



**Maina v Nyangweso & 5 others (Environment & Land Case
E012 of 2024) [2024] KEELC 5648 (KLR) (12 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E012 OF 2024**

LL NAIKUNI, J

JULY 12, 2024

BETWEEN

EPHRAIM MWANGI MAINA APPLICANT

AND

GEORGE NYANGWESO 1ST RESPONDENT

LAND REGISTRAR MOMBASA 2ND RESPONDENT

LIKONI POLICE STATION 3RD RESPONDENT

ALI SHEIKHAH SALIM 4TH RESPONDENT

AMBROSE MGENYI MWALUMA 5TH RESPONDENT

ALI RAMADHAN JUMA 6TH RESPONDENT

RULING

I. Introduction

1. The Honourable Court is tasked with the hearing and determination of the Notice of Preliminary objection dated 29th February, 2024 by the Land Registrar Mombasa and Saidi Issa, DCIO – Likoni Police Station, the 1st and 2nd Defendants/Applicants respectively.
2. Despite of service of the Notice of Preliminary objection, the Respondents never filed any responses. Nonetheless, the Honourable Court has proceeded to render its decision based on its merit.

II. The 1st and 2nd Defendant's case

3. The Applicants raised a Preliminary objection based on points of law on the grounds that:-



- a. That the suit as filed offends the mandatory provisions of Section 12 of the *Government Proceedings Act*, Cap. 40 Laws of Kenya.
 - b. That the suit offends the mandatory provisions of Section 22 of the National Government Coordination *Act, No. 1 of 2013* which protects public officers from personal liability while executing the functions of their office.
 - c. That the suit offends the provisions of Section 14 (5) of the *Land Registration Act*, No.3 of 2012.
 - d. That the suit further offends the provisions of Section 66 of the *National Police Service Act*, No. 11A of 2011.
4. The 1st and 2nd Defendants herein prayed for reasons whereof that the suit be dismissed and/ or struck out.

III. Submissions

5. On 27th May, 2024 while all the parties were present in Court, they were directed to have the Notice of Preliminary objection disposed of by way of written submissions and all the parties complied. Pursuant to that at the time when the Court retired to write this ruling none of the parties had filed their written submissions. The Court thereby reserved the ruling to be delivered on Notice.

IV. Analysis and Determination

6. I have carefully read and considered the pleadings herein and the relevant provisions made by the by the Learned Counsels. In order to arrive at an informed decision, the Honorable Court has five (3) framed the following issues for determination.
 - a. Whether the objection by the 1st and 2nd Defendants raises pure points of law?
 - b. Whether the suit as filed offends the mandatory provisions of Section 12 of the *Government Proceedings Act*, Cap. 40 Laws of Kenya?
 - c. Whether the suit offends the mandatory provisions of Section 22 of the National Government Coordination *Act, No. 1 of 2013* which protects public officers from personal liability while executing the functions of their office?
 - d. Whether the suit offends the provisions of Section 14 (5) of the *Land Registration Act*, No. 3 of 2012
 - e. Whether the suit further offends the provisions of Section 66 of the *National Police Service Act*, No. 11A of 2011
 - f. Who bears the Costs of the Notice of Preliminary objection dated 29th February, 2024.

Issue No. a). Whether the objection bt the 1st and 2nd Defendants herein raises pure points of law

7. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection. Subsequently, it will then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.



8. According to the Black Law Dictionary a Preliminary Objection is defined as being:
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
9. The above legal proposition has been made graphically clear in the now famous case of “*Mukisa Biscuits – Versus – Westend Distributor Ltd* [1969] EA 696”, the court observed that: -
- “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. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. ”.
10. The same position was held in the case of “*Nitin Properties Limited – Versus – Jagjit S. Kalsi & another* Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that;
- “A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”
11. Similarly in the case of “*United Insurance Company LTD – Versus – Scholastica A Odera* Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;
- “A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”
12. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “*In the matter of Siaya Resident Magistrate* Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;
- “A Preliminary Objection cannot be raised if any facts has to be ascertained.”
13. I have further relied on the decision of “*Attorney General & Another – Versus – Andrew Mwaura Gitinji & another* [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
14. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the 1st and 2nd Defendants herein which are the suit as filed offends the mandatory provisions of Section 12 of the [Government](#)



Proceedings Act, Cap. 40 Laws of Kenya, the suit offends the mandatory provisions of Section 22 of the National Government Coordination Act, No. 1 of 2013 which protects public officers from personal liability while executing the functions of their office, the suit offends the provisions of Section 14 (5) of the Land Registration Act, No.3 of 2012 and the suit further offends the provisions of Section 66 of the National Police Service Act, No. 11A of 2011. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection is on the doctrine of constitutional avoidance.

