



Ebrahim v Kalama (Land Case 35 of 2023) [2024] KEELC 3833 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 35 OF 2023**

EK MAKORI, J

MAY 8, 2024

BETWEEN

IDRIS JAFFER EBRAHIM PLAINTIFF

AND

ONESMUS SANGA KALAMA DEFENDANT

RULING

1. The Plaintiff, in a matter of utmost importance, filed a Complaint dated 23rd of October, 2023, together with all accompanying documents thereof, seeking the following vital orders:
 - a. A declaration that the Plaintiff, in a matter of utmost importance, is the lawful and absolute owner of the parcel of land known as Kilifi Roka/ 259, situate within Kilifi County;
 - b. An order of eviction of the Defendant and his servants, workmen, agents, heirs, personal representatives, or otherwise from the said parcel of land known as Kilifi Roka/ 259, situate within Kilifi County;
 - c. A mandatory injunction compelling the Defendant to immediately remove the structure erected on the plaintiff's parcel of land known as Kilifi Roka/ 259 within Kilifi County; failure to which the Plaintiff shall be at liberty to demolish the structure with the assistance of the police officers from Kilifi Police Station and the Defendant to bear the costs of the said demolition;
 - d. An Order of permanent Injunction does issue to restrain the Defendant by himself and his servants, workmen, agents, heirs, personal representatives, or otherwise howsoever from dealing with, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon or trespassing into or from in any way whatsoever and howsoever interfering with the Plaintiff's peaceful possession and enjoyment of the parcel of land known as Kilifi Roka/ 259 within Kilifi County;



- e. The OCS Kilifi Police Station will diligently appoint and instruct police officers of the appropriate rank to oversee the implementation of the orders herein and ensure peace and tranquility.
 - f. Damages.
 - g. Costs of the suit and interest.
2. At the same time, the Plaintiff filed simultaneously a Notice of Motion Application dated on the even date seeking the following orders:
- a. This application is hereby certified as urgent, and the service thereof will be dispensed with in the first instance.
 - b. Pending the hearing and determination of this Application, a temporary Injunction do issue to restrain the Defendant/Respondent by himself, their servants, workmen, agents, heirs, personal representatives, or otherwise howsoever from selling, transferring, leasing, charging, and dealing with in any manner whatsoever, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon and continuing to build and construct any structures or trespassing into or from in any way whatsoever and howsoever interfering with the Plaintiff/ Applicant's peaceful possession and enjoyment of the parcel of land known as Kilifi/ Roka/ 259 situate in Kilifi County;
 - c. Pending the hearing and determination of this suit, an Injunction do issue to restrain the Defendant/Respondent by himself, their servants, workmen, agents, heirs, personal representatives, or otherwise howsoever from selling, leasing, charging, and dealing with in any manner whatsoever, purporting to enter, access, remain on, getting ingress into, erecting any structures thereon and continuing to build and construct any structures or trespassing into or from in any way whatsoever and howsoever interfering with the Plaintiff/ Applicant's peaceful possession and enjoyment of the parcel of land known as Kilifi/ Roka/ 259 situate in Kilifi County;
 - d. An order of eviction of the current occupants of the structures erected on the parcel of land known as Kilifi/ Roka/ 259 situate in Kilifi County pending the hearing and determination of this suit;
 - e. The OCS Kilifi Police Station will appoint and instruct police officers of the appropriate rank to oversee the implementation of the orders herein and ensure peace and tranquility.
 - f. That the costs of this application be borne by the Defendant/ Respondent herein.
3. On the 10th of November, 2023, Defendant filed a Notice of Preliminary Objection dated the 9th of November, 2023. This objection seeks to have the Plaintiff's suit dismissed for offending the provisions of Sections 50 and 51 of the [Registration of Titles Act](#) and Section 7 of the [Civil Procedure Act](#).
4. The Court directed that the Preliminary Objection and the application be heard concurrently. At the same time, the Court directed that the parties file written submissions disposing of the pending issues demanded by the Preliminary Objection and the application for an injunction.
5. At this point, the Court frames the issues for a determination as - whether the Preliminary Objection is sustainable, whether to issue injunctive orders if the answer to the former is negative, and who will bear the costs arising from those motions.



6. A preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent time management as a Court resource by summarily flagging frail and hopeless suits that, if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a Preliminary Objection is sustainable or not but look at the pleadings and discover that the suit is a none starter - see Ogola J. in [DJC v BKL](#) (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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. Examples are an objection to 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... a preliminary objection is like 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”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates 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.”

