



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Suit 98 of 2008

**ALPHONCE MASIKA NYUKURI alias ALPHONCE MASIKA KONGENI
NYUKURI &**

**TIMOTHY MUCHINA
CHEGE.....PLAINTIFFS**

VERSUS

THE COMMISSIONER OF LANDS LAND REGISTRAR, KILIFI

THE HON. ATTORNEY GENERAL & 9 OTHERS.....DEFENDANTS

RULING

A Preliminary Objection has been raised by Mr. Ritho on behalf of the plaintiffs regarding the locus standi of the applicant M/s Holborn in this matter.

The Preliminary Objection which has twelve points which are replicate of Preliminary Objection which was raised in HCC 102 of 2008 Marion Musembi and Another V Commissioner of Lands and others – apart from the named plaintiffs, the principal legal issues raised in the Preliminary Objection are exactly the same and are as follows:

(1) Under the Civil Procedure Act Cap 21 section 7, 8, and 68 and also under Civil Procedure Rules Order XXI Rule 88 and 89, the applicant M/s Holborn Properties Ltd, who was registered proprietor of LR Chembe/Kibambamshe/394 on 21st December 2006 long after this suit had been filed in 1997 interlocutory judgment entered on 25th February 1999, 29th March 1999, 24th July 20002 and 14th November 2003 and Preliminary Decree issued on 29th July 2003, is not entitled to be heard in this suit.

(2) M/s Holborn Properties Title Deed, issued on 21st December 2006, based on unconstitutional, illegal and null and void ab initio, Edition II Land Register of L.R. Chembe Kibambamshe/394 opened on 22nd December 1986 when Edition I Land Register of LR Chembe Kibambamshe/394 opened on 30th May 1978 and the first registration under RLA Cap 300 was and still is constitutionally and legally in force.

(3) The applicant M/s Holborn Properties Ltd Title Deed dated 21st December 2006 is among the registration of transactions declared in the Preliminary Decree given on 29th March 1999 and issued on 29th July 2003 to be unconstitutional, illegal and null and void ab-initio, revoked and cancelled and the said Preliminary Decree has not been appealed against in accordance with the Civil Procedure Act Cap 21 section 68 by the parties the defendant's advocates Honourable Attorney General in the suit who the interested party, the applicant is their privies which makes the applicant to be bound by the orders against

the defendants under the doctrine of Res Judicata and Estoppel by judgment, interpartes.

(4)The interlocutory judgment applied for on 15th December 1998 and duly entered on 25th February 1999 and 28th February 1999 and on 29th March 1999 and preliminary decree dated 29th March and issued on 29th July 2003 and also the consent entered between the plaintiff's advocates, M/s S. K. Ritho & Co. Advocate for and on behalf of the plaintiffs and Honourable Attorney General for and on behalf of all the defendants, who include the Honourable Attorney General, dated 3rd December 2004 and 18th February 2005, the Applicant who was only illegally and unconstitutionally registered on 21st December 2006 in secret Land Register Edition II opened on 22nd December 1986 in the name of Government of Kenya and which is not open to public unless with specific written permission of the Chief Land Registrar is granted have no jurisdiction under (Civil Procedure Rules Order XXI Rule 88 and 89 and section 7, 8, and 68 of the Civil Procedure Act Cap 21 and also under doctrine of estoppel by judgment interpartes as expoused in Halsbury's Laws of England 3rd edition vol 15 pg 196 and 197 to apply to set aside or be vacated by the court.

(5)The Applicant, M/s Holborn Properties Ltd, unconditionally and illegally got itself registered in unconstitutional, illegal and nullity Edition II Land Register of LR Chembe/Kibambamshe/394 when the applicant was well aware of Caveat Emptors published on 28th May 2003, 14th April 2005 and 25th February 2008 by M/s S. K. Ritho & Co. advocates in which LR Chembe/Kibambamshe/394 has clearly been stated to be subject to High Court cases, one of which is HCCC No. 3108 of 997 Nairobi and specifically stated that the Land Registrar Kilifi, the Chief Land Registrar and the Commissioner of Lands have been doing illegal transactions with suit lands which include LR Chembe/Kibambamshe/394.

(6)The plaintiff Alphonse Masika Kongeni Nyukuri and his wife's registration in the 1st Edition of Land Register opened on 30th May 1978, under which Land Certificate dated 15th June 1978 was issued is protected by the Constitution of Kenya section 116(1) and, 75, Registered Land Act Cap 300, section 143(1), section 159 and 163, and Commissioner of Lands circular letter no. 113936/55 of 28th May 1986 and Gazette Notice 2505 Lands stated and informed the first plaintiff that the Commissioner of Lands would instruct the Attorney General to file a suit in court and have the court cancel the plaintiff's Land Titles LR Chembe/Kibambamshe/394 and 404 which never happened, but cancellation was done without court orders.

(7)In the absence of court orders between 28th May 1986 and 22nd December 1986, applied for by the Hon. Attorney General under sections 143 and 159 of the Registered Land Act Cap 300, the plaintiffs are not aware of any purported transactions by the Commissioner of Lands, Chief Land Registrar, Permanent Secretary Ministry of Lands and Settlement and officer Administering Settlement Fund trustees hence all such transactions are unconstitutional, illegal, null and void ab-initio and Constitutional Court in HCCC Originating Motion Miscellaneous Application No. 73 of 1989 Nairobi, judgment dated 14-3-02 and judgment in HCCC No. 2387 of 1987 Nairobi and HCC No. 185 of 1987 Nairobi, are very clear that the first registration in the 1st Edition is constitutionally deemed to be the valid registration inspite of the cancellation hence the 1st plaintiff is constitutionally and legally the registered absolute proprietor of LR Chembe/Kibambamshe/394 inspite of the illegal and unconstitutional cancellation and registration of the Government of Kenya on 22nd December 1986 if it happened as indicated and the said registration conferred to the Government of Kenya, including M/s Holborn Properties Ltd, the Applicant, no constitutional known land rights, the first registered proprietor of LR Chembe/Kibambamshe/394 is still by law the registered proprietor and not the applicant M/s Holborn properties Ltd.

(8)The constitutional and legal interest of the applicant M/s Holborn Properties Ltd which is purported to have been registered on 21st December 2006 depend on constitutional, legal land rights which the Government of Kenya, through the Commissioner of Lands, had on 22nd December 1986, when the second Edition Land Register for LR Chembe/Kibambamshe/394 which have already been declared in the Preliminary Decree given on 29th March 1999 and issued on 29th July 2003 to be unconstitutional, illegal, null and void ab initio and there was no application by the defendants who have confirmed the exparte

orders by consent dated 3rd December 2004 and 18th February 2005.

(9) The area where LR Chembe/Kibambamshe/394 is, was adjudicated between 1976 and 30th May 1978 and first registration took place on 30th May 1978 in which the first plaintiff M/s Alphonse Masika Kongeni Nyukuri was the first registered proprietor and in 1997 because of purchaser's interest, the 2nd plaintiff was added up by the first plaintiff as claimant in HCCC 3108 of 1997 Nairobi, now HCCC 98 of 2008 Malindi and that makes this court to have no jurisdiction to interfere with the said first registration which has been confirmed by the preliminary decree given on 29th March 1999 and issued on 29th July 2003 and consent dated 18-2-05.

(10) The applicant M/s Holborn Properties has no locus standi because of the doctrine of Res-judicata, estoppel by Judgment, interpartes, Registered Land Act Cap 300, section 143 (1) 159, 163 and Constitution of Kenya section 75 and 116.

(11) In the absence of orders of court canceling first registration which no court can constitutionally grant because of section 116(1) and 75 of the Constitution and section 143(1) of Cap 300, M/s Holborn Properties is only a trespasser in LR Chembe/Kibambamshe/394 and has no land rights recognizable by the Constitution of Kenya because of the Title Deed issued on 21-12-06, many years after HCCC No. 3108 of 1997 Nairobi was filed and which makes the applicant to be subject to Civil Procedure Act Cap 21 section 7, 8 and 68 and Order XXI Rule 88 and 89.

(12) It is important to note that the signatures of Alphonse Masika Nyukuri and his wife Wilfrider Nasimiyu Nyukuri, dated 28-2-80 transferring LR 394 to Fred Mutai Khaemba are forgeries. Mr. Ritho therefore urges that the application dated 7-11-08 should be dismissed.

The Preliminary Objection is opposed on basis that grounds 1,2,3,4,5,6,7,8,9,10,11,11+12 revolve on pleadings and material facts and that the grounds assume improperly, that all the pleadings by plaintiff are correct and undisputed.

At the hearing of the application, Mr. Ritho reiterated the contents of the notice of Preliminary Objection revolving around locus standi, Res Judicata, estoppel by judgment and the provisions in the Constitution of Kenya. It is his submission that title held by the plaintiffs are absolute upon first registration and that there was another land register showing that the proprietors were leaseholders and the applicant's reliance on any other subsequent register is unlawful and void. Mr. Ritho's argument is that plaintiff took the Commissioner of Lands to court, got an interlocutory judgment and decree and subsequently obtained consent orders with regard to the Attorney General and the suit was filed in 1987, long before the application was registered.

Applicant was registered – that is why he invokes section 8 of the Civil Procedure Act. His argument is that plaintiffs have judgment against the vendor and applicant is bound by all that was decided against the head Title referring to the case Loita V Tanki and others (2003) 2EA – that anyone who has a title given by Commissioner of lands, then anyone else is bound by the rights of the head Title Holder i.e Government of Kenya and Commissioner of Lands.

Yet these consents are being challenged and that is why applicant who was not even registered as at the time the suit was filed in 1987 says he is aggrieved by those consents because in tracing his title backwards, a meeting point melts at the consent.

Mr. Ritho also asks this court to consider principles used in the case of Kali Dayal V Umesh Prasad Indian Law Reports Vol 1 pg 174 on the doctrine of Estoppel and Res Judicata. That case held at pg 188 that “*a person claims through or under another when he derives his title through that other either by assignment, inheritance or succession or when he holds a subordinate title granted by the other; and except in cases specially provided by the statute or common law, he can have no better title than the person through or under whom he claims. In my opinion....the suit should be dismissed*”

This argument falls almost on all fours with what Mr. Ritho is raising except that a careful reading of the entire decision discloses at pg 1186 that there are exceptions to the general rule which may arise by statute and my comprehension is that even under the much cited Registration of Lands Act, the first registration may be challenged.

Mr. Maosa's response is that the preliminary objection is misconceived as it raises matters which are factual in nature and presumptions are being made that those facts are correct. It is argued that in fact the preliminary objection is not on points of law and is caught up by the case of Mukhisa Biscuits v West End Distributors.

Mr. Maosa explains that the applicant has not come to court because he is a Title holder, but rather because he is aggrieved by an order of this court and based in order 44, Civil Procedure Rules and section 80 Civil Procedure act, any person aggrieved by orders of the court can apply for review and so the applicant is properly before this court – he has referred to the decision in Sardra Mohamed v Chanan Singh 1959 EA pg 764 to support his argument that the issue of locus standi does not arise.

Mr. Maosa has also referred to the decision in Njoroge v Mbuti (1986) KLR pg 519 at 520 holding No. 2, and argues that one need not be a party to a suit so as to move the court under Order ILIV for review. He explains that the question of capacity is discussed in the case of Hussein v Kizza (1985) – 1982) 2A. He points out that the Preliminary Objection is out of line and legal provisions such as section 8 Civil Procedure Act is irrelevant as applicant has not instituted any other suit.

As for Res Judicata, Mr. Maosa points out that they are not talking about a former suit but rather they are in a suit where there are decrees which they are complaining about.

Does this Preliminary Objection offend the principles upon which a preliminary objection can be raised? In the Mukhisa Biscuits v WestEnd Distirbutors Ltd (1969) EA 969 at pg 700, Law JA stated:

“So far as I am aware, preliminary objection consists of point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary objection, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or submissions that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration”

This was further expounded by Sir Charles Newbold at pg 701.

“...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 preliminary objection herein raises many issues, some are points of law, such as locus standi, estoppel by judgment, Res Judicata and provisions under Order XXI Rule 88 and 89. But there are also issues of fact raises such as the use of the second Edition Register when 1st Edition Register was still in existence, the effect of a letter written by Commissioner of Lands, the alleged forged signatures – those are issues of fact which cannot be included in a preliminary objection and I doubt that it is the duty of this court to try and sieve out fact from law – the position is that once presented as a “mixed grill”, this court must consider the Preliminary Objection as a whole – both law and fact raised and in so doing, it will offend the test anticipated in the Mukhisa Biscuits (infra) case.

There is a lot of repetition in the Preliminary Objection almost to the point of sounding like some religious refrain and with all due respect is counsel, some of those paragraphs add no value to the preliminary objection and only makes it a mouthful.

So does the applicant lack locus to participate in the application dated 7-1-08?

The applicant is not a party to this suit and has not sought to be enjoined as an interested party. However

Mr. Maosa explains that applicant is aggrieved by the injunctive orders issued by this court, which orders have adversely affected the applicant.

Section 80 of the Civil Procedure Act provides that:

“Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred...may apply for review of”

Order XLIV Rule 1(1) repeats the same provision.

What then this suggests is

- (1) that the aggrieved party need not necessarily be a party to the suit and
- (2) from a reading of the application dated 7-1-08, what is being challenged is not only the decree passed in Nairobi, but also the orders of injunction issued by this court in 2008.

Is the applicant a busy body who should not be given a chance to come to court under provisions of section 80 Civil Procedure Act and Order XLIV Civil Procedure Act? I think what this court must consider is whether the resultant order is a source of legitimate grievance to the applicant, and that can only be done by hearing the application and thus giving the applicant a chance to explain why although he is not a party to the suit, his prayer should be granted – to go into details of whether the order complained of affects him at this stage, would in my opinion be prematurely dealing with the pending application suffice it to say that applicant has explained its grievance and I think gives it the locus to move this court under Order XLIV and section 80.

The fact of whether applicant has locus standi in this matter to my mind is addressed by the decision in Njoroge V Mbiti (1986) KLR pg 519 as to who is an aggrieved party and whether such a party must be a party to the suit – who has capacity to bring an application for review. In Njoroge’s case, the applicant was neither a party to the suit, nor an administrator on execution of the deceased’s estate yet he claimed to have an interest to preserve the deceased’s estate as the sole heir. One would have regarded him as a busy body since in fact the deceased was his uncle; yet he was deemed to have the locus standi to file for review as an aggrieved party.

Holding No. 2 is that decision was in the effect that:

“On the other hand, a wider discretion is provided in bringing applications for review under section 80 of the Criminal Procedure Act and Order XLIV of the Civil Procedure Rules, both of which do not make reference to the term “parties in suit”, probably because it is desired to cater for persons who have no right of appeal.”

There is also the aspect of provisions of the Registration of Lands Act section 143 and 159 – which recognize that first registration gives absolute proprietorship to an individual. Yet there is absolutely nothing unconstitutional about challenging that first registration and indeed the case of Esiroyo V Vesiroyo and Isaaka Wainaina V Murito Wa Indagara comprehensively address this aspect.

The same applies to consents – the fact that a consent was entered by parties does not make the matter Res Judicata because it is recognized that there are instances where consent entered by parties can be challenged and even set aside – I can do no better than refer to the decision in Flora Wasike v Destimo Wamboko (1988) KLR pg 429.

This matter is fraught with a lot of shifting position, titles being cancelled, promises purportedly being made by the Commissioner of Lands who then reneged, consents being entered, which are being said to be irregular and really the cure does not lie in shutting out parties, the cure lies in allowing all parties affected in this matter to ventilate their issues and assist the court in arriving at a fair decision. I therefore find that the preliminary objection is not merited and is dismissed.

Obiter we seem to be going round in circles, apparently there are 70 other matters related to this one, I have so far dealt with 43/08, 102/08, 83/08 and 84/08 – the ruling in this one greatly resembles the ruling in 102/08, even the wording – that is deliberate, because I think counsel are also trying to vex the court, arguing the same issue over and over again in different files until one gets the feeling of meja' vu – that is not helpful. I therefore direct that all matters related to this one be brought before this court on a date to be communicated to all counsel involved, so that we can sort out the matter which have a common ground and have one as a test suit.

I award costs in the preliminary objection to the respondents.

Delivered and dated this 17th day of July 2009 at Malindi.

H. A. Omondi

JUDGE

Mr. Mouko holding brief for Ritho for plaintiff

No appearance for defendants

Mr. Maosa for applicant