



**Erkaterra Tea Kenya PLC v Chepkwony & 2 others (Environment and Land  
Case E21 of 2022) [2023] KEELC 19069 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19069 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT AND LAND CASE E21 OF 2022**

**MC OUNDO, J**

**JULY 27, 2023**

**BETWEEN**

**ERKATERRA TEA KENYA PLC ..... PLAINTIFF**

**AND**

**SIMON KIMUTAI CHEPKWONY ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a Plaint dated 17<sup>th</sup> May 2016 and amended on the 21<sup>st</sup> February 2023, the Plaintiff herein sought for judgment against the Defendants, jointly and severally, a declaration that it was the only lawful and registered proprietor of the Property known as LRNo. 4098/2 (IR 3939) and LR4431 (the “Suit Properties”) and therefore there be issued a permanent injunction restraining the 1<sup>st</sup> Defendant from entering, remaining upon and/or trespassing on the said suit properties.
2. In response, the 1<sup>st</sup> Defendant filed a Preliminary Objection dated the 23<sup>rd</sup> February 2023 contending that he was not a party to the suit and therefore had been erroneously served, that the Plaintiff lacked the locus standi to file suit, that the person who had sworn the verifying affidavit on behalf of the Plaintiff had no valid authorization to swear the same and finally that the suit lacked merit, was frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.
3. In response, the Plaintiff filed its Grounds of Opposition dated 10<sup>th</sup> March 2023 opposing the Preliminary Objection on the grounds that it had been filed by a firm not properly on record for the 1<sup>st</sup> Defendant as they had not filed any Notice of Appointment. That secondly, the issues raised in the Notice of Preliminary Objection were not pure points of law as they were contested facts which could not be determined without setting the matter down for full hearing. And finally, that the Preliminary



- Objection was an attempt by the 1<sup>st</sup> Defendant to subvert the course of justice and prevent the Court from determining the legal owner of the suit property.
4. There was no response from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  5. Parties were directed to file their written submissions to dispose of the Preliminary Objection in the first instance to which the 1<sup>st</sup> Defendant filed their submissions dated 14<sup>th</sup> April 2022 wherein he had submitted that the matter had been filed in court after having repossessed his land and thereafter asking the Plaintiff, who had trespassed thereon, to vacate.
  6. That his objection was based on the grounds that he was erroneously served as he was not known as Samuel Kimutai Chepkwony but as Simon Kimutai Chepkwony.
  7. That the Plaintiff lacked the locus standi to bring this suit against him because whereas it had confirmed in its pleadings that it was the registered proprietor of LRNo. 4098/2 (IR3939) and LRNo. 4431 and had also admitted that the 1<sup>st</sup> Defendant was the registered proprietor of LRNo. 4433/5 which parcels of land were separate and distinct, nowhere in the pleadings had the Plaintiff either laid claim to LR, No. 4433/5 or that the 1<sup>st</sup> Defendant had encroached into their property. There was therefore no cause of action arising.
  8. That in our judicial system, it was essential to demonstrate that the person approaching the court must have suffered some injury or his legal right had been violated which ensured that only bonafide parties came to court. That this was known in latin as “*locus standi*” which meant the right to appear or the right to bring an action before the court. That the court was no place for busy bodies.
  9. That a party instituting legal proceedings of any nature must show that they have a real interest in the matter being brought to court. In addition, when a party is a juristic person, (s)he must show authority to sue. Since the locus in the present suit was absent, the proceedings herein are invalid. Reliance was placed on the decision in *Ex parte Sidebotham* (1980) 14 Ch D 458.
  10. That James, L. J. had given a definition of person aggrieved’ as a man who had suffered a legal grievance, a man against whom a decision had been pronounced and wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something. Further reliance was placed on the decision in the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil case No 464 of 2000, amongst several other decisions to emphasize on the implications of the lack of Locus standi in law.
  11. The 1<sup>st</sup> Defendant then submitted that one Tumaini Kimone, the Plaintiff’s Legal Counsel lacked the authorization to swear the Verifying Affidavit on behalf of the Plaintiff as the same did not bear the seal of the Plaintiff which was contrary to the provisions of Order 4 Rule 1(4) of the *Civil Procedure Rules* and thus rendered the affidavit defective. Reliance was placed on the decision in the case of *Tapastya Bhavan Limited v Samuel Karanja Kariuki & 2 Others* [2015] eKLRELC Case no 828 of 2013, where the court had held that the absence of the Plaintiff’s seal, rendered the affidavit defective. That since the affidavit filed herein was defective, it ought to be struck out.
  12. That the suit also lacked merit and was solely intended to defeat justice and to cover up for the Plaintiff’s illegal entry and use of the 1<sup>st</sup> Defendant’s land which had denied him the right of use and enjoyment of his land under the law. That the suit ought to be struck out and/or dismissed in its entirety with costs as it was frivolous, vexatious and an abuse of court process.
  13. In response and in opposition to the Preliminary Objection, the Plaintiff’s submission was to the effect that it had filed a Plaint against the Defendants seeking inta alia a declaration that it was the only lawful and registered proprietor of the Property known as LRNo. 4098/2 (IR 3939) and LR4431 (the