Issue No. b). Whether the suit as filed offends the mandatory provisions of Section 12 of the Government Proceedings Act, Cap 40 Laws of Kenya.

15. Under this subtitle, the issue raised for determination is whether or not the Respondent is a State Corporation and whether Section 12 of the Governments Proceedings Act applies to the 1st, 2nd and 6th Respondents. On whether the provisions of Section 12 Government Proceedings Act does apply to the Respondent, I wish to be guided by the case of “Grenstar Sytems Limited – Versus - Kenyatta International Convention Centre (KICC) & 2 Others [2018]” where it was held that just because a particular party is a state corporation does not in itself mean it is the government. “Association of Retirement Benefits Scheme – Versus - Attorney General & 3 Others [2017] eKLR” cited with approval the “Indian Supreme Court case of International Airport Authority of India & Others (1979) SC.R 1042” in which the test for determining whether an entity was a Government body or not, Court stated as follows:-

- “(a) Consider whether any share capital of the corporation is held by the Government and if so that would indicate that the corporation is an instrumentality or agency of Government.
- (b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;
- (c) It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.
- (d) Whether the body has deep and pervasive State control,
- (e) Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and
- (f) If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.”

16. Further my brother, Munyai J in the case of:- “Kimoi Ruto & Another – Versus - Samuel Kipkosgei Keitany & Another 2014 eKLR”, held: -

“.....It will be seen from the above that State Corporations may be established by the President (Under S.3) or through an Act of Parliament. They are ordinarily body corporate with capacity to sue and to be sued and with capacity to hold property. I find it difficult to hold that they should be considered as “government” because if they were, then litigation would be governed by the Government Proceedings Act (CAP 40) and I am more prepared to hold that they are not strictly “Government”, unless the context otherwise prescribes, but rather, that they are independent agents of Government, formed by government in order to



undertake and perform certain functions on behalf of government, which functions cannot adequately or efficiently be performed within the structure of Government Ministries.”

17. The Honourable Court is satisfied that as much as the 1st and 2nd Defendants/Respondents undertake and perform functions of the government, it is my own view that the same does not necessarily mean that the 1st and 2nd Respondents constitutes the government and as such they do not fall under Cap 40 of the [Government Proceedings Act](#) and as such provisions of Section 12 do not apply. Hence the objection under this ground fails and is hereby overruled.

Issue No. c). Whether the suit offends the mandatory provisions of Section 22 of the National Government Coordination [Act, No. 1 of 2013](#) which protects public officers from personal liability while executing the functions of their office

18. Under this sub title we examine if the suit offends the mandatory provisions of Section 22 of the National Government Coordination [Act, No. 1 of 2013](#) which protects public officers from personal liability while executing the functions of their office. Section 22 of the National Government Coordination Act only exempts a public officer from any action, claim or demand for actions done in good faith for the purpose of executing the functions of the office.

19. In regard to liability for their actions in the course of their duties, Section 22 of the [National Government and Coordination Act](#), 2013 provides as follows:-

“ 22. Protection from Personal Liability.

Nothing done by a Public officer appointed under this Act shall, if done in good faith for the purpose of executing the functions of the office, render such officer personally liable for any action, claim or demand”

20. What this section means is:-

- a. The Act shields individuals from personal liability when performing their duties related to national government functions.
- b. It ensures that officers and officials acting in good faith are not personally held accountable for decisions made in their official capacity.

21. This Court agrees with the provision of the Act, that public officers are not liable for duties they undertake in their relevant offices while in the course of their duties. I also make reliance on the case of “*Republic – Versus - Principal Secretary, Ministry of Interior and Coordination of Government & another ex - parte Lucy Nduta Ng’ang’a* [2021] eKLR”, where it was held that the operative words in section 22 is good faith which shields the officers from personal liability. I do agree with that finding.

