Kobe v Land Registrar Kilifi (Miscellaneous Application 17 of 2022)
[2022] KEELC 15394 (KLR) (19 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15394 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS APPLICATION 17 OF 2022

EK MAKORI, J

DECEMBER 19, 2022

BETWEEN

ELIAS KATANA KOBE ..... APPLICANT

AND

LAND REGISTRAR KILIFI ..... RESPONDENT

RULING

1. A Miscellaneous Application filed herein seeks to have the Land Registrar Kilifi be pleased to reconstruct the file for land title No Chembe/Kibabamshe/400 - with attendant costs.

2. The Attorney General has raised a Preliminary Objection in the following manner: -

    a. The Honourable Court lacks jurisdiction to hear the matter.

    b. The applicant has no *locus standi* to institute this suit.

3. In the supporting affidavit to the application, the Applicant contends that the National Land Commission had directed the Land Registrar Kilifi to regularize the file title No Chembe/ Kibabamshe/400, in an attempt to have the title in his favour, the file could not be traced at the Land's Office hence the current application.

4. The Attorney General has filed grounds in opposition to the application citing among other concerns that – the Applicant lacks *locus standi*, to bring the application and any other suit regarding the subject matter. There exists a pending dispute over the same subject matter before the National Land Commission, regarding the suit property. The Applicant does not have any interest in the suit property; if any, it has not been disclosed. There are no records regarding the suit property at the Land Registry Kilifi. The orders sought therefore cannot be capable of execution.

5. The court directed that the Preliminary Objection and the application be heard simultaneously and parties file written submissions. The AG did. The Applicant did not.

6. The issues that fall for determination are whether the Preliminary Objection is sustainable, on the following fronts – whether the Applicant has locus standi to institute this suit. Whether the filing of the application is premature and running contra the doctrine of exhaustion. Whether the orders sought are enforceable.

7. On *locus standi* The AG submits that the Applicant has failed to show the proprietary interest he has concerning the suit property to merit the orders sought. The case of *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR is cited where the court held;

> " ...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general." (Emphasis added)

8. On the doctrine of exhaustion, the AG submits that several people excluding the applicant wrote to the National Land Commission as per the letter dated April 3, 2014, to which they sought to complain about the ownership of the parcels of land including parcel Chembe/Kibabamshe/400. The National Land Commission wrote to the Land Registrar on April 3rd, 2014. The applicant lied to this court that the letter was to order the Land Registrar to regularize the mentioned parcels by reconstructing the same. That is far from the truth. The letter is very clear that the concerned parties were to submit documents to the National Land Commission to prove ownership.

9. The Applicant tendered no evidence to show that the issue was determined by the National Land Commission and as such relying on what has been tendered before the court can confidently be said that the matter is still pending within the internal dispute resolution mechanisms of the National Land Commission. This Honourable Court should therefore not take away the food from the mouth of the National Land Commission.

10. The AG relied on the case of Secretary, *County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR where the Court of Appeal stated:

> " Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

11. The AG further submits that it would have been prudent to allow the National Land Commission first exhaust its internal dispute resolution mechanisms before this Honourable Court can entertain any application on the same issue. Perhaps upon the conclusion of the National Land Commission's investigation, there might be no need for the application before this court. This application is thus premature and should be dismissed.

12. On the futility of the orders sought, The AG submits that Section 33 of the *Land Registration Act* provides that the Land Registrar has powers to reconstruct any lost or destroyed land register. However, there is a clear procedure to be followed, and even if this court issues orders for the reconstruction of the file as prayed by the applicant, the same will be in vain. It is a requirement that before a file in the land registry is reconstructed, the registered owner prepares a deed of indemnity. The deed of indemnity is to indemnify the Government and the Ministry of Lands in case of any transaction altering the status of the original file. The provisions of Section 81(1) of the *Land Registration Act* further buttresses

the need for the Government to be indemnified in case of wrongful reconstruction. The applicant as stated is not the registered owner of the suit land. The issue is even more complicated further, as there is a dispute before the National Land Commission hence it cannot conclusively be stated who is the registered owner of the suit land. However, it can be said that the applicant is not the registered owner and has no iota of interest in the suit land. This suit is premature as stated above and its only fate follows that it is ripe for dismissal.

13. The Applicant did not file any submissions having been granted sufficient time to do so.

14. The issues to decide are whether the Prelimary Objection raised meets the threshold and parameters enunciated in *Mukisa Biscuits Manufacturing Co Limited Vs West End Distributors Limited* [1969] EA 696.

