



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E47 OF 2021

PETRONILLA MUTUKU MAKILYA alias

PETRONILLA MUTUKU NGOVE.....1ST PLAINTIFF

WINFRED KATUNGWA NGOVE.....2ND PLAINTIFF

VERSUS

CAROLINE MBINYA KATHENDU, KENNEDY THYAKA NGOVE and

PAUL MATULAI NGOVE (Sued in their capacity as the

Administrators of the Estate of

TABITHA KALONDU NGOVE (Deceased).....1ST DEFENDANT

PAUL MATULAI NGOVE alias

EDWARD KALA NGOVE2ND DEFENDANT

RUBIS ENERGY KENYA PLC

(KENOL KOBIL PLC)3RD DEFENDANT

AND

THE LAND REGISTRAR,

MACHAKOS LAND REGISTRY1ST INTERESTED PARTY

THE HON. ATTORNEY GENERAL2ND INTERESTED PARTY

RULING

INTRODUCTION

1. This Ruling is in respect of two preliminary objections dated 24th June 2021 and 29th June 2021, filed by the 1st and 2nd Defendants, and the 1st Defendant respectively.

THE PRELIMINARY OBJECTION DATED 24TH JUNE 2021

2. In the preliminary objection dated 24th June 2021 the 1st and 2nd Defendants sought to have the Plaintiffs' suit struck out and the application dated 10th May 2021 dismissed in limine on the following grounds;

(a) **That the entire application and suit are sub judice and offend the provisions of Section 6 of the Civil Procedure Act as the questions in issue are directly and substantially in issue in Nairobi High Court Succession Cause No. 2712 of 2003**

between the Plaintiffs/Applicants and 1st and 2nd Defendants herein.

(b) That the Plaintiffs/Applicants lack locus standi to bring this application and suit.

(c) That the application and suit are frivolous, vexatious and a blatant abuse of the law and process by court and should be struck out with costs to the 1st and 2nd Defendants/Respondents.

THE NOTICE OF PRELIMINARY OBJECTION DATED 29TH JUNE 2021

3. In the preliminary objection dated 29th June 2021, the 1st Defendant has raised a preliminary objection to both the Applicants' Notice of Motion dated 10th May 2021 and the suit on the following grounds;

(a) That this Honourable Court lacks jurisdiction to grant reliefs claimed herein by virtue of the express provisions of Section 6 of the Civil Procedure Act as orders sought fall within jurisdiction of the Family Court/Division of the High Court and not the environment and land court.

(b) That further distribution of the estate of Tabitha Kalondu Ngove (deceased) and in particular distribution of property Title Number Machakos Town/Block II/283, the property subject of this suit, is an issue directly and substantially in issue in Nairobi High Court Succession Cause Number 2712 of 2003.

(c) That the Plaintiffs/Applicants lack locus standi to file this suit and application thereof.

(d) That the application and suit are frivolous, vexatious and abuse of the court process as the Plaintiffs are engaged in forum shopping and should therefore be struck out with costs to the 1st Defendant.

4. It is therefore clear that the two Notices of preliminary objection have the same content as the objection dated 29th June 2021 was a repetition of the objection dated 24th June 2021. Both objections seek for the Plaintiffs' suit to be struck out for being sub judice in so far as the suit raises the same issues raised in Nairobi High Court Succession Cause No. 2712 of 2003; that the Plaintiffs lacks *locus standi* and that the suit and the application are frivolous, vexatious and an abuse of the court process.

5. On 7th July 2021 the Plaintiff filed grounds of opposition to the preliminary objections where they stated that there is no defence filed to the suit or a response to the Plaintiffs' notice of motion dated 10th May 2021 and therefore the preliminary objection raised is not based on pure points of law and the same require production of evidence; that the preliminary objections were a delaying tactic to frustrate the Plaintiffs; that the prayers sought both in the suit and in the Notice of Motion dated 10th May 2021 are matters that can only be resolved by the Environment and Land Court as the court having jurisdiction; that the doctrine of sub judice is not applicable as the property in issue is not wholly owned by the deceased in Nairobi Succession Cause No. 2712 of 2003 and that the preliminary objection ought to be dismissed with costs.

6. The preliminary objections were canvassed by written submissions. The 1st and 2nd Defendants filed their submissions on 16th September 2021, while there were no submissions on record for the Plaintiffs.

SUBMISSIONS

7. Counsel for the 1st and 2nd Defendants submitted that both the suit and the application dated 10th May 2021 are sub judice and offend Section 6 of the Civil Procedure Act. Counsel argued that the Plaintiff has approached this court seeking for determination of ownership of the suit property Machakos Town Block II/283 while the same issue is substantially in issue in the Succession Cause between the Plaintiffs and the 1st and 2nd Defendants who are siblings and children of the late Tabitha Kalondu Ngove. That the suit property is part of the estate of Tabitha Kalondu Ngove and the succession cause will ultimately distribute the estate. Counsel argued that though the Plaintiffs had added the 3rd Defendant, a mere addition of a party does not alter the substance of a suit, counsel relied on the case of **Republic vs Paul Kihara Kariuki Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR**. Counsel also placed reliance on the case of **Thiba Min Hydro Co. Ltd vs Josephat Karu Ndwiga [2013] eKLR** to argue that a difference in form cannot assist a party who has two cases running parallel to each other.

