



Nyamobite Farmers Co-operative Society v Chief Land Registrar & 5 others (Civil Suit 130 of 2020) [2022] KEELC 15160 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15160 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 130 OF 2020
OA ANGOTE, J
NOVEMBER 24, 2022**

BETWEEN

NYAMOBITE FARMERS CO-OPERATIVE SOCIETY PLAINTIFF

AND

**CHIEF LAND REGISTRAR 1ST DEFENDANT
ATTORNEY GENERAL 2ND DEFENDANT
SAMSOM REALTORS LIMITED 3RD DEFENDANT
SAMWEL ONDIEKI MARAK 4TH DEFENDANT
DAVID NYARIBO MASEGEGE 5TH DEFENDANT
JOSIAN OYARO ONCHERA 6TH DEFENDANT**

RULING

1. This ruling is in respect of two preliminary objections dated February 9, 2021 and the March 1, 2021. The preliminary objection of February 9, 2021 was filed by the 3rd defendant is with respect to the application of July 13, 2020. In the said preliminary objection, the 3rd defendant has averred as follows:
 - i. That the application falls short on the doctrine of *res judicata* under section 7 of the [Civil Procedure Act](#) as there is a suit on the same subject matter involving similar parties wherein parties filed a consent that was adopted as the order of the court.
 - ii. That the deponent of the supporting affidavit filed by the plaintiff is improperly in office and therefore has no *locus standi* to swear, sign documents or act as a representative in any suit on behalf of the society.
 - iii. That the application is an abuse of court process.



- iv. That the application is therefore incompetent and the same ought to be struck out and dismissed.
2. In response to the preliminary objection of March 9, 2021, the plaintiff filed grounds of opposition on March 8, 2021 stating that;
 - i. The objections do not meet the threshold of a preliminary objection set out by Sir Charles Newbold in [Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd](#) (1969) EA 696.
 - ii. Res judicata is a matter in pleadings and can only be raised at trial and not during interlocutory proceedings.
 3. The 4th-6th defendants filed a preliminary objection dated March 1, 2021 seeking to have the application and the entire suit struck out with costs and the orders issued on January 28, 2021 vacated for the following reasons;
 - a. The suit and application herein offend the mandatory provisions of order 4 rule 1(4) of the [Civil Procedure Rules](#) - persons portending to represent the plaintiff have no authority.
 - b. The suit and application herein offend the mandatory provisions of order 1 rule 13-persons pretending to have the plaintiff's authority have not filed and served that authority.
 - c. The suit and application herein offend the mandatory provisions of section 28(3) of the [Co-operative Societies Act](#)-the persons pretending to represent the plaintiff are not committee members of the plaintiff.
 - d. The exhibits in the application herein offend the mandatory provisions of section 9 and 10 of the [Oaths and Statutory Declarations Rules](#)-they are not securely sealed under the seal of the commissioner nor are they marked with serial letters of identification and;
 - e. The orders herein offend the mandatory provisions of order 40 rule 4 (3)-neither the application nor orders herein were served upon the 4th-6th defendants/respondents 3 days of their being issued.
 4. The 3rd defendant's counsel submitted that the court in [David Karobia Kiiru v Charles Nderitu Gitio & another](#) [2018] eKLR observed that a preliminary objection must be on a pure point of law; that preliminary points should be capable of disposing the matter without the court having to resort to ascertaining the facts and that in the present circumstances, the preliminary objection is anchored on the fact that there was another case being ELC Miscellaneous E050 of 2020 with the same parties seeking similar orders as those in the current case.
 5. It was submitted that the plaintiff herein was the 5th respondent in the aforesaid matter and was not opposed to the adoption of the order as a consent of the court and that in the circumstances, the present suit is *res judicata* as set out in section 7 of the [Civil Procedure Act](#) and illustrated by the court in [Diocese of Eldoret Trustees \(Registered\) v Attorney General \(On Behalf of the Principal Secretary Treasury\) & another](#) [2020] eKLR and [George Omondi v National Bank of Kenya Limited & others](#) [2001] eKLR.
 6. It was submitted that a court order issued on November 2, 2018 in HCCC No 1 of 2018 restrained the Commissioner of Co-operative Societies from removing the 4th -6th defendants from the Management Committee of the Society pending determination of the suit, which orders are still in force and that the purported new appointments are irregular.