15. The Mukisa Biscuits Case has been applied with approval by our courts in so many other cases for instance in the case of *Gladys Pereruan v Betty Chepkorir* [2020] eKLR, Hon Justice Githinji, quoting several other authorities on the same subject matter held as follows: -

> " The purpose of a preliminary objection was broadly discussed in *Charles Onchari Ogoti v Safaricom Ltd & Anor* [2020] eKLR as follows:
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> "[9] This court is aware of the leading decision on Preliminary Objections where the Court of Appeal for East Africa, then the highest court for purposes of this jurisdiction and the others in East Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*. (1969) EA 696, where Law JA and Newbold P (both with whom Duffus V P agreed), respectively at 700 and 701, held as follows:
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> Law, JA.:
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> "So far as I am aware, a Preliminary Objection consists of a pure 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 on 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."
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> Newbold, P.:
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> "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 increase costs and, on occasion, confuse the issues. This improper practice should stop."
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> [10] The Supreme Court of Kenya, now the highest court in the land has broadly confirmed and extended, the nature and scope of Preliminary Objections in cases discussed below, and its decision thereon is binding on this court and all courts below it by virtue of Article 163 (7) of the *Constitution* of Kenya 2010.
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> (11) In the case cited by the 1st Respondent, *David Nyekorach Matsanga & Another v Philip Waki & 3 Others* [2017] eKLR, the three-judge bench of the High Court (Lenaola, J (as he then was), Odunga and Onguto, JJ) after

considering various holdings of the Supreme Court of Kenya on the question of Preliminary Objection held as follows:

"We quickly turn to the question of whether we have before us a Preliminary Objection proper. Traditionally, the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 has been the watershed as to what constitutes Preliminary Objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it 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."

In *Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court 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"

The preliminary objection if allowed may dispose off the entire suit without allowing parties to be heard. This has to be done with caution that the court has a duty to hear all parties and determine the case on merit. In addition, this court has also a duty to safeguard itself against abuse of its process.

The court is guided by Order 2 rule 15 of the *Civil Procedure Rules* on when a suit can be struck out as provided below:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous, or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

16. The Preliminary Objection has raised germane issues as to whether the Applicant is possessed with the necessary locus standi to bring up this matter, the doctrine of exhaustion, and whether the orders sought will be futile based on the averments we have.

17. Looking at the affidavit in support of the application, I will agree with the AG that the Applicant has not clearly stated his claim concerning the suit property. His proprietary interest against the whole world has not been *prima facie* properly pleaded and set out in his averments to warrant the orders

sought. The authority cited by the AG - *Khelef Khalifa El-Busaidy v Commissioner of Lands & 2 others* [2002] eKLR Onyancha J held as follows: -

> "...for an individual to have a locus standi, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general." (emphasis added)

18. The Applicant has failed to disclose his interest in the suit property, whether he is acting alone or in a representative capacity with others. The affidavit in support of the application is scanty. It does not properly set out his stake on the suit property.

19. The most significant issue to me in the Preliminary Objection, is the question as to whether the Applicant has exhausted the avenues available for redress as set out by the law to address his grievances before moving to this court. On the reconstruction of a land register, a clear regime is set under Section 33 of the *Land Registration Act*:

> 33.
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> (1) "Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a duplicate certificate of title or certificate of lease and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.
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> (2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed.
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> (3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and any two local newspapers of nationwide circulation, the Registrar may issue a duplicate certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.
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> (4) If a lost certificate of title or certificate of lease is found, it shall be delivered to the Registrar for cancellation.
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> (5) The Registrar shall have powers to reconstruct any lost or destroyed land register after making such inquiries as may be necessary and after giving due notice of sixty days in the Gazette."

20. That legal regime is further buttressed under Section 81 of the Act, which provides for indemnity in case one incurs a loss of any interest in land in the process of reconstruction of the land register. However, such indemnity is not available if the loss is occasioned by whoever who applies for the reconstruction of the said register in gratuity.

21. The Attorney General further argues that the matter is still active before the National Land Commission involving several other parties who have expressed interest in the land in question, the National Land Commission did not authorize the Land Registrar to reconstruct the register. As

correctly submitted by the AG quoting the case of *Secretary, County Public Service Board & another v Hulbhai Gedi Abdille* [2017] eKLR: -

> " Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such a party ought to seek redress under the other regime. In the case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, this Court emphasized-
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> "....In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the *Civil Procedure Rules* cannot oust clear constitutional and statutory provisions...."
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> Similarly, in the case of *Republic v National Environment Management Authority ex parte Sound Equipment Ltd*, [2011] eKLR, this Court observed:-
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> ".....Where there was an alternative remedy and especially
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> where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

22. Having considered the quoted authorities, I am satisfied that the Applicant has not fully exhausted all the available Alternative Justice System mechanisms to address his grievances as provided by law before moving this court. The instant application raises issues that are moot before the National Land Commission and the Land Registrar. Those are the appropriate forums to be.

23. In the end, I find the Preliminary Objection has merit. It is upheld with the net effect that the pending application fails in limine and is hereby dismissed in its entirety with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI THIS 19TH DAY OF DECEMBER, 2022.

E.K.MAKORI

JUDGE