“Suit Properties”) and therefore a permanent injunction restraining the 1<sup>st</sup> Defendant from entering, remaining upon and/or trespassing on the suit properties to issue.

14. That the 1<sup>st</sup> Defendant through the firm of Kenslaw Associates Advocates and without properly and regularly coming on record as it is required under Order 9 Rule 7 of the [Civil Procedure Rules](#), 2010, filed the Preliminary Objection. That secondly the issues raised in the Notice of Preliminary Objection were not purely points of law as they were contested facts which could not be determined without setting the matter down for full hearing. And finally, the Preliminary Objection was an attempt by the 1<sup>st</sup> Defendant to subvert the course of justice and prevent the Court from determining the legal owner of the suit property.
15. Whilst relying on the principles laid down in the decision in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, in dealing with preliminary objection, the Plaintiff framed their issues for determination as follows;
  - i. Whether the firm of M/S Kenslaw Associates Advocates are properly on record to raise a Preliminary Objection; and
  - ii. Whether the grounds set out in the Preliminary Objection are pure points of law.
16. In the first issue for determination, the Plaintiff submitted that the firm of M/S Kenslaw Associates Advocates were not properly on record for the 1<sup>st</sup> Defendant, having failed to file Notice of Appointment as required by the [Civil Procedure Rules](#). That the Court was governed by [Civil Procedure Rules](#) by virtue of Section 19(2) of [Environment and Land Court](#) (sic) No, 19 of 2011 and the [Civil Procedure Rules](#) under Order 9 Rule 1 and 7 which provisions of the law were clear that an Advocate seeking to act for a party to a suit must be duly appointed and must give a notice of their appointment to the suit. That the Courts had held that a Defendant ought to comply, failure of which would render all the pleadings and applications filed by it defective and the same be struck out. Reliance was placed on the decision in *Sunrise Properties Ltd v Fifty Investments Limited & Another* [2007] eKLR, where the High Court upheld a Preliminary Objection that was raised against pleadings lodged by a new Advocate who had not filed a Notice of Appointment of Advocates. The effect of the foregoing was that the Preliminary Objection filed by M/S Kenslaw Associates Advocates before properly coming on record, was invalid, irregular and must be expunged from the records since the firm of M/S Kenslaw Associates Advocates were strangers to the proceedings.
17. The second issue for determination as to whether the Notice of Preliminary Objection was merited, the Plaintiff submitted that the grounds raised by the 1<sup>st</sup> Defendant in the Preliminary Objection were not pure points of law but contested facts which required evaluation of evidence by the Court so as to reach a finding. That the issue regarding whether or not the person who had sworn the Verifying Affidavit on behalf of the Plaintiff had authorization, was factual and not a pure point of law. That the Plaintiff had filed an authority to swear an affidavit which had been signed by the Directors of the Plaintiff on 5<sup>th</sup> December 2022 authorizing Tumaini Kimone, the Plaintiff's legal Counsel, to swear affidavit and sign documents on behalf of the Plaintiff, which was thus sufficient proof as to his authority to swear and sign the verifying affidavit.
18. That in any event, the amendment brought about by Section 30 of the *Business Laws Amendment Act* No, 1 of 2020 was to the effect that companies were no longer required to affix their seals on documents executed by it under Section 37 of the [Companies Act](#), 2015. That without prejudice, the absence of a company seal in a Verifying Affidavit did not render the suit invalid as documents bearing the Company seal could be filed at any time within the suit. The Plaintiff relied on the decision by the Court of Appeal



in *Spire Bank Limited v Land Registrar & 2 others* [2019] eKLR to submit that the court should find that this objection lacked merit.

