Meli v Mwela & another; Rono & 3 others (Interested Parties) (Environment & Land Case 38 of 2019) [2023] KEELC 17211 (KLR) (5 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17211 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 38 OF 2019

FO NYAGAKA, J

MAY 5, 2023

BETWEEN

PHILIP MELI ..... PLAINTIFF

AND

JOHN CHEBAI MWELA ..... 1ST DEFENDANT

THE LAND REGISTRAR TRANS NZOIA ..... 2ND DEFENDANT

AND

JULIA RONO ..... INTERESTED PARTY

ISAAC LELEI RONO ..... INTERESTED PARTY

TITUS RONO ..... INTERESTED PARTY

DANIEL KIPTOO RONO ..... INTERESTED PARTY

RULING

Application

1. Before me for determination was a Notice of Motion dated 20/05/2021. It was filed by the Plaintiff on 26/05/2021. It was brought under the *Constitution* of Kenya, Articles 36, 47, 48, 165(6) and (7), and Sections 1 and 3A of the *Civil Procedure Act*, Laws of Kenya, Order 51 Rule 1, Order 45 Rule 1, Order 1 Rule 10(2), (4) and 14 of the *Civil Procedure Rules*. It sought the following reliefs:

    1. ...spent.

    2. Pending the hearing and determination of this application and suit, injunctive order do and is hereby issue directed at the 1st Defendant restraining him from encroaching on, erecting any fence, destroying structures, cultivating or in any way dealing with those parcels of

land occupied by the plaintiffs family members known as LR No. Kwanza/Kwnaza Block5/ Korosi/3, 4 and 6.

3. The Plaintiff is hereby granted leave to amend his Plaint and the Draft amended defence (*sic*) herein be deemed to have been properly filed upon payment of requisite court fees.

4. The honourable Court be pleased to give directions on and/terminate the proceedings in Kitale Chief Magistrate Case No. 19 of 2020 for abuse of Court process (*sic*).

5. This honourable Court do review its orders issued on 24th October, 2019 and issue an injunctive order against the defendant from interfering with the suit land pending hearing and determination of this suit.

6. That such other and or further order do issue in the interest of justice.

7. That the cost of this application be provided for.

2. The Application is supported by the grounds on its body and by the Supporting Affidavit of the Plaintiff, sworn on 20/05/2021. In brief, they are that the Plaintiff lodged this suit which was pending determination by the Court; the registered owner had since passed away and his estate the subject of the law of succession and the same has not been distributed; the 1st Defendant had destroyed the fence put up by the family of the plaintiff and caused great disharmony in the family; the 1st Defendant had lodged a case in the lower court in a bid to frustrate the process of this court; he had been summoned by the Area Chief and Police to desist from encroaching on the land which was LR. No. Kwanza/Kwanza Block 5/Korosi/3 and 4 in vain; the 1st Defendant had been notified to stop with the interference but ignored it and only the orders sought could safeguard the rights of the applicant.

3. Further grounds were that the 1st Defendant had demonstrated no regard of the civil law and the applicant had pending contempt proceedings against him in this matter; that this Court had no supervisory jurisdiction(*sic*) over the lower court and could issue such orders and directions to ensure proper administration of justice; the integrity of the Court ought to be safeguarded by the issuance of the restraining orders sought; the Plaintiff would continue to suffer irreparable harm if the orders sought were not granted as the 1st Defendant would continue to frustrate the family members and there was fear of likely unrest unless the court compelled to obey its orders; the defendants would suffer no prejudice if the orders were granted; and the Succession cause had not been concluded.

4. The depositions in the Supporting Affidavit were to the effect that the applicant had brought as a defendant (*sic*) and beneficial owner of the suit properties of the estate of one Chepkwony Misoi and the other one registered in the name of his father, one Charles Rono. That the said Charles Rono had given the applicant as the first born son authority to oversee the family matters. He deponed further that his father was the registered owner of land parcels LR. No. Kwanza/Kwanza Block 5/Korosi/3, 4 and 7 and his late grandfather registered as owner of LR. No. Kwanza/ Kwanza Block 5/Korosi/6.

5. He deponed further that sometime in 2003 it came to his knowledge that the 1st Defendant who had purchased 0.4 acres from his father had started encroaching onto and extending the boundary beyond where he had been allocated. Subsequently he encroached and settled on the parcel of land known as LR. No. Kwanza/ Kwanza Block 5/Korosi/6 a location he was supposed to (*sic*). That when he filed suit he sought an injunction against the 1st Defendant from interfering with the property of his late grandfather whose estate was yet to be distributed. He purported to annex and mark as PM1 a copy of the late grandfather's death certificate but it was not. But in the List of Documents he filed the copy of the certificate showed that the said Chepkwony Misoi died on 26/12/1998.