8. Counsel contended that under Section 82(a) of the Law of Succession Act, a person can only represent the estate of a deceased person if they have letters of administration. Counsel relied on the case of **Isaya Masira Momanyi vs Daniel Omwoyo & Another [2017] eKLR** for the above proposition and argued that the Plaintiff could not file suit on behalf of the estate of Tabitha Kalondu Ngove without grant of letters of administration.

9. It was further submitted for the 1st and 2nd Defendants that both the application and the suit were frivolous. Counsel argued that the Plaintiffs were busy bodies wasting the valuable court's time.

ANALYSIS AND DETERMINATION

10. I have considered the preliminary objections dated 24th June 2021 and 29th June 2021, the grounds of opposition and the submissions. In my view the issues that arise for determination are whether the preliminary objections raises valid preliminary objections, and whether the preliminary objections are merited.

11. In the case of *Mukisa Biscuits Manufacturing Company Limited vs West End Distributors [1969] E.A 696*, the Court of Appeal described a preliminary objection in the following terms;

“So far as I am aware, a preliminary objection consists of a point of law which arises by clear implication out of the 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.”

12. Similarly, in the case of *Nitin Properties Ltd vs Singh Kalsi & Another [1995] eKLR*, the Court of Appeal 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.”

13. Essentially therefore, a preliminary objection can only be anchored on pure points of law and cannot be sustained where there is a dispute as to facts relied upon by the party raising the objection.

14. In the instant suit, the 1st and 2nd Defendants are yet to file a defence or a response to the application dated 10th May 2021. The 1st and 2nd Defendants have argued that this suit is sub judice as the issues raised herein are the same issues raised in Nairobi Succession Cause No. 2712 of 2003; which concerns ownership of the suit property. On their part the Plaintiffs have contended that the issues in the two suits are not the same as the suit land was not wholly owned by the late Tabitha Kalondu Ngove. I note that there are no pleadings in Succession Cause No. 2712 of 2003 to enable the court verify the 1st and 2nd Defendants’ allegations. It is my considered view that a plea of sub judice can only be ascertained by evidence demonstrating that the pleadings filed in two parallel suits address the same issue and that the parties are the same in both suits. I opine that sub judice ought to be raised by a Notice of Motion and not by way of preliminary objection. Besides, Section 6 of the Civil Procedure Act provides that where a matter is found to be sub judice, the same should be stayed. Hence the prayer for striking out a matter based on the plea of sub judice is untenable.

15. The 1st and 2nd Defendants have also raised an objection to the suit on the ground that the Plaintiffs lack *locus standi*. They argue that the Plaintiffs are not administrators of the estate of the late Tabitha Ngove and therefore cannot bring a suit on behalf of her estate. I find and hold that the question of *locus standi* is a matter that can be raised preliminarily without resorting to the facts and therefore it is a question of law that can dispose of a suit and therefore fits the description of a preliminary objection set out in the *Mukisa Biscuit case*. See the case of *Daykio Plantations Limited vs National Bank of Kenya Limited & 2 Others [2019] eKLR*.

16. In the case of *Alfred Njau & Others vs City Council of Nairobi [1982] KAR 229*, the court held as follows;

“The term locus standi means a right to appear in court and conversely to say that a person has no locus standi means that the has no right to appear or be heard in such and such proceedings.”

17. Similarly, in the case of *Law Society of Kenya vs Commissioner of Lands & Others, Nakuru High Court Civil Case No. 464 of 2000*, the court held that;

“Locus standi signifies a right to be heard. A person must have sufficiency of interest to sustain his standing to sue in court of law.”

18. In the case of *Mumo Matemo vs Trusted Society of Human Rights Alliance & 5 Others*, the court stated that while the court should not sanction hurdles to access to justice by restricting the definition of locus standi, it should nevertheless not entertain litigation that is hypothetical, abstract or is an abuse of the judicial process.

19. I am clear in my mind that though this court has discretion to strike out a suit that amounts to an abuse of the court process, that discretion should be cautiously and sparingly exercised in exceptional cases bearing in mind that every person has a right to access to justice and the court’s core duty is to determine cases on their merits.

20. In the case of *D. T. Dobie & Company Kenya Limited vs Joseph Mbaria Machira & Another [1980] eKLR*, the court stated as follows;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

21. Similarly, in the case of *Yaya Towers Limited vs Trade Bank Limited (in liquidation) Civil Appeal No. 35 of 2000* the court stated as follows;

“A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant(plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trialIt cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one which was difficult to believe, could be

proved.

22. In the instant suit, I have considered the plaint and note that in paragraph 10 thereof, the Plaintiffs have asserted that the suit property is to be inherited by themselves as well as their siblings as was decided in the succession cause. It therefore appears that the Plaintiffs have a stake in their personal capacities as beneficiaries of the suit property. As was held in the case of ***Law Society of Kenya vs Commissioner of Lands & Others*** [supra] for a person to have *locus standi*, they must have a sufficiency of interest in the subject matter. It is my finding that the Plaintiffs' apparent interest as beneficiaries of the suit property is sufficient interest for them to seek for redress from this court. Therefore they have the requisite locus standi to bring this suit; and their suit is not vexatious or an abuse of the court process.

23. In the premises therefore I find and hold that the preliminary objections dated 24th June 2021 and 29th June 2021 lack merit and the same are dismissed with costs.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Kiluva for the Plaintiffs

Mr. Kimeu for the 1st and 2nd Defendants

No appearance for the 3rd Defendant

No appearance for the Interested Parties

Ms Josphine Misigo – Court Assistant