



Mwangale & another v Daniel Peter Gatangi Enterprises Limited & another (Environment & Land Case 418 of 2009) [2025] KEELC 344 (KLR) (5 February 2025) (Ruling)

Neutral citation: [2025] KEELC 344 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 418 OF 2009
SM KIBUNJA, J
FEBRUARY 5, 2025**

BETWEEN

RICHARD MWANGALE 1ST PLAINTIFF

JUDITH SITAWA MURUMBA 2ND PLAINTIFF

AND

DANIEL PETER GATANGI ENTERPRISES LIMITED 1ST DEFENDANT

HACIENDA ENTERPRISES LIMITED 2ND DEFENDANT

RULING

1. The 2nd plaintiff filed the notice of preliminary objection dated 4th November 2024 to the 2nd defendant's notice of motion dated 18th September 2024, raising following three grounds that:
 - a. The application is legally incompetent and has evidentiary deficiencies on account of the supporting affidavit which has been sworn by the advocate of the applicant contrary to the provisions of section 17 of the *Oaths and Statutory Declarations Act*, chapter 15 Laws of Kenya.
 - b. The application is fatally defective on account of being filed by the firm of Ahmednasir Abdulahi Advocates LLP without the court's leave to be properly on record and act for the 2nd defendant/applicant contrary to the provisions of Order 9 of the Civil Procedure Rules, 2010.
 - c. The application is incompetent, misconceived and otherwise an abuse of the due process of this honourable court.
2. By consent of counsel for the 2nd plaintiff and 2nd defendant, the court directed that the preliminary objection be canvassed first through written submissions to be filed and exchanged in seven days. I have perused the court record, both manual and CTS, and noted that none of the learned counsel has filed submissions as of today the 14th January 2025.



3. The following are the issues for the determinations by the court on the preliminary objection:
 - a. Whether the grounds on the preliminary objection raises pure points of law capable of being decided, without evidence and if upheld can determine the matter.
 - b. Whether the firm of Ahmednasir Abdullahi Advocates LLP is properly on record for the 2nd defendant/applicant as required under Order 9 of Civil Procedure Rules.
 - c. Whether the 2nd defendant's/applicant's application is incompetent, defective, misconceived and an abuse of due process of the court.
4. The court has carefully considered the grounds on the preliminary objection, the pleadings, court's record and come to the following determinations:
 - a. That as discerned from the heading on the application dated 18th September 2024, annexures thereto and the notice of preliminary objection dated 4th November 2024, this suit was formerly HCCC No. 841 of 1994 as consolidated with HCCC No. 776 of 1995.
 - b. The 2nd defendant seeks through the application dated the 18th September 2024 for inter alia;
 - i. The setting aside of the dismissal of the suit order issued on 14th July 2015.
 - ii. Reconstruction of the suit and setting it down for inter parties' hearing.
 - iii. Reinstatement of the suit.
 - iv. Order transferring the reconstructed file to ELC Milimani.
 - c. The court has on its own motion, made enquiries from the Mombasa ELC Registry on the whereabouts or status of the record and a Skeleton file with proceedings of 24th February 2017 and 28th March 2017 plus a copy of a letter dated 12th September 2014 has been brought to my attention. I have perused it and it is crystal clear from the copy of the letter dated 12th September 2014 by the DR ELC Mombasa that vide the orders made by the late Mukunya J, on 11th September 2014, the suit was transferred to ELC Milimani.
 - d. It is therefore doubtful how this court could have proceeded to issue notices to show cause why the suit should not be dismissed on the said file in 2015, and proceed to issue dismissal orders when the record/file was at ELC Milimani. The fact that the file had been transferred to ELC Milimani and the background information leading to the transfer has been detailed by the applicant at paragraphs 14 to 18 of the supporting affidavit and was noted by Oundo J, in the proceedings of 28th March 2017.
 - e. The letter by the DR ELC Mombasa to DR ELC Milimani dated the 12th September 2014 was copied to the following firms of advocates;
 - i. Kirundi & Co. Advocates
PO Box 55319-00300
Nairobi.
 - ii. Namisi Advocate
PO Box 3537-80700
Mombasa.



- iii. Sichangi Partners Advocates
PO Box 33223-00600
Nairobi.

That while one may take the above firms of advocates, to whom the letter was copied to, as the ones on record for the parties then, the court is unable to effectively determine whether or not the firm of Ahmednasir Abdullahi Advocates LLP, had properly come on record for the 2nd defendant/applicant without perusing the court file, which is not before this court as it was evidently transferred to ELC Milimani as per order of Mukunya J, through the DR letter dated 12th September 2014.

- f. That it is however clear that the application dated the 18th September 2024 should have been filed before ELC Milimani, which has custody of the file. Did the filing of the application before this court amount to abuse of court process? In the case of Muchanga Investments Limited versus Safaris Unlimited (Africa) Limited & 2 Others (2009) eKLR, the Court of Appeal equated the term abuse of court process to abuse of judicial process. It went on to state that “the employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and frivolous, vexatious or oppressive.” The filing of the said application before this court, while the 2nd defendant/applicant knew the suit had years ago been transferred to ELC Milimani, was evidently not bona fides. It was therefore an abuse of the court process as the 2nd defendant has through its depositions in support of the application shown it knew as a fact that the file had been transferred to ELC Milimani years before the time of filing of the notice of motion.
- g. Having found merit in the preliminary objection on the ground that the application was an abuse of the court process, then, pursuant to section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the 2nd Plaintiff is entitled to costs.
5. Flowing from the foregoing conclusion, the court finds and orders as follows:
- a. That the preliminary objection on the ground that the application was an abuse of the court process has merit and is hereby upheld.
- b. The application dated the 18th September 2024 is therefore, struck out with costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : M/s Muya For Wandabwa For 2Nd Plaintiff

Defendants : Mr Omar For 2Nd Defendant

Shitemi – Court Assistant.

S. M. KIBUNJA, J.



ELC MOMBASA.

