & Another* Civil Appeal No. 145 of 1990 to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.
41. All said and done, I find that not only did the current suit offend the provisions of Order 37 Rule 8 of the Civil Procedure Rules, but the Applicants herein had no locus standi to bring the said suit and I thus proceed to strike out the Originating Summons as well as the Notice of Motion both dated August 18, 2018 with costs.

Dated and delivered via Microsoft Teams at Kericho this 27th day of March 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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