



**Kenya Anti - Corruption Commission v Itolondo & 5 others (Environment and Land Miscellaneous Application E31 of 2022) [2023] KEELC 16819 (KLR) (18 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16819 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E31 OF 2022  
DO OHUNGO, J  
APRIL 18, 2023**

**BETWEEN**

**KENYA ANTI - CORRUPTION COMMISSION ..... APPLICANT**

**AND**

**LAWRENCE MULAMA ITOLONDO ..... 1<sup>ST</sup> RESPONDENT**

**TITUS KHAMALA MUKHWANA ..... 2<sup>ND</sup> RESPONDENT**

**SAMMY SILAS KOMEN MWAITA ..... 3<sup>RD</sup> RESPONDENT**

**CORNERSTONE GOSPEL MINISTRY REGISTERED TRUSTEES .... 4<sup>TH</sup>  
RESPONDENT**

**STANLEY INGOKA MUYUKWE BUSHURU ..... 5<sup>TH</sup> RESPONDENT**

**STEPHEN TUBEYI MAKOKHA ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The applicant moved the court through Notice of Motion dated December 1, 2022, seeking the following orders:
  - a. That this application be certified urgent on priority basis for prayers that the Honourable court calls for the Lower Court file due for hearing at the CMs court on December 7, 2022.
  - b. That the Notice of Motion application and sworn affidavit dated November 15, 2022 filed in the suit file No CM ELC 323 of 2018 (Formerly HCCC 83 of 2009), be set down for inter-parties hearing forth with for hearing of contempt proceedings against the 2nd Defendant/ Respondent for disobedience of this Honourable Court's order dated July 8, 2009, and more particularly Order number 1 thereof confirmed on July 7, 2009 and be committed to civil jail



for 6 months for defying and being in flagrant and contemptuous breach of the Honourable Courts order.

- c. That the Contemnor be summoned to appear before this Honourable Court to show cause why he should not be committed to civil jail for disobeying the Orders and be committed to civil jail for 6 months for defying and being in flagrant and contemptuous breach of the Honourable Courts order.
  - d. That with the proof that false documents were presented to the trial court leading to Court's erred decision in render the trial marked as settled and deeming it an academic exercise thereof warrants the re-opening of this case for conclusive hearing and determination on the legality of title to the suit property herein.
  - e. That the 2<sup>nd</sup> Defendant/Respondent be condemned to pay the costs of the application herein.
2. The application is supported by an affidavit sworn by Gladys Jepchirchir Rutto, a Legal Officer with the Ethics and Anti-Corruption Commission, who is in conduct of the matter on behalf of the applicant. The first, second, fourth to sixth respondents opposed the application through a replying affidavit sworn by the second respondent as well as through Notice of Preliminary Objection dated December 7, 2022. The gist of the preliminary objection is that the application is an abuse of process for seeking transfer of an application filed in a court without jurisdiction, for joining the 4<sup>th</sup> to 6<sup>th</sup> respondents who were not parties to the proceedings before the subordinate court and for being brought in respect of a suit that had abated. It is further contended in the preliminary objection that the application is incompetent for being brought in the name of an entity that is non-existent by law.
  3. I gave directions that both the preliminary objection and the application be canvassed together by way of written submissions. The third respondent neither responded to the application nor participated in its hearing.
  4. The applicant and the first, second, fourth to sixth respondents filed submissions. I have considered the application, the preliminary objection, and the submissions.
  5. The background of the dispute between the parties is that the applicant and the respondents have been litigating in Kakamega CM ELC No 323 of 2018 (Formerly Kakamega HCCC No 83 of 2009). The applicant filed a Notice of Motion on November 15, 2022 in Kakamega CM ELC No 323 of 2018 through which it sought to have the second respondent herein cited and punished for alleged disobedience of an order made on July 7, 2009 in Kakamega HCCC No 83 of 2009, prior to its transfer to the subordinate court. The Notice of Motion filed on November 15, 2022 is still pending before the subordinate court. The applicant wants this court to essentially call for, take over and hear the application. The first, second, fourth to sixth respondents contend that this court has no jurisdiction to do so since the application is still pending before the subordinate court and since the application was filed in a court without jurisdiction.
  6. I will deal with the preliminary objection first.
  7. The law relating to preliminary objections has been settled since the now famous statement of Law JA in *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 thus:

So far as I'm 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.

8. Thus, a valid preliminary objection must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. It follows therefore that the first, second, fourth to sixth respondents' claims that the 4<sup>th</sup> to 6<sup>th</sup> respondents were not parties to the proceedings before the subordinate court, that the suit before the subordinate court had abated and that the applicant is a non-existent entity/name are not valid preliminary objections since evidence would need to be taken to ascertain those claims.
9. There is however one aspect of the first, second, fourth to sixth respondents' argument that warrants further scrutiny: their contention that this court has no jurisdiction to call for, take over and hear the Notice of Motion filed on November 15, 2022 since the said application is still pending before the subordinate court.
10. Section 6 of the *Civil Procedure Act* provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
11. A perusal of Notice of Motion dated December 1, 2022 shows that it essentially seeks the same prayers as the Notice of Motion filed on November 15, 2022 which is still pending before the subordinate court. The issues raised in the former application are directly and substantially in issue in the latter. As long as the latter application is pending before the subordinate court, this court is precluded by Section 6 of the *Civil Procedure Act* from considering Notice of Motion dated December 1, 2022.
12. Having brought Notice of Motion filed on November 15, 2022 before the subordinate court, the applicant cannot leapfrog the application to this court in the manner sought. This court can only consider the application if it were sitting on appeal of a decision made on the application by the subordinate court. Even the claim that the subordinate court lacks jurisdiction to determine the application is not a valid basis for filing a replica of the application before this court while the original application is pending before the subordinate court. It is the duty of every court to make its own finding on whether it has jurisdiction in any matter brought before it. That is what the subordinate court must be allowed to do with regard to Notice of Motion filed on November 15, 2022, as long as it remains pending before it.
13. In view of the foregoing discourse, the preliminary objection partly succeeds. In the result, Notice of Motion dated December 1, 2022 is struck out with costs to the first, second, fourth to sixth respondents.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF APRIL 2023.**

**D O OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**Ms Rutto for the applicant**

**Mr Ingutya for the first, second, fourth to sixth respondents**



**No appearance for the third respondent**

**Court Assistant: E Juma**

