



REPUBLIC OF KENYA



Waithaka (Suing as the Attorney Joseph Maina Mburu) v Kiara & 6 others (Environment & Land Case E049 of 2023) [2024] KEELC 505 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E049 OF 2023
EK MAKORI, J
FEBRUARY 8, 2024**

BETWEEN

ANTHONY WAITHAKA (SUING AS THE ATTORNEY JOSEPH MAINA MBURU) PLAINTIFF

AND

PAUL MUGESHE KIARA 1ST DEFENDANT
PETER NGUGI MUCHERU 2ND DEFENDANT
BEATRICE WAMBUI NJERI 3RD DEFENDANT
THOMAS MORARA NYANGAU 4TH DEFENDANT
LAND REGISTRAR LAMU 5TH DEFENDANT
**THE LAND ADJUDICATION & SETTLEMENT OFFICER
LAMU 6TH DEFENDANT**
THE HON ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. A Preliminary Objection has been raised in this matter to the effect that the Plaintiff/Applicant has no locus standi to propagate the current suit because already the Power of Attorney donated to him by one Joseph Maina Mburu was deregistered by the Land Registrar (5th defendant) and the title document held by the said Mburu - Lamu/Hindi Magogoni /480 was also cancelled on 30th of November 2022 for failure to comply with the Settlement Fund Trustee (SFT) conditions offer and after following a sequence of past Adjudication Reports. The 1st to 4th defendants now hold new titles after the said cancellation.



2. The application was canvassed by way of written submissions. I can see from the record that Mr. Soita for the 1st to the 4th defendants filed his. Mr. Muthethia for the plaintiff relied on the replying affidavit sworn by the plaintiff deposed on the 5th of October 2023. Mr. Ojwang for the 5th to 7th defendants elected not to participate in the Preliminary Objection.
3. As Mr. Soita stated new title documents were issued to the 1st to 4th defendants after a series of Reports from the Land Adjudication Section, which showed that the title that was being held by one Joseph Maina Mburu, the donor of the Power of Attorney held by the plaintiff was revoked on 30th November 2022 and that went hand in hand with the deregistration of the Power of Attorney that was being held by the plaintiff hence, the land changed hands, the Power of Attorney in favour of the plaintiff was delegitimized and hence null and void and therefore the current suit ought to be struck out in limine.
4. Mr Soita quoted several authorities to support the contentions raised in the Preliminary Objection – *Attorney General & Another v Andrew Mwaura Githinji & Another* [2016] eKLR, on what consists of a Preliminary Objection, *CCB v MIB & Another* [2014] eKLR, on how a Power of Attorney can be revoked.
5. The plaintiff contended that the process leading to the cancellation of the title held by Mr. Joseph Maina Mwangi and the deregistration of the Power of Attorney held by him were both unprocedural and illegal - The 5th defendant had no powers to do so before a hearing was not conducted hence the new titles stand illegal null and void. The issue at hand cannot be resolved summarily via a Preliminary Objection. A full trial has to be conducted.
6. The issue for the determination of this Court is whether the Preliminary Objection is sustainable. Whether the plaintiff has no locus standi to sustain this cause and hence the entire suit ought to be struck out with costs.
7. A Preliminary Objection as held in *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* [1969] E. A 696: where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, consists of:

Law, J.A. :

“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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P.:

“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.”



8. 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.”

9. The plaintiff who had a dully registered Power of Attorney donated by one Joseph Maina Mburu, brought this suit claiming that the title held by the donor has long changed hands in a process he claims to be fraudulent. His Power of Attorney was long deregistered. The rejoinder is that the Land Adjudication Department after several Reports found that the title was wrongly issued to one Joseph Maina Mburu. After several calls on him to return the same for cancellation, he was not responsive hence the Gazettement of the same for revocation and actual revocation resulting in new titles issued on 30th of November 2022 to the 1st to the 4th defendants herein. This cancellation and deregistration of the Power of Attorney held by the plaintiff forms the core of this suit.

10. Can a preliminary objection handle the issues raised in the plaint? I do not think so, a trial has to be conducted and evidence adduced whether the 5th defendant had powers to cancel the title held by one Joseph Maina Mburu, or whether he had powers to deregister the Power of Attorney held by the plaintiff. See *Attorney General & Another v Andrew Mwaura Githinji & Another* [2016] eKLR:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

11. In my opinion, it is impossible to address the plaintiff’s concerns in a summary manner. To ascertain whether the 5th defendant had powers to cancel a title that had already been granted to a party in the way that it did, or deregistered a filed Power of Attorney are issues that must go for a full trial.

12. Power of Attorney terminates in the following situations: when the donor or donee passes away; the subject matter to which the power of attorney relates is destroyed and ceases to exist; either party notifies the other in writing that the Power of Attorney is revoked; if the Power of Attorney is general, it expires if and when an expiration date is specified; and if the donor becomes legally incapacitated.

13. The question here will be, did the Land Registrar have the authority in law to revoke the title held by the donor and also to deregister the Power of Attorney held by the donee? These will be trial issues.

14. The Preliminary Objection is as a result of the foregoing, dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 8TH DAY OF FEBRUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Soita for the 1st to 4th Defendants

Court Clerk: Happy



In the absence of:

Mr. Muthethia for the Plaintiffs