19. On the issue of *locus standi*, the Plaintiff submitted that the claim by the 1<sup>st</sup> Defendant that the Plaintiff lacked the locus standi was misplaced, contested and without basis. That the Plaintiff's title LR4431 was in the name of Brook Bond Liebeg Kenya Ltd which changed its name to Brook Bond Kenya Ltd, which subsequently changed its name to Unilever Tea Kenya Ltd and was now known as Ekaterra Tea Kenya Ltd as demonstrated by the Plaintiff's List of Documents filed. That the alleged Certificate of Title held by the 1<sup>st</sup> Defendant in respect of LRNo. 4433/5 measuring approximately 1.740 hectares (the "1<sup>st</sup> Defendant's Title") fell within the outspan reservation sitting within these suit properties. That the outspan reservation sat across river Jamji on the suit properties and was created for the purposes of providing a ground where horses or oxen that used to pull wagons could be unyoked or unharnessed by their drivers in order to rest and water.
20. That the outspan reservation where the 1<sup>st</sup> Defendant's title is located was created within the Plaintiff's suit properties on a temporary basis pursuant to the provisions of Sections 14 and 29 of the Crown Lands Ordinance 1902 which was later replaced by Section 85 of the *Government Lands Act* that is currently governed by Section 15 and 16 of the *Land Act*, 2012. That the 1<sup>st</sup> Defendant's title was therefore a nullity ab initio and ought not to have been given.
21. That Plaintiff's case was that it was apprehensive that by virtue of the unlawful and invalid title, the 1<sup>st</sup> Defendant would descend on the suit properties and interfere with the Plaintiff's activities thereon thereby altering the character and use of the suit properties and/or permanently disposing the Plaintiff of the same. That it was in the light of the above, that the Plaintiff had the requisite *locus standi* to institute the suit.
22. Lastly, the Plaintiff submitted that the court had to address itself on the issue of whether the 1<sup>st</sup> Defendant's property was distinct and separate from that of the Plaintiff, whether the right of the Plaintiff to the property had been violated or threatened, whether the facts as pleaded by the Plaintiff had occurred in the manner pleaded, and all this could only be determined by the Court at a full hearing on merit and not by a Preliminary Objection. Reliance was placed on the decision in *Johnson Lesanyane Echwa & 11 others v County Government of Turkana & another* [2020] eKLR.
23. That the upshot of the foregoing was that the Preliminary Objection was irregular, invalid, defective, lacked merit and should be dismissed with cost.

#### **Determination.**

24. I have carefully considered the 1<sup>st</sup> Defendant's Notice of Preliminary Objection, the Plaintiff's response herein, the submissions, the law applicable and the authorities herein cited.
25. 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.”



26. 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. v 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.”

27. In the case of *Avtar Singh Bhamra & Another v 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.”

28. In the present scenario, the 1<sup>st</sup> Defendant herein has raised a Preliminary Objection to the effect that he was not a party to the suit and therefore had been erroneously served because he was not known as Samuel Kimutai Chepkwony but rather as Simon Kimutai Chepkwony.

29. Secondly that the Plaintiff herein lacked the locus standi to bring this suit because whereas it had confirmed in its pleadings that they were registered proprietors of LRNo. 4098/2 (IR 3939) and LRNo. 4431 and had also admitted that the 1<sup>st</sup> Defendant was the registered proprietor of LRNo. 4433/5 which parcels were separate and distinct, nowhere in the pleadings had the Plaintiff laid claim to LR, No. 4433/5 or that the 1<sup>st</sup> Defendant had encroached into their property. There was therefore no cause of action established as arising.

30. Thirdly that one Tumaini Kimone, the Plaintiff's Legal Counsel lacked the authorization to swear the verifying affidavit on behalf of the Plaintiff as the same did not bear the seal of the Plaintiff as is stipulated by the provisions of Order 4 Rule 1(4) of the *Civil Procedure Rules*. That the absence of the Plaintiff's seal, rendered the affidavit defective and therefore it ought to be struck out. That the suit lacked merit, was frivolous, vexatious and an abuse of the court process and ought to be dismissed with costs.

31. In response and in opposition to the Preliminary Objection, the Plaintiff had submitted that the Preliminary Objection had been filed by firm of M/S Kenslaw Associates Advocates who were not properly on record for the 1<sup>st</sup> Defendant, them not having filed a Notice of Appointment as required by virtue of Section 19(2) of *Environment and Land Court Act* No, 19 of 2011 and Order 9 rule 1 and 7 of the *Civil Procedure Rules*. That the Preliminary Objection filed by M/S Kenslaw Associates Advocates before properly coming on record, was invalid, irregular and must be expunged from the records.

