



Bandari v Muye & 4 others; Ziani Holdings Limited (Interested Party) (Environment & Land Case E105 of 2022) [2024] KEELC 6571 (KLR) (9 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E105 OF 2022
SM KIBUNJA, J
OCTOBER 9, 2024**

BETWEEN

PHILOMENA GETRUDE BANDARI PLAINTIFF

AND

MWARABU CHIGIRI MUYE & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4 OTHERS DEFENDANT

AND

ZIANI HOLDINGS LIMITED INTERESTED PARTY

RULING

1. The plaintiff moved the court through the application dated 5th October 2022, seeking for inter alia an order of injunction restraining the defendants, their agents and or employees from occupying, alienating, working or in any way whatsoever dealing with that parcel of land known as LR MN/1/16038 – CR. 20862, pending the hearing and determination of this suit. The application is premised on the fourteen (14) grounds on its face and supported by the affidavit of Philomena Getrude Bandari, the plaintiff, sworn on the 5th October 2024, inter alia deposing that Duncan Chengo Bandari, who was her late husband, and herself were the equal shareholders and directors of the interested party, that had acquired LR MN/1/16038 – CR.20862, the suit property; that the interested party went through winding up process in High Court Winding Up Cause No. 5 of 2006, and what remained was the sale and settling of terms of sale; that in March 2018, her late husband illegally and fraudulently applied for a provincial certificate that was issued in July 2018, but it was later called for and cancelled by the Land Registrar vide letters dated 15th August 2018 and 17th September 2021; that her late husband fraudulently bequeathed the suit property to the defendants through his will, and when he passed on, the defendants invaded the property and put tenants thereon for their own benefits and financial gain; that she reported the invasion to the police, who accompanied her to the property but the defendants



- refused to open; that she was left as the interested party's sole director when her late husband passed on, and unless the defendants are restrained, she stands to suffer irreparable loss.
2. The 1st, 2nd and 4th defendants opposed the application and suit through the notice of preliminary objection dated 10th January 2023, through which they raised seven (7) grounds summarized as follows:
 - a. That the ownership and division of the suit property has been conclusively litigated in Mombasa High Court Winding Up Cause No. 5 of 2006;
 - b. That there are unchallenged judicial findings that the property belongs to the interested party, and the suit is therefore incompetent, and an abuse of court process;
 - c. That the application seeks final orders, is aimed at asserting the interested party's right and is incompetent for it was filed in the plaintiff's name and without leave.
 3. Chikodza Bandari, the 4th defendant, also filed two affidavits sworn on the 16th January 2023 and 27th October 2023, in support of the preliminary objection that was in response to the application, among others deposing that he was a son to the late Duncan Chengo Bandari, and lives on the suit property, that is registered with the interested party; that the ownership and dealings over the suit property has been concluded in Mombasa High Court Winding Up Cause No. 5 of 2006, and the plaintiff's application that aims to evict them should not be granted; that the right forum to pursue matters to do with the suit property is therefore the High Court.
 4. The record confirms that the court issued directions on the 17th January 2023 and 9th November 2023, that the preliminary objection would be heard and decided first, through submissions to be filed and exchanged within the timelines given. However to date none has been filed. During the mention of 17th January 2024, Mr. Gitonga, learned counsel for the 1st, 2nd and 4th defendants informed the court that he was aware a consent had been filed that settles this suit, and therefore did not intend to file submissions on the preliminary objection. Mr. Magolo, learned counsel for the plaintiff informed the court he was not aware of any settlement and requested for two weeks to file submissions on the preliminary objection. Though the counsel was given time, no submissions had been filed by 22nd February 2024, when the matter was mentioned. On that day, the counsel for the 1st, 2nd and 4th defendants informed the court that parties had resolved the matter and the suit should be marked withdrawn. However, as no consent had been filed, and counsel for the plaintiff was absent, the court fixed the matter for mention on the 8th May 2024, but no party or counsel appeared. Another mention was fixed for 5th June 2024, and again no party or counsel attended. The court reserved the matter for ruling today.
 5. Having considered the grounds on the notice of preliminary objection on the preliminary objection, in support of which the 4th defendant filed the affidavits sworn on 16th January 2023 and 27th October 2023, the court finds the following to be the issues for determinations:
 - a. Whether any of the grounds on the notice of Preliminary Objection amounts to a pure point of law that arises from the undisputed pleadings by the parties.
 - b. Whether any of the grounds can be determined without calling or considering evidence'
 - c. Who pays the costs?
 6. The court has carefully considered the grounds on the preliminary objection, affidavits in support by the 4th defendants, the pleadings by the parties and come to the following conclusions:



- a. A preliminary objection must be correctly raised and satisfy the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the 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.”

Sir Charles Newbold P. further held,

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be 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.”

In the case of *Oraro v Mbaja* (2005) 1 KLR 141, the court held:

“I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary objection’. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

For a ground of preliminary objection to be upheld, the same must stem from undisputed facts in the pleadings and should be based on pure points.

- b. That all the seven grounds on the notice of preliminary objection, as phrased, cannot be said to arise from the pleadings filed in this suit by the parties, leave alone being undisputed. The fact that the 4th defendant found it necessary to file two affidavits he swore on the 16th January 2023 and 27th October 2023, is a confirmation of his appreciation that evidence would be needed in support of the preliminary objection. The moment it becomes necessary to call evidence in support of ground in a notice of preliminary objection, or the court’s discretion is sought in the same, the ground stops or ceases being a pure point of law. Such a ground can best be prosecuted through an application, where both sides are given opportunity to present their evidence for or against the preliminary objection before the court makes a determination. That is what the 1st, 2nd and 4th defendants should have done. Their preliminary objection is without merit.



- c. That as the plaintiff did not participate in the hearing of the preliminary objection no order on costs will be issued.

7. Flowing from the foregoing, the court finds and orders as follows:

- a. The 1st, 2nd, and 4th defendants notice of preliminary objection dated the 10th January 2023 is without merit.
- b. The said notice of preliminary objection is hereby rejected with no order as to costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 9TH DAY OF OCTOBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff: Mr Paul Magolo

Defendants : No appearance

Interested Party : No Appearance

Court Assistant – Leakey.

