



REPUBLIC OF KENYA



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**Commission for Human Rights & Justice & another v Zia t/a Ibadu Enterprises & 11 others
(Environment & Land Petition 16 of 2021) [2023] KEELC 18949 (KLR) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18949 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION 16 OF 2021
SM KIBUNJA, J
JULY 25, 2023**

BETWEEN

COMMISSION FOR HUMAN RIGHTS & JUSTICE 1ST PETITIONER

COAST LEGAL AID & RESOURCE FOUNDATION 2ND PETITIONER

AND

IBRAHIM MWANJE ZIA T/A IBADU ENTERPRISES 1ST RESPONDENT

JOEL JOHN RIA 2ND RESPONDENT

DISCOUNT GROUP OF COMPANIES LTD 3RD RESPONDENT

SAJJAD KASHMIRI T/A KASHMIRI INVESTMENTS 4TH RESPONDENT

SHIMAKA NECHEZA LEONARD 5TH RESPONDENT

JOHN GICHUKI WANJOHI 6TH RESPONDENT

MARY KAI 7TH RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 8TH RESPONDENT

**COUNTY LAND MANAGEMENT COORDINATOR MOMBASA 9TH
RESPONDENT**

THE CHIEF LAND REGISTRAR KENYA 10TH RESPONDENT

NATIONAL LAND COMMISSION 11TH RESPONDENT

THE HONORABLE ATTORNEY GENERAL 12TH RESPONDENT



RULING

1. The 5th Respondent filed a notice of preliminary objection dated March 22, 2021, against the petitioners notice of motion dated February 11, 2020, raising the following grounds;
 - a. That the application is defective, malicious, misconceived, lacking merit, and an abuse of the court process.
 - b. That the Court lacked the administrative and pecuniary jurisdiction to entertain the application, as it contravenes section 101 of the *Land Registration Act* Cap 300. Therefore, the application should be struck out with costs, considering that the matter has been filed as a constitutional and judicial review.
 - c. The Petitioners application is incompetent and premature since the petitioners have not sought for leave before initiating the judicial proceedings against the Respondents.
 - d. Granting the orders sought by the Petitioners would prejudice the 5th Respondent, who is not a government official but an Advocate acting on behalf of the 1st Respondent. This is in accordance with section 34 of the *Advocate Act* Cap 16 Laws of Kenya.
 - e. The Petitioners application is baseless, without merit and an abuse of court process because they have failed to provide any supporting documents to substantiate their argument that the suit land is public land.
 - f. The Petitioners application seeks orders that have already been issued by another court in ECM/ELC No. E 5 of 2021, which have preserved the subject property.
 - g. That there is a decree of this Honorable Court in ELC No. 302 of 2017, which addressed ownership issues and has not been challenged or appealed against.
 - h. This Honorable Court cannot review or reconsider its own decisions, as it is *functus officio* over this matter since issuing the decree on 2nd October 2017.
 - i. The Petition/suit filed by the Petitioners contravene Rule 10, sub-rule 2 (e) of the *Constitution of Kenya* (Protection of rights and fundamental freedoms practice and procedure Rules) 2013. Additionally, it fails to meet the requirements set out in *Ananita Karimi Njeru v The Republic* [1976-1980] KLR 1272 and upheld in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] Eklr. Consequently, it should be struck out and/or dismissed.
 - j. The Petitioner's Notice of Motion dated 11th February 2020, has failed to provide reasonable cause against the 2nd Respondent's Titles No. Mombasa/Mwembelegeza/1473 and the same violates the principle of Constitutional avoidance, as established by the Supreme Court of Kenya in *Communication Commission of Kenya v Royal Media Services LTD & 5 others* [2014] eKLR, and should be struck out or dismissed.
 - k. The application is an abuse of the court process and a waste of the court's time.
5. The petitioners opposed the preliminary objection through the replying affidavit of Julius Ogotoh, sworn on the 22nd November 2022, in which he inter alia deposed that the application was brought in good faith and in the interest of justice, contrary to the 5th Respondent's claims. That the suit was transferred by the High Court to the Environment and Land Court in accordance with the law, and as such no leave was required to institute the suit against the Respondents. That 5th Respondent was



