



Republic v National Land Commission & 2 others; Almer Farm Limited (Exparte Applicant) (Environment and Land Judicial Review Case 4 of 2019) [2024] KEELC 4078 (KLR) (7 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4078 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 4 OF 2019
FO NYAGAKA, J
MAY 7, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE CHIEF LAND REGISTRAR 2ND RESPONDENT

BETTY RONO (SUING AS THE EXECUTRIX OF THE ESTATE OF DAVID RONO) 3RD RESPONDENT

AND

ALMER FARM LIMITED EXPARTE APPLICANT

RULING

1. By a Notice of Motion dated 11/10/2022, the 3rd Respondent sought the following prayers:
 1. ...spent
 2. That this Honourable Court be pleased to issue orders to the County Surveyor Trans Nzoia County to survey and curve 400 acres out of the 1198 Acres of from L. R. 8940 Acres (sic) pending the hearing and determination of this application.
 3. This Honorable Court do issue orders to the Officer in Charge of the Police Station, (OCS) Trans-Nzoia County - Cherangany Police Station to supervise this exercise pending the hearing and determination of this application.
 4. The costs of this application be in the cause.



2. It was based on several grounds and supported by the Affidavit of Betty Rono, the 3rd Respondent. Because the *ex parte* Applicant raised a preliminary objection to the Application, this Court only needs not enumerate the grounds of the Application since they are the ones that form the pleadings only that a Court is supposed to analyze and not facts as would be deposed in an Affidavit, as this Court will explain below.
3. The grounds were that the Respondent fraudulently obtained the Applicants land, measuring 400 acres. The suit land measures 400 acres to be carved out of 1198 acres from LR No. 8490. The Respondent moved to Court and sued the Applicant in ELC JR, Application Case No. 4 of 2019, ELC Misc Case E013 of 2021 and ELC JR No. 4 of 2019. All three suits were dismissed with costs in favour of the 1st Respondent. It is in the interest of justice that this Honourable Court issues orders to the County Surveyor Trans Nzoia to survey and carve 400 acres out of the 1198 acres from LR. No. 8490. The Officer in Charge of Trans-Nzoia West Police Station (OCS) is to provide security during the exercise. The application was brought on time and in good faith.
4. Based on the above, this Court points out that before the application could be heard, the *ex parte* Applicant raised a Preliminary Objection to the Application. It was based on the following grounds:-
 1. The application seeks remedies against the wrong party and it is premised on a misjoinder. The remedies are sought against Alma Farms Limited yet in the Gazette Notice issued by the National Land Commission, no such remedies were granted against Almer Farms Limited.
 2. The application is bad in law as it seeks to usurp the jurisdiction of the courts and use shortcuts in litigation the question of ownership of land (sic).
 3. The application is an abuse of the process of the code and should be struck out in limine.
5. The Preliminary Objection was disposed of by way of written submissions. The 3rd Respondent filed his dated 02/01/2024 on 10/01/2024. He submitted that the Court considered whether the objection was proper in law. On this he stated that it was not. He relied on the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696 which defined a preliminary objection. He reproduced the relevant paragraph thereof. Also, he relied on the case of *John Masakali v Speaker of County Bungoma & 4 others* (2015) eKLR and that of *Oraro v Mbaja* [2005] KLR 141. He summed it that the Preliminary Objection did not meet the threshold of one and the grounds lacked merit.
6. On her part, the *ex parte* Applicant submitted on 11/11/2023 which written submissions he filed on 14/02/2024. Having summarized the grounds of the Preliminary Objection she submitted on whether the application was premature and stated that it was. She gave the reasons that the National Land Commission recommended to the Registrar to excise 400 acres belonging to Abraham Kiptanui. The recommendation was not binding and no document had been produced from the Chief Registrar to show that the recommendation was acted on. He relied on the case of *Union of Kenya Civil Servants -v- Kenya County Government Workers Union and another*.
7. On whether the National Land Commission's recommendation was acted upon within the statutory, she submitted that section 15(10) of the *National Land Commission Act* provided for determination of an issue of historical and injustice by the Commission within a reasonable time but not more than 3 years. She submitted that the word "shall" as used was an imperative as defined in the *Blacks' Law Dictionary*. She relied on the case of *Ako v Special District Commission Kisumu and another*, and the Court of Appeal case of *Wilson Osolo v John Ojiambo Ochoa & another* (sic). She summed it that the period had lapsed and there was no extension of the period of the recommendation past the period.



8. On whether the Application was against the wrong party, she gave the details of the Gazette Notice to whom it referred to. She relied on the case of *Mwangi Stephen Muriithi v. The National Land Commission & 3 others* [2018] eKLR and the seminal case of *Salomon v Salomon & Co. Limited* (1897) AC.1 which restated that a company is different from the shareholders.
9. I have considered the Preliminary Objection raised herein based on the understanding of what a preliminary objection is. I have given due consideration of the submissions by the parties herein and have compared them with the finding that I make herein below as I apply the arguments by the parties to the law.
10. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold defined a Preliminary objection 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 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”
11. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same Court held that:

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”
12. Also, in *Susan Wairimu Ndiangui v Pauline W. Thuo & another* [2005] eKLR, Musinga J as he then was held as follows:-

“a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”
13. It is clear that a preliminary objection is grounded on points of law and not facts. The determination of the issue always flows from the consideration of parties’ pleadings indicated.
14. In the instant case, in a bid to convince the Court to grant the orders sought the Applicant relies on a number of grounds. Each of the grounds require evidentiary support by way of a supporting Affidavit to which there is annexed documentary evidence to prove it. For instance, the ground that there were three cases filed against the Applicant and all were dismissed. That is matter which does not flow from the ground of the application directly. Similarly, the grounds that there was fraud and regarding the manner the 3400 acres were obtained and that the parcel measures 400 acres. Both need factual proof.



No wonder the ex parte Applicant labored very much in the submissions to explain the facts to clarify the argument on the points raised in the Preliminary Objection.

15. The Upshot is that the preliminary objection is not merited. I dismiss it with costs to the Applicant in the Application dated 11/10/2022.
16. I direct that the said application be heard virtually on 06/06/2024 at 8:30 AM. Any party who has not filed submissions thereto to do so within seven (7) days of this ruling. The submissions should strictly not to exceed two (2) pages of New Times Roman Font 12 of 1.5 Spacing. If any party had filed its submissions longer than that specification he/she should summarize it to not more than the two (2) pages: (they should not add new argument). Any argument exceeding two pages will not be considered. Parties must annex to the submissions and highlight any authority they rely on.
17. Orders accordingly

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 7TH DAY OF MAY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE

