



**Kama Upepo Limited & another v Mutie (Environment & Land Case E046 of 2022) [2022] KEELC 15389 (KLR) (9 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15389 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E046 OF 2022**

**AE DENA, J**

**DECEMBER 9, 2022**

**BETWEEN**

**KAMA UPEPO LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**ELIZABETH STOCKER ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BRUCE MUTUKU MUTIE ..... DEFENDANT**

**RULING**

1. The firm of Munyao Muthama & Kashindi Advocates instituted this suit on behalf of the Plaintiffs by way of plaint dated October 24, 2022. It is pleaded that the is the 1<sup>st</sup> plaintiff is the registered proprietor of parcel no Kwale/Diani Beach Block/1609 where it has constructed the Umbi Complex comprising of 27 units of shops and apartments. The units are sold under subleases registered against the mother title to various individuals. It is stated that the 2<sup>nd</sup> Plaintiff owns 10 of the units while the 1<sup>st</sup> plaintiff being the head lessor retains the management of the complex. With the plaint was filed a Notice of Motion application under certificate of urgency seeking orders of injunction against the defendant restraining the him from interfering with the 1<sup>st</sup> Plaintiff's peaceful management of the common areas and provision of services such as utilities over the Umbi Complex. The Plaintiffs further seek for orders restraining the defendant from interfering with their enjoyment and use of the 10 units.
2. In response to the suit the defendant filed a preliminary objection dated 8/11/2022 and which is subject of this ruling. The same is premised on the grounds that;
  1. This honourable court lacks jurisdiction to hear and determine this matter.
  2. The issues raised herein by the Plaintiffs are matters in the realm of management and provisions of services in the property and not on the ownership or indeed use of the land



3. That there is no dispute between the parties over ownership of the land and the invitation of this honourable court by the plaintiffs into the arena of conflict is misconceived and a grave misdirection.
3. The defendant also filed grounds of opposition on 9/11/2022 as follows in response to the application.
  - a. That the application is frivolous, vexatious and an abuse of the court process.
  - b. That the application and indeed the suit is bad in law having been instituted by the 1<sup>st</sup> Plaintiff a company that the 2<sup>nd</sup> Plaintiff acquired fraudulently through a criminal enterprise.
  - c. That the 2<sup>nd</sup> Plaintiffs fraudulent and criminal acquisition of the 1<sup>st</sup> Plaintiffs company is pending investigations at the directorate of criminal investigations Ukunda office under OB No 74/25/06/2022.
  - d. That the plaintiffs have come to a court of equity with unclean hands, seriously soiled and tainted by involvement in fraud and forgery of the 1<sup>st</sup> Plaintiffs transfer of shares, board resolutions and the use of dead past directors of the 1<sup>st</sup> plaintiff
  - e. That the application has got nothing to do with the 2<sup>nd</sup> Plaintiffs ownership of the respective sub lease interests but grievances related to the management of the property a task legally donated to the 1<sup>st</sup> Plaintiff company.
  - f. That the application is bad in law having been filed in a court devoid of jurisdiction.

### **Submissions**

4. The preliminary objection was canvassed by way of oral submissions on 14/11/22. Mr. Waweru urged that the matters raised were commercial and did not relate to use of land and or title thereto. That all attached documents related to disconnection of water and electricity. The defendant urged that the suit be struck out. The Mr. Kariuki for the plaintiffs submitted that the ELC had jurisdiction to redress denial, violation, infringement or a threat emanating from ownership and use of land. That the argument that the dispute was commercial cannot stand by dint of Section 13 (2)(d) of the [ELC Act](#). That the plaintiffs had approached the court to assert to seek protection of their property and enjoyment under article 40,42, 70 of [the Constitution](#) and therefore the jurisdiction of the court is conferred under article 162. In rejoinder Mr. Waweru urged that the sec 13(2) was not available to the plaintiff since the issues listed therein are not commercial.
5. Pending the ruling on the objection orders No. 2 and 4 of the application were allowed by consent effectively restraining the defendant from interfering with the 1<sup>st</sup> Plaintiff's management of the Umbi Complex and the 10 units belonging to the 2<sup>nd</sup> plaintiff.