7. The issue flagged here is that the Plaintiff has no locus standi to sustain the current suit, there being a Power of Attorney donated to another party, his brother Ibrahim Jaffer Ibrahim. That power should have been extinguished before the plaintiff could move any further. The power said to have been created was never registered. It is also noted that a Power of Attorney acts in a manner that does the principal-agent relationship. The principal cannot be rendered hopeless and can act on his motion despite the pendency of such powers as the principal does in ordinary business.

8. I agree that the issues raised regarding the Power of Attorney cannot be resolved summarily. A trial must be held because it has not been shown that the Power of Attorney was registered; it has also not been shown that when a donor confers Power of Attorney, the principal is rendered otiose and cannot originate a matter or conduct business as a principal until the Power of Attorney donated to the agent is revoked.

9. On the other front, it is alleged that a similar application was made and dismissed; therefore, the current application is *res judicata*. The doctrine of *res judicata* is based on the principle that if a suit has been heard and issues have been tried thoroughly and finally settled, the reopening of another matter on the same issues is untenable because litigation has to end in one way or another. It saves costs to parties and lessens the rigmaroles of seeking redress in our justice system. It abhors abuse of the Court process



by decreeing that litigation replayed over and over again on already litigated and settled issues has to be halted by the Courts once raised and proven - see the case of *E.T v Attorney General & Another* [2001] eKLR:

“The rationale behind the doctrine of res judicata and issue estoppel is that if the controversy in issue is finally settled, determined, or decided by the court, it cannot be reopened. The rule of res-judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.

52. The general principle of res-judicata is captured in section 7 of the *Civil Procedure Act*, which provides that: -

7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of *Karia and Another v The Attorney General and Others* [2005] 1 EA 83, 89).”

10. Looking at the application made before Hon. Chepseba (CM) in Malindi CMLC No.10 of 2020, the Preliminary issue raised in the motion based on locus standi succeeded because the agent (brother of the Plaintiff in this matter) had not sought the Court's leave to propagate his brother's claim as his agent. The issue of ownership regarding the suit property was never determined, so res judicata will not apply. There was no merit-based determination on the issues before the Court to bar one from commencing another suit afresh. Perhaps one could have raised the issue of abuse of the Court process as grounds here and not as a bar to commence a fresh suit.

11. The entire Preliminary Objection as raised is hereby dismissed.

12. Coming now to the injunction sought by the applicant, for an injunction to be attained as held in the celebrated case of *Giella v Cassman Brown & Company Limited* [1973] EA 360 (*supra*), the following threshold has to be surmounted:

“The applicant should satisfy the Court that he has a prima facie case with a probability of success. Secondly, he stands to suffer irreparable loss or injury which cannot be compensated by damages, and thirdly, if the Court is in doubt, it should decide on a balance of convenience.”

13. Firstly, this Court has to ascertain whether the applicant has established a prima facie case with the probability of success as held in *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125:

“A *prima facie* case in a civil application includes but is not confined to a ‘genuine and arguable case.’ It is a case which on the material presented to the court, a tribunal properly



directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation in rebuttal from the latter.”

14. And, that the principles stated in the *Giella case (supra)* are to be addressed sequentially as held in *Kenya Commercial Finance Company Ltd v Afraha Education Society* [2001] 1 EA 86 as cited in [Karen Bypass Estate Ltd v Print Avenue and Company Ltd](#) [2014] eKLR:

“so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

15. In the current suit, the Plaintiff claims to own the suit property, Kilifi/Roka/259, situate in Kilifi County. In the affidavit in support, he claims that the defendant invaded his land, settled on it in 2016, and built permanent structures thereon, which stand to date; attempts by his brother to evict him as he was abroad were futile. The suit he filed in the Malindi CMLC No.10 of 2020 was dismissed on technicalities since his brother, who acted as his agent, was not represented.
16. On the other hand, Defendant alleges that he has been on the suit property, developed thereon, and acquired the same by operation of the doctrine of adverse possession. The Court has yet to be told how long the Defendant has been on the suit property and whether this period aggregates to 12 years to warrant the extinction of the plaintiff's title.
17. The facts I have are such that a mandatory injunction can't be issued yet against the Defendant; eviction cannot be issued, too, at this stage. The best that can happen is to have status quo orders on the ground to obtain as follows:
- a. The suit property Kilifi/Roka/259 is to remain registered in the Plaintiff's name, and no further dealings until the current suit is heard and determined.
 - b. The Defendant is to stick to the portion he has built and not undertake further developments until this suit is heard and determined.
 - c. The Defendant bears the costs of the Preliminary Objection and the application for an injunction.

DATED, SIGNED, AT MALINDI ON THIS 8TH DAY OF MAY 2024. SINCE THE COURT WAS NOT SITTING, A SOFT COPY WOULD BE EMAILED TO THE ADVOCATES ON RECORD.

E. K. MAKORI

JUDGE

