



Itabari v Kenya Electricity Transmission Company Limited (Environment & Land Case 77 of 2022) [2023] KEELC 19945 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 77 OF 2022
CA OCHIENG, J
SEPTEMBER 20, 2023**

BETWEEN

IBRAHIM KARUTI ITABARI PLAINTIFF

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . DEFENDANT

RULING

1. What is before Court for determination is the Defendant's Notice of Preliminary Objection dated the 25th November, 2022 seeking to have the suit struck out on the following grounds:-

1. That the Plaintiff lacks locus standi to institute this suit pursuant to Section 26(1) of the [Land Registration Act](#) No. 3 of 2012.

The Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

2. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether this suit should be struck off for contravening the provisions of Section 26(1) of the [Land Registration Act](#).

The Defendant in its submissions contends that the suit land is registered in the name of Samuel Kimondo Theuri and not the Plaintiff. It explains that the Plaintiff at paragraph 4 of the Plaintiff confirms having bought the land from Samuel Kimondo Theuri. It insists that the Agreement of Sale does not confer an interest in land but simply an intention to acquire land. Further, that the Plaintiff hence does not have locus standi to institute this suit. To support its averments, it relied on the following decisions: [Alfred Njau & Others Vs City Council of Nairobi](#) (1982) KAR 229; [Julian Adoyo Ongunga Vs Francis Kiberenge Abano](#) Migori Civil Appeal No. 119 of 2015; Civil Appeal No. 142 of



1999, *Kenya Commercial Finance Company Limited Vs Afraba Education Society* (2001) 1 EA 86 and Nakuru Civil Suit No. 260 of 2004, [*The Attorney General Vs Kenya Commercial Bank Ltd & 3 Others*](#).

3. The Plaintiff in his submissions insists that the instant Preliminary Objection is incompetent as it contravenes the trite legal principle that it must only be raised on a pure point of law with a result that if argued, it will dispose of the suit. Further, that the said Notice of Preliminary Objection does not raise pure points of law and the grounds raised therein can only be determined after ascertainment of the sale agreement made between Samuel Kimondo Theuri and himself. He argues that Section 26(1) of the [*Land Registration Act*](#) does not bar him from instituting a suit to protect his purchaser's interest from the trespassers. Further, the Sale Agreement dated the 6th July, 2021 and his occupation and use of the suit land gives him sufficient interest over the said land. He reiterates that he is entitled to claim occupation of the suit land pending registration as absolute proprietor and the issue of *locus standi* does not arise. To support his averments, he relied on the following decisions: [*Roman Mutuku Kisini & 2 Others Vs Mary Mwikali Muasya & 3 others*](#) (2021) eKLR; [*Lilian Mosonik & Another Vs Management Committee of AGC Riverside Church*](#) (2022) eKLR; [*Samuel Mwangi Vs Jeremiah M'Itobu*](#) (2012) eKLR.

The Defendant seeks to have the Plaintiff's suit against it struck out on the basis that the Plaintiff does not have locus standi since he does not have a Certificate of Title in respect to the suit land. The Plaintiff has opposed the instant Notice of Preliminary Objection and insists that he has proprietary interest over the suit land since he is in possession thereof and had a Sale Agreement with the owner to that effect.

4. The Plaintiff filed this suit vide Plaint dated the October 26, 2022 where he sought for the following orders:
 - i. A declaration that the Plaintiff is the entitled legal owner of all the Land known as Konza North/Konza North Block 2 (Malili)/3 (formerly Agricultural Plot No. 1923 at Malili Ranch Ltd).
 - ii. A declaration that the Defendant has trespassed onto the Plaintiff's parcel of land and caused damages and loss of property.
 - iii. An order of permanent injunction restraining the Defendant, his agents and any other person acting under him from trespassing onto the Plaintiff's land.
 - iv. An order directing the Defendant to remove all of the transmission towers/poles with the electric cables from the land known as Konza North/Konza North Block 2 (Malili)/3 (formerly Agricultural Plot No. 1923 at Malili Ranch Ltd).
 - v. General Damages for trespass and mesne profits.
 - vi. And in the alternative and without prejudice to the above prayers, the Plaintiff seeks Compensatory damages.
 - vii. Costs of this suit.
 - viii. Interests on iii, iv and v.
5. The Defendant though duly served failed to file a Statement of Defence to controvert the Plaintiff's averments but instead filed the instant Notice of Preliminary Objection.



In the case of *Mukbisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

6. While 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.” Emphasis Mine

I note the Plaintiff has raised the issue of trespass on the suit land which fact the Defendant has not controverted. It is trite that where a Defendant fails to file a Defence expressly rebutting the Plaintiff’s averments, the claim remains unopposed. However, in this instance, while associating myself with the decisions I have cited, I opine that the issues raised in the Plaintiff including trespass can only be ascertained during a full hearing. Further, since the Plaintiff is in occupation of the suit land and has demonstrated how he acquired it, insofar as he is yet to acquire a Certificate of Title, this does not negate his proprietary interest over it. I also note the Plaintiff at paragraph 4 of the Plaintiff confirms having bought the land from Samuel Kimondo Theuri and there is no indication that this Sale has been challenged in any forum.

7. In the case of *Samuel Mwangi V Jeremiah M’itobu* [2012] eKLR, it was held that:-

There are, therefore, concurrent findings of facts by the two courts below that the appellant was in lawful occupation of the suit land. These facts are also accepted by the respondent. However, his argument simply is that mere occupation of land does not entitle the appellant to evict another person. That “other” person in this case is neither the owner of the suit land, nor anyone claiming the right to occupation. He is, in fact, the respondent, a trespasser for all intents and purposes. The learned Judge of the High Court erred in his conclusion that only an “owner” of land had the right to sue in trespass. That is clearly not so. As Winfield and Jolowicz state in their book “Tort” (12th Edition @ p. 361):

“Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who himself cannot show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person’s right to possess (the “jus tertii”) unless he can prove that he acted with that person’s authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”

8. See also the case of *Lilian Mosonik & Another Vs Management Committee of AGC Riverside Church* (2022) eKLR.

9. From the foregoing while associating myself with the decisions cited, I will decline to find that the Plaintiff does not have locus standi to institute this suit. In my view, the Defendant should have filed a Defence first to controvert the Plaintiff’s allegations before lodging the Notice of Preliminary Objection.



10. In the circumstance, I find the Notice of Preliminary Objection dated the November 25, 2022 unmerited and will disallow it.

I direct the Defendant to file and serve its Statement of Defence within twenty one (21) days from the date hereof.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2023

CHRISTINE OCHIENG

JUDGE