### **Analysis And Determination**

6. The supreme court in the case of [Hassan Ali Jobo & Another v. Suleiman Said Shabbal & 2 others](#), Petition No. 10 of 2013, [2014] eKLR stated that a preliminary objection may only be raised on a 'pure question of law'. In order to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed. It is the defendant's case that the 2<sup>nd</sup> Plaintiff herein acquired the 1<sup>st</sup> Plaintiff company through fraud and forgery and that the matter is still pending investigation by the police and provided the particulars of the OB. The 2<sup>nd</sup> plaintiff in her supplementary affidavit filed before court states at paragraph 3 that the fraud allegations are unsubstantiated and that the acquisition of the 1<sup>st</sup> Plaintiff company is not subject of this suit. The 2<sup>nd</sup>



plaintiff avers that she managed to purchase a part of the property when the defendant was a tenant of the same. Clearly these are issues of fact that can only be established upon a substantive interrogation of evidence from both parties. They are being disputed by both parties. While issues of law have been raised, there are also disputed issues of facts between the parties herein. On this limb alone, the preliminary objection falls short of the requisite threshold.

7. Article 162(2) of *the Constitution* established the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. The jurisdiction of this court further flows from the provisions of Section 13 (1) of the *Environment and Land Court Act* which stipulates as follows:
- (1) ) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
  - (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes;
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land.
  - (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
  - (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
  - (5) Deleted by Act No. 12 of 2012, Sch.
  - (6) Deleted by Act No. 12 of 2012, Sch.
  - (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including:
    - (a) interim or permanent preservation orders including injunctions;
    - (b) prerogative orders;
    - (c) award of damages;
    - (d) compensation;
    - (e) specific performance;
    - (g) restitution;



- (h) declaration; or
- (i) costs. -

8. The plaintiffs seek various reliefs in the plaint dated 24/10/22 as follows; -

- a. A declaration that the Defendant has no authority whatsoever from the 1<sup>st</sup> Plaintiff or any authorised agent of the 1<sup>st</sup> Plaintiff to deny any of the unit holder their tenants, agents, or servants at Umbi Complex erected on the property known as Kwale/Diani Beach Block/1609 electricity, water, and access to the premises for whatever reasons.
- b. An order of permanent injunction compelling the defendant to immediately cease and desist from mis representing to any unit holder,tenant,or any other person whatsoever visiting, leasing or in an occupation or use of the units at Umbi Complex erected on the property known as Kwale/Diani Beach Block/1609 that he has authority from the 1<sup>st</sup> Plaintiff to collect service charge, receive any money, supervise and/or manage any of the common areas at the complex including regulating electricity and water supply and access to the premises.
- c. An order of permanent injunction restraining the defendant by himself, his agents, servants or any other person purportedly acting on the defendant’s instructions from interfering with the peaceful and quiet occupation, enjoyment and use of all the 27 units held by all legal owners of property known as Kwale/Diani Beach Block/1609
- d. An order of permanent injunction restraining the defendant by himself his agents, servants or any other person purportedly acting on the defendants instruction from interfering with the 2<sup>nd</sup> plaintiffs peaceful and quiet occupation, enjoyment and use of properties registered as Kwale/Diani Beach Block/1609

9. Orders a) and b) relate to restraining the defendant from denying the unit holders utility services including access to the premises, while c) relates to interference with peaceful and quiet occupation, enjoyment of the 27 units in the complex and d) the peaceful and quiet occupation, enjoyment of the 2<sup>nd</sup> plaintiffs 10 units as listed thereon. It is therefore clear that there are issues of management as well as matters touching on the right to property as envisaged under articles 40 of *the Constitution*. Indeed, the defendant in his grounds of opposition seeks to impeach the 2<sup>nd</sup> plaintiffs ownership of the properties. For me this matter is within the proper jurisdiction of this court and may be termed as what is hybrid. The pleadings annexed and filed clearly demonstrate that there are serious issues over the suit properties as listed that need to be interrogated by the court and determined. The plaintiffs have outlined abuse of their rights to the use of the properties, the defendant needs to put in a response to the allegations raised and not to try and find an alternative way of evading the main issues which form the substratum of the suit and which need to be determined between him and the plaintiffs. I associate myself with the courts holding in the case of *Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 Others* [2015] eKLR.

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the



Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

10. The upshot is that the preliminary objection is hereby dismissed with costs to the Plaintiffs.
11. Having said that, I am aware that the orders issued on November 14, 2022 are still in place. The same are hereby extended until the hearing and determination of this matter.

It is so ordered

**DELIVERED AND DATED AT KWALE THIS 9TH DAY OF DECEMBER, 2022.**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Gitari for the Plaintiffs

Omondi Waweru for Defendant

Ms. Wambu Holding Brief for Mr. Waweru for Defendant

Mwakina Court Assistant

