



**Bakari v Kea & 2 others (Environment & Land Case E21 of 2024)
[2025] KEELC 353 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E21 OF 2024
FM NJOROGE, J
FEBRUARY 4, 2025**

BETWEEN

SUDI SULEIMAN BAKARI PLAINTIFF

AND

JOYCE ZAWADI KEA 1ST DEFENDANT

MOUNT ZION CHILDREN'S HOME 2ND DEFENDANT

**LAND REGISTRAR, KILIFI THROUGH ATTORNEY GENERAL 3RD
DEFENDANT**

RULING

1. The Notice of Motion dated 14th November, 2024 has been brought under Section 1A, 1B and 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, under Order 40 Rule 1 and 2, under Order 51 of Civil Procedure Rules and all other enabling provisions of the law. It seeks the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to issue an order of temporary injunction, restraining the 1st and 2nd Respondents, whether by themselves, their agents, employees, servants or any person acting at their behest and direction from encroaching, demolishing the plaintiff's property, further interrupting the Plaintiff's works or in any other manner interfering with the Plaintiff's quiet possession and enjoyment of her property rights and interests over a portion of land on Title No. Klifi/Kijipwa 129 pending the hearing and determination of the suit herein.
 4. That the 1st Respondent, its servants, agents and/or any other persons whatsoever be restrained from operating from, working in, constructing on and/or continuing with the construction



of any building or any other structure on the suit property and be restrained from harassing the Applicant pending the hearing and final determination of this suit.

5. That the 3rd Respondent be restrained from effecting any other entries/changes in the parcel of land on Title No. Kilifi/Kijipwa 129 pending the hearing and determination of this suit.
6. That this Application be heard inter partes on such date and at such time as this Honourable Court may direct.
7. That this Honourable Court be pleased to grant orders or any such relief it deems fit and necessary to grant to meet the end of justice; and
8. That the costs of this Application be provided for.

Amended Notice of Preliminary Objection

2. The 1st defendant seeking that the application and the entire suit be dismissed with costs filed the above mentioned notice comprising of one broad limb raising two objections as follows:
 1. That the application dated 4/11/2024 has been filed contrary to Section 5 of the [Oaths and Statutory Declarations Act](#) (CAP 15) and the provisions of the [Societies Act](#) (CAP 108) Laws of Kenya.

Determination

a. The Preliminary Objection.

3. The court ordered that both the motion and the preliminary objection be tried by way of written submissions. The most appropriate course of action is to begin with consideration of the preliminary objection as it may dispose of the application.
4. The first limb of the preliminary objection is that the affidavit in support of the application is defective for failure to state where the same was sworn. It is urged that the jurat states that the deponent made his deposition at Mombasa and commissioned at Nairobi. With respect to counsel for the respondent, this court is of the view that the address on a commissioner's stamp should not be deemed to be the address where the affidavit was sworn for the sole reason that he may possess a mobile stamp and conduct his commissioning business anywhere in the republic. I do not therefore think that there is any defect in the affidavit that can make it be rejected under Section 5 of the [Oaths and Statutory Declarations Act](#).
5. The second limb is that the 1st defendant lacks capacity to sue or be sued, being a registered society under Section 10 of the [Societies Act](#). A copy of its registration certificate was supplied in these proceedings by way of a replying affidavit. The case of Peter Taracha Vs International Pentecostal Holiness Church and Huruma Children's Home HC [Civil Appeal No. 128 of 2013](#) is relied on for the proposition that capacity to sue or be sued in a weighty matter is not a merely procedural issue.
6. Section 10 of the [Societies Act](#) provides as follows:
 10. Manner of effecting registration or exemption from registration
 - (1) Upon application being made in the prescribed manner for registration of a society, the Registrar shall, subject to this Act, register the society by entering in the register of societies, kept for the purpose, the prescribed particulars and the date of the entry.
 - (2) Upon application being made in the prescribed manner for exemption of a society from registration, the Registrar may, with the approval of the Cabinet Secretary, so



exempt the society, and if he does not so exempt the society he shall treat the application as an application for registration and shall, subject to the provisions of this Act, register the society.

