



Mheithi alias Kikonde s/o Sakeh Bukheit v Shah & 4 others (Environment & Land Case 54 of 2022) [2023] KEELC 22429 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 54 OF 2022
EK MAKORI, J
DECEMBER 6, 2023**

BETWEEN

**ATHUMA SWALEH MHEITHI ALIAS KIKONDE S/O SAKEH
BUKHEIT PLAINTIFF**

AND

**RAVJI WAMJI MANJI 1ST DEFENDANT
JANENDRA RAICHAND SHAH 2ND DEFENDANT
MUNIR MOHOAMED SKETTY (ADMINISTRATOR TO THE ESTATE OF
NASSOR MOHAMED NAHDY (DECEASED) 3RD DEFENDANT
LAND REGISTRAR MOMBASA 4TH DEFENDANT
ATTORNEY GENERAL MALINDI 5TH DEFENDANT**

RULING

1. Before this Court is the plaintiff/ applicant's Application dated 8th September 2022 seeking an Order for temporary injunction restraining the respondents from dealing in any way with Land Parcel No. Subdivision 890 (Original No. 284/99) Section III Mainland North, Certificate CR. 39208 measuring approximately 10.65 ha. now being subdivision MM/III/10772- 10968, registered in Survey Plan No. F/R Nos 415/64 and 415/65 pending hearing of the application and subsequent suit, the applicant contended that he is the beneficial owner and proprietor of the suit property, which he inherited from his father Saleh Bukheit, his uncles and aunties who were the original shareholders
2. The 3rd respondent opposed the said application by way of notice of Preliminary Objection dated the 30th of November 2022 and filed on the same day. The said Objection is premised because the application and plaint offend the provisions of Order 4 Rule 1(f) of the *Civil Procedure Rules*, such that the applicant has failed to show the capacity in which he is suing and the capacity in which the 3rd



defendant is sued, and that the plaintiff failed to disclose the existence of several cases that were filed by the 3rd defendant against the Plaintiff being; ELC Case No. 346 of 1993 and Civil Appeal No. 123 of 2022.

3. Parties were directed to file written submissions.
4. The issues that fall for the determination of this Court are:
 - i. whether the Objection raised by the 3rd respondent is merited;
 - ii. Whether the applicant has established a case for the grant of orders of temporary injunction pending the hearing and determination of the suit;
 - iii. Whether the orders sought by the applicant in the application should be granted;
5. The 3rd respondent submitted that the capacity the applicant has commenced this suit without capacity having failed to take out letters of administration with respect to the estate of the deceased relatives. The decision in *Hawo Shanko v Mihammed Uta Shanko* [2018] eKLR. Is quoted where failure to take out letters of administration was said to have been fatal and the suit was struck out in limine.
6. The next point taken by the 3rd respondent was that the 3rd Respondent does not own the suit land, and an order against him would be an order in futility since he doesn't own the same. Besides, there is an ongoing case regarding the suit property in the court of appeal, Mombasa Civil Appeal No. E123 of 2022, where the 1st respondent is sued for obtaining the title to the present suit fraudulently.
7. Preliminary Objection constitutes as held in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited* (1969) E. A 696 where it was held that:

“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 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 exercise of judicial discretion.”

The Court further stated that:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”

8. The first ingredient of a Preliminary Objection will then be that it must be based on pure points of law. The second element is that the objection must arise from matters that are pleaded and which if argued as a preliminary point may dispose of the suit.
9. Emerging from the Plaintiff and the Notice of Motion application. While the applicant pleaded in the Plaintiff and in the application that he is a beneficial owner of the suit property, having inherited the same from his late relatives, the 3rd respondent has challenged the capacity of the applicant and the jurisdiction of the Court. This is so by dint of Section 2 of the Law of Succession Act. On this point, the Court held as follows in the case of *Hawo Shanko v Mihammed Uta Shanko* [2018] eKLR:

“The issue as to whether a party can file a suit involving a deceased's estate before obtaining a limited grant has been the subject of several Court cases. The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been



formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate. If each beneficiary is allowed to file a suit touching on a deceased's estate without first obtaining a limited grant, then several suits will be filed by the beneficiaries. It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case. It does not matter whether the suit involves a claim of intermeddling of the estate or the preservation of the same. One has to first obtain a limited grant that will give him/her the authority to file the suit. The leave of the Court is not required before one seeks a grant limited to the filing of the suit. The orders granted to the plaintiff herein authorizing her to seek a grant of letters of administration are superfluous and cannot assist her. She ought to have sought a limited grant first before filing this suit. The Judgement by Justice M.A. Ang'awa (as she then was) in Nairobi Succession Cause No.1731 of 2000, *in the matter of the estate of Moraji Bhanji Dhanak (deceased)* delivered on 30th November, 2000 is to the effect that a grant limited to the filing of a suit has to be issued before the suit is filed.

In the case of *Morjaria v Abdalla* [1984]KLR, 490 holding No.7 of the Court of Appeal reads as follows as page 491:-

Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the *Law of Succession Act* as provided by rule 36(2) of the *Probate and Administration Rules*, the grant was specifically limited to "the purpose only" of representing the appellant in his appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal.

In the case of *Julian Adoyo Ongunga v Francis Kiberenge Abano* Migori Civil Appeal No.119 of 2015, Justice A. Mrima had this to say on the issue of a party filing a suit without having obtained a limited grant.

"Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. It is also worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties."

The effect of the above cases is that for a party to have locus standi and appear in a case involving a deceased person, he or she must first obtain a grant limited for that purpose.

10. The plaintiff /applicant has not shown that he obtained letters of administration in respect to the estates of his deceased relatives' estates merely describing himself as a 'beneficial owner'. He cannot therefore approach this Court for want of locus standi and the Preliminary Objection on this point alone stands germane.
11. There was also raised another issue that there has been litigation in the past over the same subject matter. However significant is Mombasa ELC Case No. 346 of 1993 and Civil Appeal No. 123 of 2022. The applicant admits in the application for injunction the existence of this suit. Why file this suit when



there exists another one similar to this one? That has not been explained by the plaintiff /applicant. The tendency of filing a multiplicity of suits has been puckered up by this Court on the basis that it tends to lead to an abuse of the judicial process and sheer confusion likely to emerge in case of two conflicting decisions over the same subject matter. It is discouraged. It goes against an orderly manner of doing court business and a proper administration of justice and safeguard of the Rule of Law.

12. From the drafting of the pleadings herein one wonders what the applicant is up to given the so many cases cited as having been determined over the same subject matter. This is yet another one of those cases likely to cause proliferation and convolution of suits. It is common within the jurisdiction of this Court.
13. The Preliminary Objection is sustained, on the issues of locus standi and the pendency of Mombasa ELC Case No. 346 of 1993 turned Civil Appeal No. 123 of 2022. Parties to exhaust the avenues available in the primary suit first to avoid a multiplicity of suits. The upshot is that the entire suit and the application dated 8th September 2022 are struck out with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 6TH DAY OF DECEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Wmbani for the 3rd Respondent

CC Happy

In the absence of

M/s Omollo 1st and 2nd Applicants

AG for 4th and 5th Respondents

