



Tebere Concrete Co. Ltd v Kinani & 3 others (Environment & Land Case E002 of 2023) [2023] KEELC 22557 (KLR) (24 October 2023) (Ruling)

Neutral citation: [2023] KEELC 22557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E002 OF 2023
A KANIARU, J
OCTOBER 24, 2023**

BETWEEN

TEBERE CONCRETE CO. LTD PLAINTIFF

AND

JOHN IRERI KINANI 1ST DEFENDANT

MUGO NJERU 2ND DEFENDANT

COUNTY GOVERNMENT OF EMBU 3RD DEFENDANT

LAND REGISTRAR EMBU COUNTY 4TH DEFENDANT

RULING

1. This is a ruling on a notice of preliminary objection dated 08.02.2023 and filed on 10.02.2023. It was raised by the 4th defendant – The Land Registrar, Embu County. It is based on the following legal premise:
 - i. The suit expressly offends the provisions of section 16(1) (i) cap 40 Laws of Kenya.
2. It was agreed that the preliminary objection be disposed of by way of written submissions. The 4th defendant’s submissions were filed on 13/6/2023 and so also were 1st and 2nd defendants submissions. The 3rd Defendant did not file submissions. The plaintiff on its part filed its submissions on 12.06.2023.
3. The 4th Defendants submitted that the plaintiff through its plaint is seeking orders that the court is bound by law not to issue as the Government Proceedings Act forbids the court from issuing injunctive orders against the Government. The 4th defendant has cited the cases of Alamin Sheikh Ahmed v Registrar of Lands Kilifi County (2022) eKLR, Harriet Naitore v Lydia Mbcu Ireri & 2 others (2018) eKLR, and Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA to drive the point home. The 1st & 2nd Defendants held the same position and cited the case of Harriet Naitore v Lydia Mbcu Ireri & 2 others (2018) eKLR.



4. The plaintiff on the other hand submitted that this suit has not been brought against the Government as contemplated under the Government Proceedings Act as the Registrar has not been sued for recovery or delivery of the suit land. That no intention to sue the Government under section 13A of the said Act was issued by the plaintiff and that the Land Registrar was sued as a mere vehicle to carry out any orders that this court may make. The plaintiff submitted further that there is no relief sought against the Government in this case as the orders sought against the Land Registrar will not have an effect of giving a relief against the Government. The plaintiff urged the court to find that the Land Registrar is properly sued in this suit and that the preliminary objection lacks merit and should be dismissed.
5. I have considered the objection as raised and the rival submissions. The issue for determination is whether the objection has merit.
6. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -v- West End Distributors Ltd* (1969) EA 696, as follows:

“ 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 effect of a preliminary objection if upheld, renders any further proceedings before the court redundant or unnecessary. Thus a preliminary objection may only be raised on a point of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

7. The 4th defendant raised the preliminary objection on the ground that;
 - i. The suit expressly offends the provisions of Section 16(1)(i) Cap 40 Laws of Kenya.
8. Section 16 (1) (i) of the Government Proceedings provides that;

“Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties”
9. The plaintiff – Tebere Concrete Company Limited – filed a suit on 26/1/2023 vide a plaint dated 25/1/2023. The plaint came with the following prayers:
 - a. A declaration that the plaintiff is the lawful lessee of LR No. Mbeere/Wachora/1618 from the 3rd Defendant.
 - b. A permanent injunction restraining the defendants by themselves, their agents, servants or anybody claiming under them from disposing, leasing, entering, trespassing and or in any manner interfering with the plaintiff’s occupation and quiet possession of LR Mbeere/Wachora/1618.
 - c. Costs of this suit.
 - d. Any other relief that this court may deem fit to grant.



10. The plaintiff herein seeks an order of permanent injunction against the Defendants. The 3rd & 4th Defendants are officers of the government.

In *Royal Media v Telkom Kenya* (2001) EA the court held that where there is a cause of action directly against the government there can be no injunction and the appropriate remedy would be a declaratory relief. The court held this concept is founded on the principles that the king cannot do wrong and that the king cannot be sued in his court.

11. I also find the case of *Harriet Naitore v Lydia Mbucu Ileri & 2 others* [2018] eKLR quoted by the 4th Defendant's in their submissions relevant in this case. It was observed thus:

“The court is persuaded that on the basis of section 16(2) of the *Government Proceedings Act* (Cap 40) the order of injunction against the 2nd Defendant is not available.”

12. Guided by the above reasoning and the clear legal provisions, my finding is that the Plaintiff's suit offends the provisions of section 16A of the *Government Proceedings Act* and therefore the 4th defendant's Preliminary Objection is merited. However, I am of the considered view that the fact that an injunction is sought against the 3rd and 4th Defendants does not render this suit fatally defective as the same can be cured by amending the plaint to reflect the correct position. I therefore direct that the plaintiff amend their plaint accordingly. Costs in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF OCTOBER, 2023.

Kinyanjui for Plaintiff/Applicant;

Nyanyuki for 1st & 2nd Defendants;

M/s Msando for Okore for 3rd Defendant;

M/s Mutua for Kiongo (AG's office) for 4th Defendant.

A.K. KANIARU

JUDGE

