



Officials of Mission in Action Nakuru Baby Ophanage v Rigiri & 3 others (Environment & Land Case E34 of 2023) [2023] KEELC 21021 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21021 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E34 OF 2023
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

**OFFICIALS OF MISSION IN ACTION NAKURU BABY
OPHANAGE PLAINTIFF**

AND

**DAMARIS RIGIRI 1ST RESPONDENT
CYRUS KIVUTI 2ND RESPONDENT
LAND REGISTRAR, NAIROBI COUNTY 3RD RESPONDENT
KENYA REVENUE AUTHORITY 4TH RESPONDENT**

RULING

1. This is a ruling in respect of the application dated 27/4/2023 filed by the plaintiff under Sections 1A, 1B and 3A the *Civil Procedure Act*, Article 40 of *the Constitution* of Kenya, 2010, Section 4 (2) of the *Land Act*, 2012, Order 40 of the *Civil Procedure Rules*, 2010. It seeks orders that in the interim and pending the hearing and determination of the suit, the Court be pleased to issue a temporary order of injunction restraining the Defendants/Respondents or their agents from engaging in any dealing/ act interfering with the Plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession and enjoyment of the Land parcel No LR. No 14242/46, LR No 14242/47 and LR No 27776/3, that cost of this application be awarded to the Plaintiffs/Applicants, that this honorable court be pleased to issue any order it deems just and fair in the circumstances.
2. On 4/5/2023 when the matter came before the court in the absence of legal counsels for both the Plaintiff and Defendants the Court ordered service of the application, that the Respondent shall file and serve her response within 7 days of service and that the application be disposed of by way of written submissions and their highlighting and gave a time frame for compliance by parties. A temporary order of injunction was also issued restraining the Defendants/Respondents whether and their agents,



from doing any act interfering with the plaintiff's/Applicant's quiet, peaceful, actual and exclusive possession and enjoyment of the Land parcel No. LR No. 14242/46, L.R No. 14242/47, L.R No 27776/1 and L.R No 27776/3 pending inter partes hearing of the application.

3. The background to the present application is that on or about 2005, the Plaintiff/Applicant was registered as a society under the [Societies Act](#) under registration number 24697 and KRA pin number P051195035V.
4. The society was founded by one Ivan Budulica (now deceased) and Slavica Summerscales previously known as Slavica Budulica. The Plaintiff/Applicant has several properties inter alia Land Parcel LR No 14242/46, LR No 14242/47, LR No 27776/1 and LR No 27776/3 and the said parcels of land were purchased at different times. As regards L.R No 27776/1, it was said to have been bought from proceeds of assets belonging to Ivan Budulica (now deceased) and Slavica Summerscales which had been sold back in Australia before they moved to Kenya; that Land Parcel No LR NO 14242/46, LR No 14242/47 and L.R No 27776/3 were purchased from donor funds and that erected on the parcels of land is the Mission In Action Nakuru baby orphanage, Mission in Action day and Boarding school and Mission in Action "Nyota", mama MIA restaurant and many other buildings; that upon the demise of Ivan Budulica, there have been issues surrounding the management of the orphanage and the properties owned by the Society and there is even an existing case HCCC No 002 of 2023; that recently, the 2nd Respondent brought some people to survey the land with the intention of purchasing the said parcel of land which information was brought to the applicant's knowledge by the neighbors and that the suit property herein adds up to a total of 70 acres; that upon conducting a search at the registry, the Plaintiffs discovered that 50 acres had been fraudulently transferred to the name of Ivan Budulica in 2021 and 20 acres to the 1st Respondent on 9/2/2023.
5. Upon further investigations, the applicants realized that the KRA Pin No. P051195035V registered to Mission in Action Nakuru Baby Orphanage of registration Certificate No. 24967, now belongs to Mission in Action of registration certificate No. 000686 and the email registered to the PIN number belongs to the 1st Respondent herein who is a stranger to the Society; that it is through fraudulent activities occasioned by the 1st Respondent that she was able to convince the 3rd Respondent to transfer a portion of the suit property culminating to 20 acres to herself; that the 1st and 2nd Respondent have maliciously been denying the Plaintiff access to the said suit property and they have expressed their intentions to permanently deprive them of the land; that the Plaintiff/ Applicant is fearful that the 1st and 2nd Respondents, their agents or servants may succeed with their illegal actions due to their influence and this may deprive the Plaintiff of its right to quiet possession of the suit property; that in order to put a stop to the impending wanton, unwarranted and illegal actions, there is need to immediately restrain the 1st and 2nd Respondent from disposing off the parcel of land as it will render children homeless.
6. The 1st and 2nd Defendant raised a preliminary objection dated 12/5/2023 on grounds that:
 - a. The application and the suit fall short on the doctrine of Order 1 Rule 8 [Civil Procedure Rules](#), mandatorily requiring that such an application and/or suit must be brought in the name(s) of officials of a society
 - b. The Application and the suit have been filed by a non-existent entity unknown to the Law and is thus incapable of suing or being sued.
 - c. The application and the suit fall short on the doctrine of Res-subjudice under Section 6 of the [Civil Procedure Act](#) as there is a suit and application on the same subject matter pending determination under HCCC No E002 of 2023.