22. As was held in “*R – Versus - Commissioner for Co-operatives ex parte Kirinyaga Tea Growers Co-operatives Savings and Credit Society Ltd* {1999} 1 EA 245” no statute ever allows anyone on whom it confers a power to exercise such a power arbitrarily, capriciously or in bad faith. Bad faith has been defined rarely, but an Australian case defined it as “a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker” as was the holding in the case of:- “*SCA – Versus - Minister of Immigration* [2002] FCAFC 397 at [19]”. Recklessness was held not to involve bad faith (“*NAFK – Versus - Minister of Immigration* (2003) 130 FC 210, [24]”). Even though “Bad faith” has not been given a precise definition, it has been frequently associated with actions involving malice, fraud, collusion, illegal conduct, dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. Justice Southing in the case of:-



“MacMillan Bloedel Limited – Versus - Galiano Island Trust Committee {1995} BCJ 1763” articulated the concept of bad faith as follows: -

“The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, conflict of interest, discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.”(Emphasis added)

23. The words “good faith” must be read in the context in which they are found. Acting in good faith presumes exercising a judgment which is either made in good faith or in bad faith. If it is made in good faith, the statutory immunity applies. If it is made in bad faith, the statutory immunity does not apply.
24. Bad faith is a serious allegation which attracts a heavy burden of proof. In the Plaintiff according to the Plaintiff, at paragraph 13 stated in part that:-

“The Plaintiff has come to learn that the 4th and 5th Defendant claimed and obtained ex parte orders for title described as Tittle No. C.R. 8831, Sub - Division No. 48 (ORG. No. 9/3 of Section V Mainland South through a suit filed in the Chief Magistrate Court Mombasa as CMCC ELC NO. E3 (O.S.) of 2020 and later through Mombasa High Court ELC MISC. Application No. E037 of 2022 which was filed by the 4th and 5th Defendants against the 1st Defendant and others seeking a committal order to civil jail against the 1st Defendant and others for disobedience to comply with orders issued by the Chief Magistrate on 18th March, 2021 in CMCC ELC No. E3 (O.S.) of 2020.”

25. Further under paragraph 17 the Plaintiff avers that:-

“The Plaintiff further avers that the 1st Defendant knowingly recklessly, negligently and willfully in breach of his statutory duty caused to issue Title No. Mombasa / MS / Block V / 48 to the 3rd Defendant purporting to enforce the Order and/ or Decree given in Chief Magistrate Court CMCC ELC NO. E3 (O.S) of 2020 and High Court ELC MISC. Application No. E037 of 2022, which was not the case.

26. As against the 2nd Defendant in the Plaintiff the Plaintiff avers at Paragraphs 18 and 19 that:-

18. That on diverse dates between 1st February and 12th February 2024 the 2nd Defendant negligently without lawful authority together with the 3rd Defendant accompanied by goons forcefully and violently entered and trespassed upon the Plaintiff’s aforesaid land and evicted the Plaintiff’s caretakers/ servants and/ or employees from the Plaintiff’s land and wantonly destroyed and damaged Plaintiff’s properties on the land and have taken occupation of the said land claiming the land belongs to the 3rd Defendant upon strength of Title No. Mombasa / MS / Block V / 48 issued by the 1st Defendant to the 3rd Defendant and remain in forceful and illegal occupation of the barricaded both by the 2nd and 3rd Defendants and other unknown goods.



19. The Plaintiff avers that the 2nd Defendant has conspired with the 1st, 3rd, 4th, and 5th Defendants to dispose of and/or sell the Plaintiff's land Title No. MOMBASA / MAINLAND SOUTH / BLOCK V / 48 by using fraudulent Title No. Mombasa / MS / Block V / 48 and purporting it to refer to the Plaintiff's land. A number of interested purchasers have frequently come to inspect the Plaintiff's land with intent to purchase it. The Plaintiff's servants and employees have been thrown off the Plaintiff land which is currently cordoned by goons hired by 3rd Defendant with the knowledge and nod from the 2nd Defendant.
27. It is likewise unsurprising that courts have shrank from attempting a comprehensive exposition of what is and is not countenanced by the formula "a bona fide attempt to exercise a power." Rather the burden of the formula has been illustrated by examples as in the observations. The following examples though not conclusive may suffice. It must be established that: - (i) there was no bona fide attempt by the public officer to exercise the power; (ii) the exercise of that power must relate to the subject matter of the Act; and, (iii) the decisions taken were reasonably capable of reference to the power given to the public officer. In this this case, the Petitioners were required to demonstrate the absence of these three tests. I am convinced that the attempt to surmount the high threshold required to establish bad faith to justify impleading the 1st and 2nd Defendants/ Respondents in their personal capacities. Their inclusion in this suit is warranted. Therefore the objection made out under the provision of Section 22 of the of the National Government Coordination Act is overruled.

Issue No. d). Whether the suit offends the provisions of Section 14 (5) of the Land Registration Act, No.3 of 2012

28. Under this sub title, Section 14 (5) of the Land Registration Act, No. 3 of 2012 in Kenya pertains to the preparation of instruments by the Registrar. Sections 14 aforesaid provide:
14. The Chief Land Registrar, County Land Registrars or any other land registrars may, in addition to the powers conferred on the office of the Registrar by this Act—
- (a) require any person to produce any instrument, certificate or other document or plan relating to the land, lease or charge in question, and that person shall produce the same;
 - (b) summon any person to appear and give any information or explanation in respect to land, a lease, charge, instrument, certificate, document or plan relating to the land, lease or charge in question, and that person shall appear and give the information or explanation;
 - (c) refuse to proceed with any registration if any instrument, certificate or other document, plan, information or explanation required to be produced or given is withheld or any act required to be performed under this Act is not performed;
 - (d) cause oaths to be administered or declarations taken and may require that any proceedings, information or explanation affecting registration shall be verified on oath or by statutory declaration; and
 - (e) order that the costs, charges and expenses as prescribed under this Act, incurred by the office or by any person in connection with any investigation or hearing held by the Registrar for the purposes of this Act shall be borne and paid by such persons and in such proportions as the Registrar may think fit.
29. Whereas the provision of Article 40 of the Constitution protects the right to property, however that protection pursuant to the provision of Article 40(6) of the Constitution, does not extend to any



property that has been found to have been unlawfully acquired. There have been allegations of fraud in the Plaint and this Honorable Court should not be subjecting to deciding the suit through a preliminary objection when it has not had the opportunity to examine the evidence. Fraud and illegality of titles are issued engraved in this suit which can only be exhaustively through adducing of empirical both oral and documentary evidence to be adduced before this Honourable Court through a trial. During that session the Court will be accorded all the opportunity to critically examine all the evidence and arrive at an informed judicial decision. Therefore the Honourable Court is not persuaded to allow the objection made out under the provision of Section 14 (e) of the Land Registration Act, No.3 of 2012 is adequate. Thus, the same is overruled.

Issue No. e). Whether the suit further offends the provisions of Section 66 of the National Police Service Act, No. 11A of 2011

30. Under this title the Court is taxed with examining if this suit offends the provisions of Section 66 of the National Police Service Act, No. 11A of 2011. Section 66(1) of the National Police Service Act protects Police officers from personal liability. It states that no matter or thing done by a member, employee or agent of the Service shall, if the matter or thing is done in good faith for the performance and execution of the functions, powers or duties of the Service, render the officer, employee or agent personally liable to any action, claim or demand whatsoever. As this Honourable Court has rightfully put it before in this ruling, the 2nd Defendant has been mentioned personally for the alleged forceful and violent entry and trespassed upon the suit property with the 3rd Defendant accompanied by goons. I believe this is a prime reason to decline to grant the objection on the basis that the suit offends the provision of Section 66 of the National Police Service Act. Likewise, the objection is overruled.

Issue No. f). Who bears the Costs of the Notice of Preliminary objection dated 29th February, 2024.

31. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus -Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus -Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Mubumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
32. In the present case, the matter is still proceeding on to full trial. Thus, in the given circumstances, the Honourable Court elects to have the costs in the cause.

V. Conclusion & Disposition

33. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Clearly, the 1st and 2nd Defendant/ Respondents have failed in raising suitable objections to the suit and the Notice of Motion Application both dated 20th February, 2024.
34. Having said that much, there will be need to preserve the suit land in the meantime. In a nutshell, I proceed to order the following:-



- a. That the Notice of Preliminary objection dated 29th February, 2024 is hereby found to lack merit and is dismissed entirely.
- b. That the Notice of Motion Application dated 20th February, 2024 be and should hereby be disposed of by way of written submissions in the following terms:-
 - i. The Plaintiff is granted 14 days to file and serve his written submissions.
 - ii. Thereafter the 1st to 6th Defendants are granted 14 days leave to file and serve submissions.
 - iii. Thereafter the Court shall render its Ruling on 31st July, 2024.
- c. That the cost of these applications will be in the cause.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 12TH DAY OF JULY 2024.

.....
HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Asige Advocate for the Plaintiff.
- c. Mr. Kemei Advocate for the 1st, 2nd and 6th Defendants.
- d. No appearance for the 3rd and 4th Defendants.
- e. Mr. Mohamed Advocate the 5th Defendant.