32. On the second issue in relation to Tumaini Kimone who was the Plaintiff's Legal Counsel and who allegedly lacked the authorization to swear the verifying affidavit on behalf of the Plaintiff, the Plaintiff had submitted that this was a factual issue and not pure points of law. That it was a contested fact which could not be determined without setting the matter for full hearing, the Plaintiff having filed an authority to swear an affidavit which had been signed by the Directors of the Plaintiff on 5<sup>th</sup> December 2022.

33. On the last issue as to whether or not the Plaintiff lacked the locus standi to file suit against the Defendants, it had been the Plaintiff's submission that this was not a pure point of law. That the Plaintiff was the registered proprietor of title LR4431 which was in the name of Brook Bond Liebeg Kenya Ltd which had changed its name to Brook Bond Kenya Ltd, subsequently Unilever Tea Kenya Ltd and currently Ekaterra Tea Kenya Ltd. That the alleged Certificate of Title held by the 1<sup>st</sup>



Defendant in respect of LRNo. 4433/5 measuring approximately 1.740 hectares (the “1<sup>st</sup> Defendant’s Title”) fell within the outspan reservation sitting within the Plaintiff’s suit properties to which they had been apprehensive that by virtue of the 1<sup>st</sup> Defendant’s unlawful and invalid title, that he would interfere with the Plaintiff’s activities thereby altering the character and use of the suit properties thereby permanently dispossessing the Plaintiff off the same. That it had been for these reasons that the Plaintiff had the requisite locus standi to institute the suit. That the Notice of Preliminary Objection was therefore not based on pure points of law because there were contested facts which could not be determined without setting the matter down for full hearing. That the same lacked merit and should be dismissed.

34. The issues that speak out for determination herein are as follows:
- i. Whether the firm of M/S Kenslaw Associates Advocates are properly on record for the 1<sup>st</sup> Defendant.
  - ii. Whether the Preliminary Objection should be upheld.
35. The Plaintiff herein has submitted that the 1<sup>st</sup> Defendant’s pleadings ought to be struck for reasons that the of M/S Kenslaw Associates Advocates were a stranger to the pleadings having not properly come on record by filing a Notice of Appointment which was contrary to the provisions of Order 9 Rule 1 and 7 of the [Civil Procedure Rules](#).
36. Order 9 Rule 1 of the Civil Procedure Rules provides that;
- “Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an Advocate duly appointed to act on his behalf:
- Provided that—
- (a) any such appearance shall, if the court so directs, be made by the party in person; and.....”
37. From the reading of Order 9 Rule 1 of the [Civil Procedure Rules](#), and my understanding of the said provision, there is nothing that requires a formal Notice of Appointment of an Advocate, the 1<sup>st</sup> Defendant having not been a party to the proceedings and having not previously acted on his own or through another Counsel. Order 9 Rule 1 of [Civil Procedure Rules](#) does not require the filing of Notice of Appointment of an Advocate as filing of the said notice only applies where a party appoints an Advocate after having previously acted in person or having previously sued or defended in person as clearly provided for under Order 9 Rule 7 of the [Civil Procedure Rules](#) which stipulate that:
- “Where a party, after having sued or defended in person, appoints an Advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of Advocate shall apply to a notice of appointment of an Advocate with the necessary modifications.”
38. In the instant case, there had been no Advocate on record previously engaged for the Applicant and the Applicant is not proposing to act in person. There would therefore be no logic in the Applicant’s Advocate giving notice to his client that he proposes to come on record for him and then seeking leave of Court.
39. The Plaintiff placed their reliance on the decision in [Sunrise Properties Ltd](#) (*supra*), where the High Court had upheld a Preliminary Objection that had been raised against pleadings that had been lodged by a new Advocate who had not filed a Notice of Appointment of Advocates. The decision is



distinguishable herein as the provision of the law that had been applied in the said case was Order III Rule 1 of *Civil Procedure Rules* (repealed) and Order 8 of Civil Procedure Rules (repealed) which is in similar terms with Order 9 Rule 1 of *Civil Procedure Rule* 2010.

