



REPUBLIC OF KENYA



**Maro & another v Sifuna & 3 others (Environment & Land Case
E024 of 2023) [2023] KEELC 20999 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20999 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E024 OF 2023
EK MAKORI, J
OCTOBER 23, 2023**

BETWEEN

SALIM RASHID MARO 1ST PLAINTIFF

MOHAMED RASID MAKO 2ND PLAINTIFF

AND

DAVID KINISU SIFUNA 1ST DEFENDANT

MOSES MASIKA WETANGULA 2ND DEFENDANT

LAND REGISTRAR- MOMBASA 3RD DEFENDANT

ATTORNEY GENERAL- MALINDI 4TH DEFENDANT

RULING

1. Before he became a Speaker of the County Assembly of Trans-Nzoia and Legal Service Manager/Ag. Corporation Secretary at the Kenya Medical Training College, David Kinisu Sifuna (the 1st Defendant) practiced as a lawyer in Mombasa with his Law firm situated in Shanzu.
2. One of the briefs he handled according to his sworn affidavit deposed on 24th April 2023, was that involving one Maro Mwinyigwisa (deceased) who was a squatter on land described as MN/III/2900. The deceased and his family had been living on this land for over 60 years.
3. He was retained with the said Maro Mwinyigwisa (deceased) and Said Maro Mwinyigwisa (deceased) to act for them with respect to the land parcel as described.
4. According to him the land case was complex because he realized that it was family land but then it was under the ownership of the government and that adverse possession could not apply.
5. The brief involved him camping at the land officer, dealing with Land Registrars and Government officials over that land.



6. His fees were not guaranteed. He entered a deal with his clients to give part of the land (two acres) or the equivalent of Kshs 1,200,000/- as his fees. A retainer agreement was signed. He did his due diligence as a lawyer and acted in the best interest of his clients and discovered the land was under a private company called En-Kent Traders Ltd Which had been granted a lease for 99 years.
7. He later realized there was a court action initiated by Messrs Nzamba Kitonga and Company Advocates who had won the case and the title was to revert to his clients. The order could not be enforced for over ten years.
8. He had to bring another action Misc App No. 100 of 2009 (Rashid Maro Mwinyingwisa and Said Maro Mwinyingwisa v The Commissioner of Lands and Registrar of Titles Mombasa. This suit was compromised. His clients were thereafter registered as the owners of the land in dispute. He was entitled to his retainer- 2 acres or its equivalent Kshs 1,200,000/- but there was the pending issue of sub-divisions. He offered to continue but with a second retainer of Kshs 1,600,000/- or the equivalent of two additional acres namely parcels 8388/III/MN and 8391/III/MN. It is then his clients executed a transfer of four acres in his favour for the completion of the sub-divisions. Acting on his former clients, he did sub-divisions as instructed and contained in his affidavit paragraph 21 (i)- (Vii). It took him four years to complete the assignment, from 2009 to 2013. Because the work was tedious and expensive he decided to sell a portion of the land parcel No. 8392/III/MN to the 2nd Defendant Hon. Moses Masika Wetangula to keep his Law Firm afloat.
9. In 2013 he proceeded to seek an elective entire post at the Tran-Nzoia County where he became a Speaker.
10. The present plaintiffs waited for the death of their parents, sold their portions, and are now targeting his portion and that of the 2nd Defendant hence this suit.
11. This suit was commenced by the Law Firm of Angelline Omollo and Associates. The Plaintiffs allege that the 1st defendant used his influence as a lawyer to go against the retainer agreement they entered with their late parents. They are beneficial owners of all those parcels known as Plot Nos. 8388/III/MN, CR No. 57519, 8390/III/MN, CR No. 57519, CR No. 8391/III/MN, CR No. 57520 measuring approximately 0.4000 hectares illegally registered under the name of the 1st Defendant and Plot No. 8397/III/MN, CR No. 57921 measuring approximately 0.4000 hectares registered illegally under the name of 2nd Defendant.
12. The Plaintiffs' grievance is that the acreage registered in the names of the 1st and 2nd Defendants is more than what the initial agreement was all about hence pleading fraud on the part of the 1st Defendant.
13. A Preliminary Objection has been raised that:
 - a. Plaintiffs lack *locus standi* to bring up this suit for want of letters of administration.
 - b. The court lacks jurisdiction therefore to entertain the matter given the lack of locus standi
 - c. The suit offends the doctrine of estoppel.
 - d. Cause of action has not been disclosed against 1st Defendant.
 - e. The suit is time-barred.
14. I directed parties to file written submissions. They complied.