6. He deponed further that the 1st Defendant had been very violent and reports of the behavior reported severally at Kwanza Police Station. He had been destroying plants of family members. The Plaintiff wished to amend the Plaint to bring to the Court the real issues in controversy. He deponed that he had been advised that leave was necessary before the amendment of the pleading. He swore that restraining orders were necessary to avoid a likelihood of breach of peace and serious conflict by family with the 1st Defendant. He deponed that the 1st Defendant had instituted Kitale CMCC No. 19 of 2020, whose copy of Plaint he annexed and marked as PM2, to frustrate him and the instant matter. He emphasized that this Court had power to issue the orders sought. He deponed that it was in the interest of justice for the application to be granted and the defendants would not suffer any prejudice if they were granted. He prayed that the application be allowed.

7. The 2nd Defendant opposed the application dated 20/05/2021 through grounds of opposition dated 12/04/2022 and filed on 11/10/2022. In brief the grounds were that the application was incompetent, misconceived unmerited and abuse of the process of the Court. That the applicant lacked the requisite capacity and or *locus standi* to institute and sustain the application and suit herein. Further, the application and suit were time-barred. That the applicant had not met the threshold for the grant of the orders sought. Lastly, that the applicant had failed to demonstrate sufficient ground to warrant the orders sought.

8. The Application was disposed by way of written submissions but as at the time of preparing the ruling only the 2nd Defendant had file submissions in that regard. Nevertheless, by virtue of the fact and law, as state by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR that submissions are only words and a language employed by parties to try and convince the Court to find in either's favour, I will determine the instant application on its merits based on the facts and the grounds of opposition thereto even as I consider the submissions filed.

9. The 2nd Defendant began its submissions by giving a summary of the application and the grounds of opposition he had filed. He then gave three issues which he felt was to be for determination. These were whether the applicant had *locus standi* to bring both the application and the suit, whether the application and suit were time-barred, and whether or not the applicant had demonstrated sufficient cause to warrant the orders sought.

10. Regarding the issue on whether or not the applicant had *locus standi* to bring both the suit and the application, he submitted that the Plaintiff had pleaded and deponed that his father, one Charles Rono, was the registered owner of the parcel of land known as LR. No. Kwanza/Kwanza Block 5/Korosi/3, 4 and 7 and his late grandfather registered as owner of LR. No. Kwanza/Kwanza Block 5/Korosi/6, yet he averred that he brought the suit as a beneficial owner of the said suit properties, having been given authority as the first son to oversee them.

11. On the issue he submitted that since the title LR. No. Kwanza/Kwanza Block 5/Korosi/6 was registered in the name of a deceased person it fell under the *Law of Succession Act* and the plaintiff had not demonstrated that he was either the legal administrator of the estate of the deceased person or had a Will given to him to execute. As such he had no capacity to bring both the suit and the application. He relied on the case of *Hawo Shanko v. Mohammed Uta Shanko* [2018] eKLR which held that a party lacks *locus standi* to bring a suit before obtaining a grant of letter of administration of that purpose.

12. Again, the 2nd Defendant submitted that the applicant had not given reasons why his father could not institute suit or that he had not demonstrated that he had legal authority from his father to institute the suit or filed a duly registered Power of Attorney to that effect. He relied on the case of *Francis Mwangi*

Mugo v. David Kamau Gachago [2017] eKLR which held that a power of attorney gives one capacity to one who had no capacity to have it to act for another, and is the backbone of jurisdiction.

13. On the issue of whether or not the suit was time-barred, he submitted that it was, by virtue of the claim being outside of the time given under Section 7 of the *Limitation of Actions Act*. He explained that *vide* paragraph 6 of the Plaint the Applicant (and paragraph 4 of the Supporting Affidavit) the claim arose in 2003 yet the suit was brought in 2019, about 15 years after the alleged encroachment. He submitted that the applicant was guilty of laches. He relied on the case of *Paul Chebii Chelimo & 15 others v. A.I.C. Kaptabuk & 2 others* [2022] eKLR which held that a plaint barred by limitation was a plaint barred by law.