7. According to the 3rd defendant, it is apparent that the deponent of the affidavit had no locus to swear the affidavit and in any event appears to be unsure of the position he holds in the society, either as a secretary manager or chairman of the plaintiffs' committee and that as affirmed by the cases of Mumo Matemv v Trusted Society of Human Rights Alliances & 5 others [2014] eKLR, *locus standi* is a point of law touching on the courts jurisdiction and must be determined at the earliest opportunity.
8. It was submitted that the plaintiff's application and suit constitute an abuse of court process and is liable to be struck out pursuant to order 2 rule 15 (1)(d) of the Civil Procedure Rules and that the 4th-6th defendants' preliminary objection of March 1, 2021 is merited because the suit offends the mandatory provisions of order 4 rule 1(4) of the Civil Procedure Rules and section 28(3) of the Co-operative Societies Act.
9. It was submitted that the plaintiff also offended the mandatory provisions order 40 rule 4(3) of the Civil Procedure Rules, 2010 which provides that where ex-parte orders are issued, the same ought to be served on the opposite party within 3 days and that in this case, the orders issued on January 27, 2021 were only served on February 16, 2021.
10. None of the other parties filed submissions.

Analysis and Determination

11. Having analyzed the pleadings and submissions by the parties, the issues that arise for determination are;
 - a. Whether the preliminary objections are competent and if so,
 - b. Whether they are merited?
12. The plaintiff's application seeking for an interlocutory prohibitory injunction restraining the 1st, 3rd and 6th defendants from interfering with land title IR 5074/1 (suit property) pending the hearing the determination of the application. The suit on the other hand is seeking, inter alia, for permanent injunctive orders to restrain the 1st, 3rd, 6th defendants from dealing with the suit property and an order compelling the Registrar to rectify the register by cancelling the registration of the transfer of title to the Defendants.
13. The objections to the application are primarily on locus of the deponent to swear the affidavit in support thereof or act as a representative of the plaintiff in any capacity, res judicata, the failure to mark exhibits in line with sections 9 & 10 of the Oaths & Statutory Declarations Act and the fact that the orders of January 28, 2021 were not served upon the defendants within the requisite 3 days. With respect to the suit, there is an objection as to locus in so far as the person representing the plaintiff has allegedly no authority either in his individual or representative capacity.
14. As correctly stated by the 3rd defendant, the threshold of a preliminary objection was set out by the Court of Appeal in the locus classicus case of Mukhisa Biscuits Manufacturing Co Ltd v West End Distributors (1969) EA 696 at 700 wherein Law, JA stated that;

“...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.”



15. In the same case, Newbold, P further held as follows:

“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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”

16. The Supreme Court in the case of *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others*, Petition No 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa case stating by stating as follows:

“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 ... 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’.”

17. Locus standi denotes the right to bring an action or to be heard in a given forum. It is trite that lack of requisite capacity to bring a suit or indeed an application goes to the root of the matter and without locus standi they cannot stand. This was expressed by the court in the case of *Priscilla Jesang Koech v Rebecca Koech & 3 others* [2018] eKLR, where the court stated as follows;

“Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of *BV Law society of Kenya v Commissioner of Lands & Others*, Nakuru High Court, Civil Case No 464 of 2000. It was held that:

If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily.”

18. According to the 3rd Defendant, it is apparent that the deponent of the Affidavit had no locus to swear the Affidavit and that in any event, he appears to be unsure of the position he holds in the Society, either as a Secretary Manager or Chairman of the Plaintiffs’ committee.