40. In the case of *Kazungu Ngari Yaa Mistry v Narani Mulji & Co. Ltd* [2014] eKLR the claimant had raised a Preliminary Objection on the grounds that a firm of Advocates had come on record post judgment by filing an application for stay of execution without filing a Notice of Appointment. The court had held that as the Advocates were coming on record for the first time where no appearance or defence had been filed, there had been no requirement to file a Notice for Appointment. In the present case, I find that since there had been no Advocate on record previously engaged by the 1<sup>st</sup> Defendant, who was not even proposing to act in person, there would therefore be no logic in the 1<sup>st</sup> Defendant's Advocate giving notice to his client that he proposed to come on record for him.
41. On whether the Preliminary Objection raised by the 1<sup>st</sup> Defendant is sustainable, I find that as has been rightly pointed out by the Plaintiff herein and based on the principles set out in *Mukisa Biscuit Manufacturing Co. Ltd* case (*supra*) that govern the courts in dealing with a Preliminary Objection, to wit that Preliminary Objection must consist of points of law and not facts that need to be ascertained, that the 1<sup>st</sup> Defendant has failed to conform to these principles.
42. The 1<sup>st</sup> Defendant had submitted on a Preliminary Objection, that the Plaintiff's Legal Counsel had no authorization to swear the affidavit on behalf of the Plaintiff but the record is clear that vide the Authority to Swear sworn on 5<sup>th</sup> December 2022 and filed on the 8<sup>th</sup> December 2022, the Plaintiff's Directors had given authority to one Tumaini Kimone, their legal counsel, to swear the affidavit and sign documents on its behalf.
43. In a persuasive case of *The Presbyterian Foundation & Another v East Africa Partnership Limited & Another* [2012] eKLR the court had held that
- “The Civil Procedure Rules do not define what an authorized officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavits be sworn by either the Directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word "authorize" which is defined by Oxford Dictionary as "sanction"; "give authority"; "commission". That being the position, whether or not the 2<sup>nd</sup> Plaintiff was given authority to swear the verifying affidavit is a matter of evidence and cannot certainly be the subject of a Preliminary Objection unless the said fact is admitted.”
44. I agree with the court's holding. Whether or not Tumaini Kimone, was authorized to swear the Affidavit on behalf of the Plaintiff, I find is a matter of evidence, which requires to be canvassed before the court and does not therefore fall within the purview of Preliminary Objection as herein raised. (see the case of *Spire Bank Limited supra*)
45. The 1<sup>st</sup> Defendant had also sought on Preliminary Objection that the suit be dismissed because the Plaintiff lacked the locus standi since it was not the proprietor of the suit land and therefore there had been no cause of action established against the 1<sup>st</sup> Defendant. The Plaintiff has explained itself at length as to why it had the locus standi. A snippet of its argument was that it was the registered proprietor of title LR4431 that it was originally known by the name of Brook Bond Liebeg Kenya Ltd, it then changed its name to Brook Bond Kenya Ltd, subsequently to Unilever Tea Kenya Ltd and was currently known as Ekaterra Tea Kenya Ltd. That the alleged Certificate of Title held by the 1<sup>st</sup> Defendant in respect of LRNo. 4433/5 measuring approximately 1.740 hectares fell within the outspan reservation sitting within the Plaintiff's suit properties.



46. Again I find that this issue would best be resolved through a full hearing where the evidence had to be adduced to prove or disprove the facts therein raised. This argument is again displaced by the principles laid down in the *Mukisa Biscuits* case (Supra) and cannot therefore form a basis to raise a Preliminary Objection.
47. On whether or not the Plaintiff had sued the wrong party as claimed by the 1<sup>st</sup> Defendant for reason that his name was Simon and not Samuel, I find that the title No. IR 251993 of Ref 4433/5 measuring 1.740 hectares was issued prima facie to one Simon Kimutai Chepkwony, the amended Plaintiff/pleadings as drawn were in reference to Simon Kimutai Chepkwony and were to be served upon Simon Kimutai Chepkwony of Box 728 Nairobi. If at all the 1<sup>st</sup> Defendant is not suited then this evidence shall have to be adduced at the hearing. This line of argument as a Preliminary Objection, I find is a non-starter and is disallowed.
48. The upshot is that the 1<sup>st</sup> Defendant's Preliminary Objection dated 23<sup>rd</sup> February 2023 is without merit and is accordingly dismissed with costs to the Plaintiff/Applicant.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 27<sup>TH</sup> DAY OF JULY 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