15. Looking at the materials placed before me, to my mind, the issue of locus standi if successful will displace the other objections which seem intertwined and will take care of the other issues raised in the Preliminary Objection.
16. Whether the current Preliminary Objection has achieved the threshold as laid in the leading authority in this realm - *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E. A 696: where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, J.A.:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“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.”

17. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A Preliminary Objection 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.”

18. In this case the 1st defendant contends that the plaintiffs have no locus standi to propagate this suit because of lack of letters of administration. But in a surprise move counsel for the plaintiffs in her submissions has annexed a certificate of confirmation of Grant of Representation to the estate of the late Rashid Maro Mwinyingwisa issued at Mombasa on 6th March 2017 (Thande J.) to his sons Mohammed Rashid Maro & Maro Rashid Maro with Rashid Maro and Omar Rashid Maro being the beneficiaries vide Succession Cause No. 357 of 2014 and gazetted on the 15th March 2015.
19. This move by the plaintiffs is stated by the 1st Defendants to be an ambush as those documents are not mentioned on all the suit documents filed by the plaintiffs so far. The 1st defendant pleads that the documents are a forgery at best and ought to be expunged from the record. A Preliminary Objection as alluded to in the *Mukisa Biscuits case (supra)* should largely be on legal point(s) and ought to dispose of a matter without calling any evidence. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. (see *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR).
20. The 1st defendant largely raised the Preliminary Objection on *locus standi* based on the pleadings and documents as filed by the plaintiffs. I agree with the 1st defendant that the documents should not



possibly have been sneaked through submissions. They are from the backdoor. Unfortunately, it has been brought to the attention of this court that those letters of administration exist. I don't want to dismiss this matter at that level a full trial would be ideal to avoid an injustice.

21. The other issues on the jurisdiction of the court, the doctrine of estoppel, and whether the 1st defendant had a client-advocate relationship with the plaintiffs will require a hearing based on the bulky documents filed by the 1st defendant. It will require a rebuttal from the other side. All these issues will require adducing evidence.
22. On limitation of actions, the plaintiff pleads fraud on paragraph 18 of the Plaint;

“The 1st Defendant herein took advantage of the Plaintiffs’ trust and confidence as their advocate and without their knowledge and consent he processed the title documents in both his favour and that of his friend’s name the 2nd Defendant herein.”
23. The plaintiffs are not clear when they detected this fraud. The manner fraud is framed and the overall drafting of the suit papers is wanting to say the least. The pleadings lack vigor strength and health as stated by Rebecca Love Kourlis, Jordan M. Singer, and Natalie Knowlton - Reinigorating Pleadings, Denver University Law Review [Vol. 87:2] page 245:

“Pleadings are the gateway to the American civil justice system. When properly drafted, they frame the issues to be resolved and open the door to the procedures that make complete and effective dispute resolution possible. To fulfill their potential, however, pleadings must provide litigants with two types of access: the ability to get into court in the first place, and the ability to participate meaningfully in the process until a complete judicial resolution is reached. Getting in the courthouse door is a necessary step, but it is not sufficient; parties must be able to afford to stay in the system long enough to narrow their disputed issues and collect relevant evidence for presentation to a judge or jury.”
24. The preliminary Objection raised here arises from the manner the plaint was drafted and the accompanying affidavits and materials in support. The plaintiffs are well in court via those pleadings as a gateway to court, but the pleadings do not seem to have their access to stay in court for long.
25. Be that as it may, the Preliminary Objection will stand dismissed with no orders as to costs. Let us accord the parties a hearing.
26. To fast-track the matter, and considering the nature of the claim, and the relationship of the parties in the past, it will be unnecessary to argue the application for injunctive orders sought, the court will direct the parties to maintain the “Status quo” on the ground pending the hearing and determination of this suit.
27. Further looking at the relationship that has persisted in the past by parties, the court encourages exploration of dispute resolution in this matter either, by way of Court-Annexed Mediation or Alternative Justice System. It is so directed.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
23RD DAY OF OCTOBER 2023**

E.K. MAKORI

JUDGE

In the presence of:



M/s Omollo for the Plaintiff

Mr. Sifuna for the defendants

In the Absence of:

The AG

