



REPUBLIC OF KENYA



**Obuyu v Mbithi & another (Environment & Land Case E008 of 2022)
[2023] KEELC 21024 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E008 OF 2022
A NYUKURI, J
OCTOBER 25, 2023**

BETWEEN

JACKTONE NYENDE OBUYU PLAINTIFF

AND

PENINAH MBITHE MBITHI 1ST DEFENDANT

MBUKONI HOLDINGS LIMITED 2ND DEFENDANT

RULING

Introduction

1. Before court is the Notice of Preliminary Objection dated October 25, 2022 raised by the 1st Defendant on the following grounds;
 - a. That this Honourable Court has no jurisdiction to grant the prayers sought in the originating summons.
 - b. That the prayers sought are not within the ambit of the provisions of Order 37 Rule 3 of the *Civil Procedure Rules* 2010.
2. The Preliminary Objection was canvassed by way of written submissions. On record are the 1st Defendant's submissions filed on December 16, 2022 and the Plaintiff's submissions filed on February 27, 2023.

1st Defendant's submissions

3. Counsel for the 1st Defendant submitted that prayer 1 in the Originating Summons before court, seek to determine a question regarding the validity of the Plaintiff's sale agreement and proprietary rights with regard to Plots Nos 244, 245, 246, 247, 252, 253, 254 and 255 being part of LR No 439 now subdivided to LR No. Mavoko Town Block 3/6091 (suit property). He also stated that prayers 2, 3 and



4 are on ownership and occupation of the suit property. Counsel submitted that it was clear from the questions presented and determination thereof, reliance is heavily placed on the validity of the contract between the Plaintiff and the 2nd Defendant which he had annexed in his bundle of documents.

4. Counsel further submitted that Order 37 Rule 3 forbids the Plaintiff/Applicant from bringing his claim by way of Originating Summons since he was not a vendor nor a purchaser neither was there a requisition or objection sought against him with regard to the contract of sale. Counsel maintained that the avenue adopted by the Plaintiff was wrong in law. He relied on the cases of *Nairobi HCC No 14 of 2013(OS) Roselyn Naserian Kaina -v- Farna Apartments Ltd*; *Kiburiti v Kiburiti (1983) KLR 6W* and *Kenya Commercial Bank Ltd -v- Osebe (1982) KLR 296* to buttress his arguments. He stated that the court lacked jurisdiction to grant the prayers sought and prayed that the Summons dated March 28, 2022 be struck out with costs to the Respondents.

Plaintiff's submissions

5. Counsel for the Plaintiff submitted that the Originating Summons was brought under the provisions of Section 38 of the *Limitation of Actions Act*, Section 28 (h) of the *Land Registration Act* and Order 37 Rule 3, of the Civil Procedure Rules, which allows such claim to be sought by way of Originating Summons. They further submitted that under Order 37 Rule 3 of the Civil Procedure Rules, a purchaser or vendor may take out Originating Summons. She also contended that the Environment and Land Court has mandate to hear and determine disputes relating to environment and use and occupation of and title to land as provided under Article 162 (2) (b) of the *Constitution* of Kenya and Section 13 of the *Environment and Land Court Act*, 2011.
6. They further submitted that the objection as filed did not meet the threshold for a Preliminary Objection as the same was marred by disputed factual matters which cannot be entertained through a Preliminary Objection. Counsel relied on the case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd (1969) EA 696* for the proposition that a Preliminary Objection must raise a pure point of law.

Analysis and determination

7. I have considered the Notice of Preliminary Objection, as well as the submissions by counsel. In my considered view, the issues for determination are;
 - i. Whether the Preliminary Objection is merited?
 - ii. Who should bear the costs of the Application?
8. A Preliminary Objection is an objection on the pleadings on a pure point of law based on undisputed facts.
9. In the case of *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors (1969) EA 696* the court stated what constitutes a Preliminary Objection as follows;

---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.

10. In this case, the 1st Defendant argues that the suit as filed does not fall within the provisions of Order 37 Rule 3 upon which it is predicated, as the Plaintiff is not a vendor or purchaser and no requisition or objection has been made in regard to the contract of sale. It is not in dispute that the Plaintiff's suit has been brought pursuant to the provisions of Order 37 Rule 3 of the Civil Procedure Rules. Therefore the objection having been premised on that law, the objection herein in my view constitutes a proper Preliminary Objection.

11. On whether the objection is merited, the 1st Defendant alleges that the Plaintiff does not fall in the ambit of claimants provided in Order 37 Rule 3. Order 37 Rule 3 of the Civil Procedure Rules provides as follows;

A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).

12. The question would then be whether the summons by the Plaintiff fall within the above provision or under the exemption. A look at the summons indicates that the Plaintiff alleges to have purchased the suit property from the 2nd Defendant and that the 1st Plaintiff obtained registration of the title to the suit property unlawfully. He alleges to have acquired rights over the suit property by adverse possession and an overriding interest over the suit property. He referred to a sale agreement dated July 29, 2003 between one Stephen Mwanzia Nthiwa and the 2nd Defendant. The Plaintiff is not Stephen Mwanzia Nthiwa. The Plaintiff's suit is not only against the person who is alleged to have sold the suit property to Stephen Mwanzia. It is also against the registered proprietor of the suit property, who is the 1st Defendant and who became registered as proprietor on July 2, 2013. The Originating Summons clearly show that the Applicant does not allege any contractual relationship between himself and the 1st Respondent, but he seeks to get the suit property to be transferred to him. Therefore, I find and hold that the scope of this suit is outside the purview of Order 37 Rule 3 of the Civil Procedure Rules.

13. In addition, and more important to note is that from the Plaintiff's documents, the Plaintiff attached a court order made on December 20, 2018 by the ELC sitting at Nairobi in NAIROBI ELC No 1079 of 2016 where the court struck out a suit by the Plaintiff herein for being an abuse of the court process as the Plaintiff had filed Machakos HCCC No 28 of 2015 which was then pending. It is also on record that in 2019 the Plaintiff filed Machakos ELC Case No 15 of 2019. In a Ruling delivered on November 1, 2019, this court held that the Plaintiff's only option after the decision of the court in Nairobi ELC No 1079 of 2016 was either to appeal against the decision or have it reviewed. The court further held that if Machakos HCCC No 28 of 2015 was dismissed by the court for want of prosecution, the Plaintiff's recourse was to apply for the reinstatement of that suit and not filing a similar suit. That



filing a suit similar to the one that has been dismissed by the court for want of prosecution was an abuse of the court process. That decision has not been appealed against, reviewed or set aside.

14. All the above three cases are based on the Plaintiff's claim that he purchased the suit property from the second Respondent herein and the suits involve the same parties and the same issues as the case now before court. It is therefore my view that as Machakos HCCC No 28 of 2015 was dismissed for want of prosecution and that decision having not been appealed against, or sought to be set aside, this suit, just like Nairobi ELC No 1079 of 2016 and Machakos ELC 15 of 2019, is an abuse of the court process and cannot be entertained by this court.
15. For the above reasons, this suit is hereby struck out with costs to the 1st Respondent.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF OCTOBER 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