7. The court ordered the application and the Preliminary Objection be disposed of by way of written submissions, which were filed in compliance by the Plaintiff on 18/5/2023 and by the 1st and 2nd Defendants/ Respondents on 26/5/2023. The Plaintiff/Applicant filed its supplementary submissions on 5/6/2023.

Analysis and Determination.

8. The court has taken into consideration the submissions filed by the parties as well as the authorities relied upon.
9. Section 1A of the *Civil Procedure Act* provides that:
1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
10. Section 1B of the *Civil Procedure Act* provides that: For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- a. The just determination of the proceedings;
 - b. The efficient disposal of the business of the Court;
 - c. The efficient use of the available judicial and administrative resources;
 - d. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - e. The use of suitable technology.
11. Order 40 rules 1a, and 1b of the *Civil Procedure Rules* provides that:
- “Where in any suit it is proved by affidavit or otherwise—
- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,
- The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”
12. Order 40 rule 2 of the *Civil Procedure Rules* provides that: “



1. In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 2. The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”
13. Order 1 Rule 8 of the *Civil Procedure Rules* provides:
1. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.
 2. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.
 3. Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.
14. This court will first determine whether the 1st and 2nd Defendants Notice of Preliminary Objection dated 12/5/2023 is merited.
15. In the case of *Hassan Ali Jobo & another -v- Suleiman Said Shabal & 2 Others* [2014] eKLR the Supreme Court stated that:
- “ 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.”
16. The case of *Samuel Waweru v Geoffrey Muhoro Mwangi* [2014] eKLR quoted *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 which is the canonical decision on the issue of what constitutes a preliminary objection where their Lordships observed thus:
- “ 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 a contract giving rise to the suit to refer the dispute to arbitration”.
- In the same case Sir Charles Newbold, P. stated:
- “ 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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”



17. The 1st and 2nd Defendant in their preliminary objection dated 12/5/2023 state that: the application and the suit fall short on the doctrine of Res-subjudice under Section 6 of the *Civil Procedure Act* as there is a suit and application on the same subject matter pending determination under HCCC NO E002 OF 2023. However, this Court finds that the above ground is raised improperly as a preliminary objection as it invites the court to ascertain facts which are denied by the Plaintiff/ Applicant.
18. On the 1st and 2nd Defendant's ground that the violates Order 1 rule 8 of the *Civil Procedure Rules*, this court relies on the case of *Eritrea Orthodox Church vs. Wariwax Generation Ltd.* [2007] eKLR where the Court held as follows:

“There is no doubt that the plaintiff is non-incorporated body of many members registered under the *Societies Act*, Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of *Civil Procedure Rules*.”
19. The Court finds that the Plaintiff in filing the suit has contravened the provisions of Order 1 Rule 8 of the *Civil Procedure rules*. It is imperative from the onset to determine who the parties in the suit are.
20. Given the foregoing, the 1st and 2nd Defendants have demonstrated by Preliminary Objection dated 12/5/2023 that the application and suit offend Order 1 Rule 8 of the *Civil Procedure Rules* mandatorily requiring such a suit as the present to be brought in the names of the officials of a society. However, I would find it onerous on the applicants to have this court strike out their suit while it was not coming up for hearing. Only the application dated 27/4/2023 came up for hearing before this court. In this court's view, it would be rather drastic to strike out the main suit without giving the plaintiff a chance to amend the plaint to join its officials.
21. Consequently, I issue the following orders:
 - a. That the application dated 27/4/2023 is struck out with costs.
 - b. That the plaintiff shall amend its plaint to include its officials within 14 days of this order.
 - c. The costs of the application dated 27/4/2023 shall be borne by the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