- (3) Upon registering a society or exempting it from registration, the Registrar shall issue to the society a certificate of registration or exemption from registration in the prescribed form.”

7. Obviously the 1st defendant, having been registered under the above provisions, lacks a corporate personality. In the Turacha appeal case (supra), the appellants objected to the validity of the trial in the lower court contending that the respondents who were the plaintiffs then did not have legal capacity to file or maintain a suit against them and that the learned trial magistrate erred in failing to appreciate that fact. The record of the trial court shows that the 1st respondent was registered under Section 10 of the *Societies Act*. The 2nd respondent was registered as a charitable children’s institution under the Ministry of Gender, Children and Social Development. The court held as follows:

“There is therefore no doubt that the respondents are not and were not body corporates with legal capacity to sue or be sued at the time the suit in the lower court was instituted. Case law abounds to the effect that entities registered under the *Societies Act* or other unincorporated bodies are not legal persons with the capacity to sue in their own names. They can only sue or be sued either through their officials, members or registered trustees in the case of registered trusts.”

8. The court, allowing the appeal before it, noted that the issue of capacity ought to have been addressed by the trial court even if no party had raised it. It held as follows:

“Though I agree with the respondents in their submissions that the issue of their capacity to sue did not arise in the proceedings before the trial court, my take is that this is a significant point of law which the learned trial magistrate ought to have taken cognizance of without being urged by any party. It is important to appreciate that lack of capacity to sue or be sued is a weighty matter that goes to the root of the validity of proceedings before a court. It is not a mere procedural issue. The consequences of instituting a suit without legal capacity to sue are grave: such a suit is incompetent and any proceedings flowing from it are a nullity in law.

The learned trial magistrate ought to have addressed her mind to this legal point at the earliest opportunity even if none of the parties raised it. And although this issue was not explicitly included in the appellant’s grounds of appeal, this court is duty bound to address it on appeal since it concerns the legality of the proceedings before the lower court.”

9. In the renowned Kipsiwo Community Self Help Group Vs the Attorney General & 6 Others – Eldoret Petition No 9 of 2013, the court held as follows:

38. I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because *the Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the



litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued...”

10. It is thus the case that the suit against the 1st defendant is not competent and is for striking out.

b. The Application.

11. The application is however, still intact as against the other respondents, and it must be determined. It seeks injunctive orders and a restriction against the Title No. Kilifi/Kijipwa 129 on the basis that the applicant is the beneficial owner of a portion of the land measuring 0.955 ha., having been in occupation since the 1970s. He states that he buried his parents on that land and has built a permanent structure. He also claims that he was allocated the land by the Director of Land Adjudication and Settlement in 2008. In March 2012 the Settlement Fund Trustees signed the discharge of charge and transfer of the suit property to the applicant and that action is evident from a search on the title.

12. In the renowned case of *Giella V Cassman Brown* 1973 EA 358 it was held that an applicant seeking an injunction must establish a prima facie case and risk of irreparable loss.

13. A perusal of the response to the application shows that the suit property has already been subdivided and portions thereof disposed of to third parties who have not been joined to the suit. The survey report attached to the respondent’s response states that there are no squatters and no structures on the suit land. The ground report that the applicant relies on refers to a demolished house. If that was his house and that report was, as indicated on its date, made in 2015, then the event of demolition sought to be enjoined must have happened long ago, if at all, and the applicant is therefore no longer, if he ever was, on the suit land. That notwithstanding the survey report filed by the respondents refers to the area as characterized by general boundaries. It is not in the habit of courts to issue orders in vain. Having found that the applicant is not on the suit land, that there is no building he can claim standing on the same premises, and that if it was his structure, that it was demolished long ago, the question that arise in this application then are whether it would be prudent to issue injunctive orders in the circumstances described above.

14. This court is of the view that the applicant has neither established a prima facie case nor risk of irreparable loss. He has also sued a party devoid of capacity to be sued and has failed to join third parties who may be affected by the orders he seeks. For the foregoing reasons the 1st respondent is struck out of these proceedings and the application dated 14th November, 2024 is hereby dismissed with costs.

15. Parties shall attend court for a mention for directions as to the hearing of the Originating Summons on 27/2/2025.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 4TH DAY OF FEBRUARY 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