19. Locus standi is defined by the *Black’s Law Dictionary*, 9th Edition at page 1026 as-

“The right to bring an action or to be heard in a given forum.”

20. The court in the case of *Alfred Njau & others v City Council of Nairobi* (1982) KAR 229, defined *locus standi* thus;

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



21. More recently, the court in the case of *Sisilia Nyakoe & another v Attorney General & 4 others* [2021] eKLR stated;
- “It is clear that locus standi is the right to appear and be heard in court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he or she cannot be heard even on whether or not he has a case worth listening to.”
22. The plaintiff herein is a Co-operative Society which is a body corporate pursuant to the provisions of section 12 of the *Cooperative Societies Act*, cap 490 which provides as follows:
- “Upon registration every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold movable and immovable property of every description, to enter into contracts, to sue and be sued and to do all things necessary for the purpose of, or in accordance with its by-laws”.
23. Section 27(1) of the same *Act* states as follows:
- “The supreme authority of a co-operative society shall be vested in the general meeting at which members shall have the right to attend, participate and vote on all matters.”
24. Section 28 of the *Act* provides for membership and powers of the committee and states;
- “(1) Every co-operative society shall have a Committee consisting of not less than five and not more than nine members.
- (3) The Committee shall be the governing body of the society and shall, subject to any direction from a general meeting or the by-laws of the co-operative society, direct the affairs of the co-operative society with powers to—
- (a) enter into contracts;
- (b) institute and defend suits and other legal proceedings brought in the name of or against the co-operative society; and
- (c) do all other things necessary to achieve the objects of the co-operative society in accordance with its by-laws.”
25. What arises from the foregoing is that the authority to institute pleadings is vested with the committee of the society, which in turn gets directions in that regard from the general meeting or the by-laws of the society.
26. The court has considered the pleadings. The suit was filed by the Plaintiff in its name and the Verifying Affidavit thereto sworn by one Stanley Michira Kibore who described himself as “the Secretary Manager of the Plaintiff.” However, in the Supporting Affidavit, the Plaintiff has described himself as the Chairman of the management Committee of the Plaintiff and competent to swear the affidavit.
27. No authority has been attached to the Verifying Affidavit or the Supporting Affidavit by the deponent in terms of Section 28 above. The averments in support of the application have also been sworn by Mr Stanley Michira who indicates that he is the Chairman of the Society. Here too, there is no indication of any authority from the general meeting or by laws.



28. From the pleadings of the Plaintiff, it is not clear to this court whether the person swearing the Verifying Affidavit and the Supporting Affidavit is the Chairman of the Plaintiff or its secretary
29. Apart from section 28 of the Cooperative Societies Act aforesaid, Order 4 Rule 1(4) of the Civil Procedure Rules states as follows :
- “Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”
30. And Order 4 Rule 1(6) states:
- “The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”
31. It is apparent that the provision of Order 4 of the Civil Procedure Rules had not been complied with. The question of the impact of failure to file authority in terms of Order 4 Rule 1(4) of the Civil Procedure Rules was discussed by the Court of Appeal in Spire Bank Limited vs Land Registrar & 2 others [2019] eKLR, which interpreted the law thus:
- “It is essential to appreciate that the intention behind order 4 Rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. The company’s seal that is affixed under the hand of the directors ensured that they were aware of, and had authorized such proceedings together with the persons enlisted to conduct them. And where evidence was produced to demonstrate that a person was unauthorized, the burden shifted to such officer to demonstrate that they were authorized under the company seal. With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”
32. The Court will be guided by the same. The mere fact that the deponent did not file authority from the Plaintiff authorizing the swearing of the Verifying Affidavit to file the suit on its behalf or in the Supporting Affidavit, cannot be a ground for invalidating the suit.
33. This is especially so in light of the fact that the application and indeed suit are yet to proceed to full hearing and considering that this is an issue which can be rectified before trial. That being the position, the objection fails.
34. It is claimed that the Application is res judicata ELC Misc E050 of 2020 which has similar parties, similar issues and was settled by way of consent. Indeed, this is a question which if answered in the affirmative is potentially dispositive. However, how is the Court to make a finding on whether or not a matter is res judicata?
35. It must of course consider the relevant pleadings, which pleadings cannot be adduced by way of a Preliminary Objection. It is noted that the consent in ELC E050 of 2020, has been attached to a Replying Affidavit and forms part of the record. It is however insufficient for purposes of determining the nature of the case in ELC Misc E050 of 2020. The issue of whether this suit is res judicata therefore requires factual interrogation of the pleadings thus pushing it outside the limb of a Preliminary Objection.



36. The next issue is the legal effect of the failure to seal and serialise exhibits. Rules 9 and 10 of the *Oaths and Statutory Declarations Rules* made under the *Oaths and Statutory Declarations Act* provides as follows:

“All exhibits to affidavits shall be securely sealed thereto under the seal of the Commissioner, and shall be marked with serial letters of identification.

“The forms of jurat and of identification of exhibits shall be those set out in the Third Schedule.

37. As aforesaid, the obtaining situation herein is that the annexures have merely been marked but not attested to nor signed and sealed by the Commissioner of Oaths. So what is the legal effect thereof? This question arose in the case of *Musikari Nazi Kombo v Moses Masika Wetangula and 2 others* [2013] eKLR where the Court aptly expressed thus;

“1. The legal requirement relating to securely sealing and marking exhibits in an affidavit entailed a substantive legal act within the context of the production of evidence and the admissibility of evidence, and it was not a legal technicality. The requirement would serve to ensure that only proper documents were placed before the Court and admitted in evidence.

2. Allowing documents brought in an improper and inappropriate manner to form part of the Court’s record would prejudice the administration of justice and it would also go against the Law of Evidence as it would defeat the aims of safeguarding the fairness of the trial process.

3. The document titled “Principal Register of Voters PRV” and annexed to the Petitioner’s further affidavit was not securely sealed and marked with serial letters of identification as required by Law. As there was no basis laid in the further affidavit for its introduction as an annexure and its sources were unknown, the document was inadmissible.”

38. The Court in *Solomon Omwega Omache & another v Zachary O Ayieko & 2 others* [2016] eKLR stated as follows;

“Although the point was not taken up by the plaintiffs, the Court has a duty to uphold the sanctity of the record noting that this is a Court of record. Before the Court is a replying affidavit with annexures which are neither marked nor sealed with a Commissioner’s stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and that renders the replying affidavit incomplete and the same is also for rejection as without the annexures it is valueless. This should serve as a wake up call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them or their clients as crucial evidence could be excluded owing to Counsels or their assistants lack of attention and due diligence.”

39. The Court agrees with the above sentiments. Failure to properly mark, seal and attest to the exhibits go to the root of the propriety of the evidence which goes to the substance of the application. This, the court opines, is not a matter curable by article 159 and in this respect I reiterate the statement by Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR wherein he stated:

“... I am not in the least persuaded that article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever



meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

40. Having found that the exhibits attached to the Affidavit in support of the Application of July 13, 2020 contravene section 9 and 10 of the *Oaths and Statutory Declarations Act*, the same are hereby expunged from the record. The ripple effect of this is that the Affidavit being unsupported has no probative value and the Application has no foundation.
41. In light of the foregoing the court makes the following final determination;
- i. The preliminary objection of February 9, 2021 fails and is dismissed in its entirety.
 - ii. The preliminary objection of March 1, 2021 partly succeeds to the extent that the application dated July 13, 2020 be and is hereby struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

OA ANGOTE

JUDGE

In the presence of;

Ms Lusweli holding brief for Saad for 3rd Defendant

Ms Okinyi for Anyoka for Plaintiff

Mrs Lusweli for Mbuthia for 4th – 5th Defendants

Court Assistant - June

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