sued properly as an Advocate as he was involved in furtherance of illegal activities, which is against the code of standards of professional practice and ethical conduct. That although the law provides extensive protection for titles, the Court can remove such protection and impeach the title if it is obtained through fraud or misrepresentation. That for the Court to make a just and wise decision, all facts must be presented. That the preliminary objection is not factual as the Applicant refers to court cases whose documents are not currently before the Court. That the Court in ELC 302 of 2017 did adopt the consent arrived at by the parties as the Court order given without prior knowledge of any ill motives of the parties. It was further clarified that the Honorable Court neither adjudicated on the substance of the case nor pronounced a judgment on its own merits, as the 5th respondent suggests. The matter in dispute pertains to the procedure by which ownership of the land was acquired and the classification of the land as either public or private. That the suit land was initially owned by the Settlement Fund Trustees, a body of trustees formed under section 167 of the *Agriculture Act* Cap 318, that had a mandate to settle settlers on either un-alienated Government land or land purchased from private owners. That the matter is not *res judicata*, and the petition meets the threshold set out by the Honorable Court in *Ananita Karimi Njeru v The Republic* [*supra*]. That the illegal and unprocedural dealings concerning the suit land had violated the rights of members of the public who are entitled to use and benefit from the facilities and amenities for which the land was reserved, both present and future generations. The Respondents have violated Articles 61 and 62 of the *Constitution*, contravened laws relating to ownership, disposition, and dealing with land and are guilty of fraud and should not be allowed to benefit from it. The orders sought in the suit are fair, just, and there is a prima facie case against the Respondents jointly and severally. Finally, the preliminary objection was factual, inaccurate and failed to meet the criteria set out in *Mukisa Biscuit Manufacturing Co. Ltd v West end Distributor LTD* [1969] 696.

6. That after hearing counsel for the parties on the 21st February 2023, the court directed that the preliminary objection be heard first through submissions to be filed and exchanged within the timelines given. During the subsequent mention of the 19th April 2023, the only submissions on the file were those filed on the 12th April 2023 by Ms. Shabaan Associates LLP, learned counsel for the petitioners dated the 17th February 2023. The Counsel set out the following four issues for determination:
 - a. Whether the suit was transferred by the Honorable Court.
 - b. Whether the suit is *res judicata*.
 - c. Whether the suit land is public land.
 - d. Who should pay the costs.

On the first issue, it was argued that the suit was initially brought before the High Court Constitutional and Judicial Review Division on 18th March 2021, with the 5th Respondent present. The Court then ordered the suit to be transferred to the Environment and Land Court. The 5th Respondent neither appealed nor sought to review that order. That the transfer was deemed necessary in the interests of justice and to place the case in the appropriate court with jurisdiction. The counsel referred to the case of *Gaikai Kimani Kiarie v Peter Kimani Kiramba* (2020) eKLR, and it was emphasized that the High Court has the power to transfer suits under Section 18 of the *Civil Procedure Act*, as highlighted in *Oceanic Towers Limited V Hussein Builders Limited* [2021] eKLR. On the second issue, the counsel argued that the ELC E5 of 2021, is a subordinate court suit, and involved parties litigating under different titles, and the Petitioners are not a party to that suit, which is still ongoing. In ELC 302 of 2017, the 2nd Respondent was the Plaintiff, and the 1st Respondent was the Defendant. The latter case was concluded through the adoption of consent, and the Honorable Court neither adjudicated on the substance of the case nor pronounced a judgment on its own merits. Reliance was placed on the cases



of *Joyce Eseri Misiko v Martin Barasa & 12 Others* [2018] eKLR, and *Telkom Kenya Limited v John Ochand* [2014] eKLR. On whether the suit property is public land, it was submitted that Annexure JO2 indicates that the suit land was initially owned by settlement fund trustees. Any land owned by the settlement fund trustees is considered public land, as stated in the case of *Joel Kazungu Yaa Mangi v Director of Land Adjudication and Settlement & Another; David Green & Another (Interested Parties)* [2020] eKLR. On the question of costs, Counsel argued that the petitioners should be awarded costs as the present application has been brought by the 5th Respondent and they have invested their time and resources to participate. It is emphasized that the present application was brought after the Honorable Court had already issued orders for the transfer of the suit to the Environment and Land Court on 18th March 2021, in the presence of the 5th Respondent.

7. The following are in the issues for determinations in the court's view;
 - a. Whether the preliminary objections raised by the 5th Respondent are valid?
 - b. Which party caters for costs of the application?
8. The court has considered the grounds on the preliminary objection raised by the 5th respondent, the response by the petitioners, submissions by counsel, superior courts decisions cited therein, and come to the following determinations;
 - a. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, the Court of Appeal held that preliminary objection consists of points of law pleaded or implied from the pleadings, which, if argued as a preliminary point, may dispose of the suit. Examples include objections to jurisdiction, pleas of limitation, or submissions regarding contractual obligations to refer disputes to arbitration. Sir Charles Newbold, P, further explained that a preliminary objection raises a pure point of law that assumes the correctness of all facts pleaded by the opposing side. It cannot be raised if any fact needs to be ascertained or if judicial discretion is required. Improperly raising preliminary objections leads to increased costs and confusion, and such practice should cease. The first issue raised pertains to whether the Court has pecuniary jurisdiction over the matter. This falls within the definition of a preliminary objection as described in the aforementioned case. The 5th Respondent argues that the Court lacks administrative and pecuniary jurisdiction to entertain the matter, citing a violation of section 101 of the *Land Registration Act* Cap 300. It is well-established that jurisdiction is a fundamental requirement for a Court to have when dealing with any matter before it. This was emphasized in the leading case of *Owners of the Motor Vessel "Lillian S"* where it was held that jurisdiction is everything for a Court. Without jurisdiction, a Court lacks the power to proceed. The Petitioners however argue that the matter was initially filed in the High Court, but was transferred to the Environmental and Land Court by Justice Ogola on 18th March 2021 in the presence of the 5th Respondent, who did not appeal or apply for review of the order. Upon reviewing the court proceedings on 18th March 2021, it is confirmed that the matter was indeed before the High Court, and Justice Ogola transferred it to the present Court, without any party raising any objection.
 - b. Further to this the jurisdiction of the Environmental and Land Court (ELC) is provided by Article 162(2)(b) and (3) of the *Constitution* of Kenya 2010, and Section 13(2) of the *ELC Act* No. 19 of 2011. Article 162(2)(b) of the *Constitution* grants the ELC Court the mandate to hear and determine disputes relating to the use, occupation, and title to, land. The matter herein involves change of ownership and nature of suit parcel title number Mombasa Mwembelegeza/1473/R (now subdivided and registered as Mombasa Mwembelegeza 1691 and 1692) and hence falls within the jurisdiction of the Environmental and land Court.



- c. On the issue of competence and prematurity raised by the 5th Respondent, alleging that the petitioners should have sought leave before initiating judicial proceedings, it is noted that the 5th Respondent failed to specify the contravened law and the persons against whom leave should be sought. That therefore is not a pure point of law as contemplated in the Mukisa Biscuits case[*supra*].
- d. The 5th Respondent has also argued that the relief sought by the Petitioners has already been addressed in ECM/ELC No. E.5 of 2021, which preserved the subject property, and there is a decree issued by this Honorable Court in No. 302 of 2017 regarding ownership issues that have not been appealed or challenged. The Petitioners however contend that in ELC 5 of 2021, the parties in the subordinate court are under different titles, and the Petitioners were not a party to that suit. That the 3rd Respondent in the present petition was the Plaintiff in the subordinate court suit, while the 2nd Respondent was the 1st Defendant. In ELC 302 of 2017, the 2nd Respondent was the Plaintiff, and the 1st Respondent was the Defendant. The latter case was concluded through adoption of consent, and the Honorable Court did not adjudicate the substance of the case or pronounce judgment on its merits, while the former case is still ongoing. An objection based on *res judicata* is a point of law. The doctrine of *res judicata* is outlined in Section 7 of the *Civil Procedure Act*, which bars a Court from trying any suit or issue that has already been finally determined by a competent Court in a previous suit involving the same parties or parties litigating under the same title. In this case, the parties needed to avail evidence in the form of documents relating to those other mentioned suits for the court to peruse and determine whether this instant suit and application are *res judicata*. The production of evidence cannot be done in this instance as the preliminary objections were raised through a notice of preliminary objection as opposed to an application supported by affidavit. It is well-established that the party alleging a fact must provide evidence but this was not done in the present matter and the Court cannot make a ruling without evidence being placed properly before it.
- e. The 5th Respondent further argued that the Court is *functus officio* due to a decree issued on 2nd October 2017, but without availing a copy of the said decree. The 5th Respondent also contends that the Petitioners have not attached any documents supporting their argument that the suit land is public land and claims that it is private land. He also alleges a violation of section 25 and 26 of the *Land Registration Act* Cap 300 and Article 64 of the *Constitution* of Kenya 2010. However, these are matters that can be determined only after hearing the matter and examining the evidence presented.
- f. The 5th Respondent also alleges that the Petition contravenes the provisions of Rule 10 sub-rule 2 of the *Constitution* of Kenya (Protection of rights and fundamental freedoms practice and procedure rules) 2013 and fails to meet the requirements set in *Ananita Karimi Njeru v the Republic* [*supra*]. The petitioners have disputed the claim indicating that it meets the specificity test established in *Ananita Karimi Njeru, [supra]* as it specifies Articles and the manner of the alleged violations of the *Constitution*. The court agrees with the petitioners on that position.
- g. The 5th Respondent contends that no reasonable cause has being disclosed against the 2nd Respondent Titles No Mombasa /Mwembeleza/1473 and the same violates the principle of Constitutional avoidance. The petitioner has however explained that the 2nd Respondent has been involved in concealing deeds of the 1st, 5th and 6th Respondents in subdividing and concealing identity of suit parcel and seeks that they be restrained permanently from acting by



themselves of their servants from dealing with the suit parcel. This by itself consists of a cause of action against the 2nd Respondent.

- h. In conclusion, the 5th Respondent's grounds and arguments regarding jurisdiction, competence, prematurity, *res judicata*, and the nature of the suit land as public or private are all found unmerited as grounds raised in a preliminary objection.
- i. The discretion of the court in awarding costs is firmly rooted in legal principles codified under Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, and case law including the following:
 - i. *R v. Kensington Income Tax Commissioners, ex parte Princess Edmond de Polignac* [1917] 1 KB 486: This case established the principle that costs are generally in the discretion of the court and are not automatically awarded to the successful party.
 - ii. *Kiam Motors (Kenya) Ltd v. Kenya Revenue Authority* [2007] eKLR: The court held that the award of costs is discretionary and must be exercised judiciously. The court takes into account various factors, such as the conduct of the parties, the complexity of the case, and the importance of the issues involved.
 - iii. *Tritton Valve Ltd v. Nitron Group BV* [2013] EWHC 574 (TCC): This case emphasized that costs are not a matter of right, but rather a matter within the discretion of the court. The court considers the overall justice of the case and may depart from the general rule that costs follow the event if it is appropriate to do so.
 - iv. *Muthaura v Attorney General & 6 Others* [2013] eKLR: The court reiterated that the award of costs is at the court's discretion, and the court has the power to make appropriate orders on costs based on the circumstances of each case.

These cases demonstrate that the court has wide discretion in awarding costs and takes into account various factors when exercising that discretion. The court considers the particular circumstances of each case to ensure a fair and just outcome in relation to costs. As the 5th respondent is the one who caused the proceedings on the preliminary objections and has failed, then he should pay the petitioners their costs as the successful parties.

9. The Court finds that the notice of 5th respondent's preliminary objection dated 22nd March 2021 is unmerited and is hereby rejected with costs to the petitioners.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 25th DAY OF JULY 2023.

S. M. KIBUNJA, J.

In the Presence of;

Petitioners : M/s Meme for 1st Petitioner.

Respondents : Nil

Wilson – Court Assistant.

S. M. KIBUNJA, J

ELC MOMBASA.