14. On the issue whether the applicant had shown sufficient reason to warrant the grant of the orders sought, he submitted that the applicant was not deserving of the orders sought. The reason he gave was that the suit was time-barred and that the Plaintiff had no arguable case, the suit did not disclose any reasonable cause of action and that the instant suit when compared with the one in the subordinate court were totally different. He prayed for the dismissal of the suit and the application for all the reasons given.

Analysis and Disposition

15. I have considered the Application, the Affidavit in support thereof and the only one annexure thereto. I have also given thought to the 2nd Defendant's response, examined 2nd Defendant's submissions and analyzed the relevant law. The application determination, which I list as follows:

    a. Whether the application is an abuse of the process of court

    b. Whether the applicant had locus standi to bring the suit and application

    c. Whether an of injunction can issue in light of the earlier dismissed application

    d. Whether the prayer for amendment of the Plaint is merited

    e. Whether the Court can order the termination of Kitale CMCC No. 19 of 2020

    f. Whether the prayer for review of orders of 24/10/2019 is merited

    g. Who to bear the costs of the application or both the suit and application

16. As I begin the analysis of the issues that I have listed above it is worth stating that the first two may dispose of the application and both the application and suit respectively if they succeed. Therefore, it is appropriate to begin determining them because of they succeed then a determination of the others would be a mere academic exercise and not worthy of taking the Court's time to decide them, but the last one being a consequence of a determination of the either all or the ones the Court will consider it has to also be concluded on.

a. Whether the application is an abuse of the process of court

17. The second defendant raised the issue that the application was an abuse of the process of the Court. Under Section 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, this court is obligated under the inherent powers given to it to make such orders as it may deem just in order to prevent an abuse of its process. Abuse of the process of Court has been defined in a number of cases. I will rely on a few herein.

18. In *Satya Bhama Gandhi v Director of Public Prosecutions & 3 Others* [2018] eKLR, Justice Mativo stated that abuse of judicial process occurs "...when a party improperly uses the issue of the judicial

process to the irritation and annoyance of his opponents." He then gave nine instances where it may be taken to occur. He stated as follows:

> " The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
>
> (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
>
> (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
>
> (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
>
> (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
>
> (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]
>
> (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
>
> (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
>
> (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]."

19. In *Agwasim v. Ojichie*, In the Supreme Court of Nigeria, SC. 15/2000, Tobi J.S.C., had this to say about abuse of judicial process:

> " The above factual position creates a scenario of the appellants pursuing the same matter by two court process. In other words, the appellants by the two court process, are involved in some gamble or game of chance to get the best in the judicial process."

20. In *Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 (2009) eKLR 229, the Court of Appeal stated as follows;-

> " The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective

administration of justice. It is a term generally applied to a proceeding, which is wanting in bona fides and frivolous, vexatious or oppressive'.

21. Abuse of the process of the court occurs when a party uses and misuses the process. It means he/she intentionally employs the process by requiring the Court to decide on the same issue directly or indirectly. In one instance it may involve calling on the court to pronounce itself on an issue it has already done so or the party subtly bringing the same issue before Court while suppressing the knowledge about its existence.

22. In the instant case, the Court record bears it that on 30/04/2019, the applicant sought in this suit, among others, an interlocutory injunctive order through the application dated 29/04/2019 over the same suit parcels as in the instant application but against three parties who he had sued as defendants then. The 1st Defendant and now 3rd were two of them. The application was considered by the Court and dismissed on 24/10/2019.

23. Again, on 03/03/2020 the Applicant another application, dated 2/03/2020, against the two Defendants. While he listed the two parties alone as defendants and respondents for that matter he sought a similar prayer of injunction over the same suit parcels but specifically against the 1st Defendant. On 12/03/2020, the Application was dismissed for want of prosecution. It is more puzzling than ever before that 26/05/2021 the applicant filed the instant application which was exactly similar to the one dismissed on 12/03/2020 (in every respect) except that in the title he introduced the four interested parties as indicated in the head of this ruling, changed only the date of the application and that of making oath on the depositions of the supporting affidavit, and in the instant one introduced a deposition on the fact that the respondent had filed a suit in Kitale CMCC No. 19 of 2020.

24. What else can be an abuse of the process of the Court other than an applicant misusing its process as borne by the facts herein? He did not even have the sincerity and respect of applying to set aside the orders of dismissal. Instead he is intent on asking the Court to review the earlier orders of dismissal of the initial application for injunction. It is a pity. It is indeed a clear case of abuse. I dismiss with costs to the Respondents the application on that account.

b. Whether the applicant had locus standi to bring the suit and application

25. I now turn to the other legal issue which was raised by the 2nd Defendant, which is, whether the applicant had locus to bring the suit and maintain the application. The issue raised by the 2nd Defendant appears to me to be a preliminary objection to not only the application but the entire suit. I hold so because the party has raised an issue which can only be decided based on the pleadings as they are and the law.

