



Kirao & 106 others v Kassamjee (Enviromental and Land Originating Summons 27 of 2022) [2023] KEELC 22520 (KLR) (13 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 27 OF 2022**

EK MAKORI, J

DECEMBER 13, 2023

IN THE MATTER OF: PLOT NO. 220-MALINDI LT 37, FOLIO 225, FILE 3403

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS/APPLICANTS HAVE OBTAINED FIFTY DECIMAL ZERO SEVEN

(50.07) ACRES OF THEREABOUTS OF THE ABOVE-MENTIONED SAID PARCELS OF LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

DOMINIC JUMA KIRAO & 106 OTHERS APPLICANT

AND

SHABBIR KASSAMJEE RESPONDENT

RULING

1. Two Preliminary Objections are pending, the one dated 31st January 2023 stating that the filing of this suit offends the doctrine of estoppel since there is a similar suit pending that is ELC 55/2020 (O.S). [*Dominic Juma Kirao & 106 Others v Shabbir Kassamjee*](#)
2. The second Preliminary Objection as amended on 28th June 2023 seeks to invalidate a replying affidavit deposed by one Shabbir Kassamjee on 31st January 2023 and the entire counterclaim struck out because one Mr. Obaga Muriuki who commissioned it had not taken out a practicing certificate for the year 2023.
3. In the 1st Preliminary Objection, the respondent contended that the applicant had filed another similar suit - ELC 55/2020 (O.S) before filing this suit. [*Dominic Juma Kirao & 106 Others v Shabbir Kassamjee*](#), seeking similar orders over the same subject property as sought in the current suit, however,



the applicants withdrew the same *vide* withdrawal notice dated 24th November 2022. The respondent on the other hand did not withdraw his counterclaim which is slated for a hearing shortly.

4. The respondent submitted that the applicants are estopped from commencing the current suit having withdrawn a similar one - quoting the decisions in [748 Air Services Ltd v Theuri Munyi](#) [2017] eKLR and [Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Ltd](#) [2007] eKLR. The respondent is of the view that the applicants having taken out the withdrawal notice dated 24th November 2022 had by their conduct acquiesced and waived their rights by freely and voluntarily withdrawing their O.S which contained their claim against the respondents herein and thus estopped from bringing up a similar fresh cause of action.
5. On the second Preliminary Objection which seeks to strike out the entire averments by the respondent for having been commissioned by an Advocate/ Commissioner for Oaths who had not taken out a practicing certificate, the respondent averred that The Preliminary Objection does not raise purely points of law as it will need a probe as to whether the said Mr. Obaga Muriuki indeed did not have such practicing certificate. Nothing was attached from the Law Society of Kenya to support the allegations by the applicants.
6. Besides, the respondent argued that if Mr. Obaga Muriuki did not have a practicing certificate and proceeded to commission the affidavit by Mr. Shabbir Kassamjee, that did not invalidate the same as held in the case of [National Bank of Kenya Ltd v Anaj Warehousing Ltd](#) [2015] eKLR. The remedy available as per the respondent is to report Mr. Obaga Muriuki to the Law Society of Kenya or our criminal Agencies for misconduct and the appropriate penalty meted out to him.
7. On the part of the applicants, on the 1st Preliminary Objection, it is asserted that the withdrawal of a suit cannot act as a defence or a bar to the bringing up of another fresh suit as provided under Order 25 Rule 1 of the [Civil Procedure Rules](#). The applicant further quoted the decision in [Bahati Shee Mwafudi v Elijah Wambua](#) [2015] eKLR, to support that assertion.
8. On the 2nd Preliminary Objection brought by the applicant attacking the commissioning of the replying affidavit deposed by the respondent, the applicants argued that Mr. Obaga Muriuki had not taken out a practicing certificate for the year 2023 and was therefore not competent to commission the same rendering it invalid, irregular, null and void. At the time of filling the same, Mr. Obaga was an unqualified person within the meaning of Section 9 of the [Advocates Act](#). The applicant cited the decisions in [Belgo Holdings v Akber Abdullah Kassam Esmail](#) [2005] 2 EA 28 cited with approval by Majanja J. in [Abraham Mwangi Njibia v Independent Electoral and Boundaries Commission & 2 Others](#) [2013] eKLR and [Miriam Wambui Thiriku v Bomas of Kenya](#) [2014] eKLR, all the decisions enunciating that pleading drawn, signed and presented by unqualified persons cannot stand and ought to be struck out.
9. It is the applicants' view therefore that the verifying affidavit and counterclaim were commissioned by an unqualified person and therefore the counterclaim dated 31st January 2023 as well as the replying affidavit sworn on the even date should be struck out for incompetence and invalidity.
10. Arising from the foregoing the following issues stand for the determination of this court, whether the Preliminary Objections attain the threshold as held in [Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd](#) [1969] EA 696. Whether then, the applicants are estopped from bringing up this matter having withdrawn a similar one. Whether the counterclaim and the replying affidavit by the respondent ought to be struck out for lack of competence and validity, having been drawn by an unqualified person.



11. A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“ 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 the contract giving rise to the suit to refer the dispute to arbitration.

On page 701 paragraphs B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

12. I have considered the materials and submissions by the parties herein on the two objections raised. I called for the physical file in ELC 55/2020 (O.S). I had a look at that file and the entire proceedings. The current suit is a replica of ELC 55/2020 (O.S). No explanation has been advanced as to why the withdrawal happened, leaving behind a counterclaim which is due for hearing, and commencing a similar separate suit raising congruent issues as the former suit.
13. The withdrawal has been raised as a ground to attack the manner this suit has been commenced. The applicants say estoppel cannot apply here by dint of Order 25 Rule 1 of the *Civil Procedure Rules* (that is true), while the respondent says the applicants are estopped from bringing a new suit since ELC No. 55/2020 (O.S) is still alive, active and due for hearing. As stated, I have not been told the explanation behind the withdrawal. There is a common strand here - the Malindi ELC, where either numerous suits are filed and then abandoned on the midway, and other suits similar filed or where when one loses a matter, one rushes to other courts of parallel or concurrent jurisdictions on a forum shopping extravaganza to seek “fresh” redress oblivious of the judicial trail of the earlier filed matters. It tends to abuse the court process. It must be stopped. Look at it this way, ELC No. 55/2020 (O. S) was filed with the intent, I think running the full circle of a hearing and to have it concluded timeously (sic). Instead, it was withdrawn leaving behind a counterclaim that has to be heard. How do we reconcile the two files? How do we factor the judicial time, and that of the litigants expensed in the former suit? And what about the monetary expenses to both the court and the litigants? Is this not what is called abuse of the judicial process? If not what do we call it? My take will be (and this is purely on active case management strategy), that the applicants in this matter cannot escape from the initial file No. ELC 55/2020 (O.S), which is currently active. Witnesses have not been called to testify. It will be up to the applicants to move the court, plow back the withdrawal, and have the matter heard on merit to avoid proliferation and convolution of suits. Therefore, the applicants will be estopped from proceedings in this matter and the entire suit will be struck out with costs. Thus the 1st Preliminary Objection - by the respondent succeeds to that extent.
14. The 2nd Preliminary Objection on Mr.Obaga Muriuki lacking a practicing certificate and commissioning documents herein on behalf of the respondent, considering the authorities cited by



both sides, I have been persuaded by the reasoning of the Supreme Court in *National Bank of Kenya Ltd v Anaj Warehousing Ltd* [2015] eKLR where the apex Court stated:

“The Court’s obligation coincides with the constitutional guarantee of access to justice (*Constitution of Kenya, 2010*, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2) (d) of the *Constitution*: “justice shall be administered without undue regard to procedural technicalities”.

(67) To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such a course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in Articles 40 (protection against arbitrary legislative deprivation of a person’s property of any description), 20 (3) (a) and (b) (an interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.

(68) The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the *Advocates Act*, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

(69) While securing the rights of the client whose agreement has been formalised by an advocate not holding a current practising certificate, we would clarify that such advocate’s obligations under the law remain unaffected. Such advocate remains liable in any applicable criminal or civil proceedings, as well as any disciplinary proceedings to which he or she may be subject.”

15. In other words, whereas Mr. Obaga- did not have a practicing certificate and proceeded to commission the replying affidavit, he ensnared himself in the realm of professional misconduct. He can be subjected to criminal or civil proceedings as disciplinary measures. The respondent cannot suffer for the misconduct of Mr. Obaga. In any event, I already decided that these proceedings migrate to No. ELC 55/2020 (O.S). The 2nd Preliminary Objection is hereby struck out with costs.

16. At the end parties should find recourse in ELC No. 55/2020 (O.S) for the ventilation of the issues raised in this suit.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13TH DAY OF DECEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of: -



Mr. Kimani for the Applicants

Ms. Oloo for the Respondent

CC Happy