26. A preliminary objection was defined in the seminal case of *Mukisa Biscuit Manufacturing Co. Ltd vs. 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 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."

27. Also, in *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] eKLR, the same Court stated as follows:

> " We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. 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."

28. Additionally, in Susan Wairimu Ndiangui V Pauline W. Thuo & Another [2005] eKLR Musinga J. as he then was held that

> " 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."

29. From the above definitions, I find that the ground raised by the 2nd Defendant would fit fully in it, and since it may go to the root of the case, if successful, I will handle it now. But as I do, it is clear that I will not apply it to the application that was before me for determination for I have already made a finding that it was an abuse of the process of the court and dismissed it. I will limit the point to considering the pleadings. In any event if I apply it to the application, I would have to address my mind to the facts to be gathered from the application hence I would be using contentious facts to ascertain the proof thereof.

30. Locus standi, which means legal standing is a Latin term which revolves around whether or not the party can have ground to stand on when bringing a suit. To have such a ground would literary mean that he has legs or feet to stand on. To be sensitive to the persons with disability, the term would be taken to mean that there is a base upon which the applicant can firm his grip and stand to maintain the action before the Court.

31. In the instant case, the argument was the Plaintiff's claim is founded on averments that he was a beneficial owner of the suit properties some of which are registered in the name of his father, one Charles Rono, who is still alive, and one which is registered in the name of his late grandfather, one Chekpwony Misoi. He claims that the basis for his action in the matter is purely beneficial ownership an nothing more.

32. In regard to bringing suits for and on behalf of natural persons, the law is clear. In so far as an individual is of capacity to sue or be sued he alone can bring a suit by himself or through a recognized agent. Where does not have capacity, for instance he is a minor or of other incapacity such as unsound mind or bankruptcy, the suit has to be brought on behalf of the person the Guardian Ad Litem or next friend (who must be authorized by law to do so) as the *Civil Procedure Rules* require (see Order 32 Rule 3, Order 32 Rule 15, among others, of the Civil Procedure Rules). Aside from that the individual who has capacity to sue but is prevented for other reasons from brining suit may appoint another person

through a Power of Attorney to represent him or her. The Power of Attorney must be given prior to the filing of the suit and be duly registered as required by law, that is to say Sections 4 of the *Registration of Documents Act*, Chapter 285 of Laws of Kenya, as read with Section 19 of the Stamp Duty Act. Absent of that no other person may lawfully claim to have the right or capacity to sue in that behalf.

33. In the case of Francis Mwangi Mugo v. David Kamau Gachago [2017] eKLR where the plaintiff claimed to have been given a power of attorney by the person on whose behalf he purported to sue but he did not register the same before filing the suit, Justice Munyao had this to say:

> "I do not think capacity is a technicality curable under Article 159 of the *Constitution*. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney."

34. I could not agree more. In the instant suit the Plaintiff has not shown that he has the requisite legal document that gives him the basis to maintain the suit on behalf of his father. The claim in respect of all the properties registered in his father's name cannot therefore stand. The law does not recognize beneficial ownership, whatever that may mean, as a basis for bringing suit on behalf of the both the living and the dead.

35. In regard to land parcel LR. No. Kwanza/Kwanza Block 5/Korosi/6 the Plaintiff claimed beneficial ownership thereof also as the basis for bringing suit on behalf of the estate of his late grandfather, Chepkwony Misoi. The Plaintiff does not pretend to claim that the suit land has been distributed. He does not also claim that he has any letters of administration on the estate of the deceased grandparent or even a Limited Grant or Ad Litem for purposes of suing. Under Section 80 (2) of the *Law of Succession Act*, "A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of such grant." Since the Plaintiff does not claim to have had the grant of letters of administration to the estate of the late Mosoi to date, it means he cannot maintain the action on behalf of the estate and his claim along that limb fails. I therefore find that in sum the Plaintiff did not have capacity to sue herein on behalf of the two individuals he claims to have brought the suit. He did not have the *locus standi* to do so.

h. Who to bear the costs of the application or both the suit and application

36. Consequently, I dismiss the application and strike out the suit. Since both the application and the entire suit have failed for reason that they were urged by a busybody, I cannot find any reason not to award costs to the Defendants.

37. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 5TH DAY OF MAY, 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE