



Temba & another v Governer Bungoma County Government & 3 others (Environment & Land Case E007 of 2023) [2023] KEELC 20643 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E007 OF 2023
EC CHERONO, J
OCTOBER 5, 2023**

BETWEEN

KHAMALA KIZITO TEMBA 1ST PLAINTIFF

BERNARDETTE TEMBA 2ND PLAINTIFF

AND

THE GOVERNER BUNGOMA COUNTY GOVERNMENT 1ST DEFENDANT

COUNTY GOVERNMENT OF BUNGOMA 2ND DEFENDANT

**THE CHIEF OFFICER ROADS AND INFRASTRUCTURE BUNGOMA
COUNTY 3RD DEFENDANT**

SARYDA TRADERS LIMITED 4TH DEFENDANT

RULING

1. What is for determination before me is a preliminary objection by the defendant's dated June 13, 2023 and June 20, 2023. The objection is directed to the suit filed herein. It is premised on four (4) grounds as follows:-
 1. That the plaintiff lacks locus standi to file this suit before the Court as the Title Deed is registered in the name of Maurice Tembda Kisabuli and there is no nexus between the plaintiffs and the said registered owner.
 2. That the 1st and 3rd defendants are improperly joined as parties to this proceedings not being constitutional and statutory legal entities that initiated the process the subject matter of these proceedings and who ought and cannot by dint of section 123 of the County Government Act, 2012, be sued in their personal capacity in discharge of their public mandate vested in the County Government of Bungoma and whose offices are not capable of being sued and the plaintiff ought to be struck off as against them.



3. That the purported 1st and 3rd defendants are legal phantoms for they are neither human beings nor an incorporated or statutory legal entity capable of suing or being sued and this honourable Court is obligated to strike them off from the plaint as its an abuse of the Court process to purport to sue nonexistent entities.
2. The plaintiffs vide a plaint dated May 24, 2023 claim against the defendant's that the 4th defendant acting under the authority of the 1st, 2nd and 3rd defendants trespassed on the plaintiff's land and proceeded to demolish the permanent fence, reinforced fence of treated poles, barbed wire and corrugated iron sheets together with indigenous and exotic trees planted on the said land. The plaintiffs suit ultimately seeks for a declaration that the defendants violated his constitutional rights, an injunction against the defendants from interfering with the plaintiffs use of land parcel no Ndivisi/Makuselwa/1552 damages and costs of the suit.
3. The plaintiff's application is opposed by the defendant's grounds of opposition and preliminary objection dated June 13, 2023 and June 20, 2023. Parties took directions and by consent the preliminary objection was canvassed through submissions.
4. The defendants submitted that the plaintiffs lacked the locus standi to institute the current suit as the Certificate of title to the suit land is registered in the name of Maurice Temba Kisabuli and no nexus has been established between the plaintiffs and the registered owners. Seeing that the said registered owner is deceased counsel argued that the plaintiff had neither obtained letters of administration nor attached evidence of grant ad litem before the court. The failure to attach the letters of administration has been termed as defective and fatal.
5. It is submitted by the 1st, 2nd & 3rd defendants that by enjoining the 1st & 3rd defendant's the plaintiff upset the provisions of section 5, 6 and 133 of the *County Government Act, 2012* as they were not constitutional or legal bodies capable of being sued in their personal capacity and therefore they ought to be struck out off this suit.
6. They relied among other on the case of *John Minning Temoi & another vs. Governor of Bungoma County & 17 others* (2014), *Alfred Njau v City of Nairobi* (1983) KLR 625, *Julian Adoyo Ongonga v Francis Kiberenge Abano*, Migori Civil Appeal No. 119 of 2015 and *Fredrick Wachira Ndegwa (substituting Ndegwa Wachira (deceased) v Ridharada Wanjiku Ndanjeru & another* (1997) eKLR.
7. The plaintiffs submitted that the registered owner of the suit property, Maurice Temba Kisabuli - deceased was their father and husband respectively and that they have been in occupation of the suit land and developed the same. It was submitted that contrary to the defendant's contention on locus standi, the law allows anyone affected by trespass to invoke locus standi. Further, it was submitted that the defendants have wrongly applied the authorities cited as they do not relate to the issue in question which is founded on trespass. On the issue of joinder of the 1st and 3rd defendants, it was submitted that their actions as officers of the county government of Bungoma is what is in issue and it was imperative that they be included as parties in this suit.
8. The plaintiff relied on various cases among them *James Gacheru Kariuki & 69 others v William Kabogo Gitau & 104 others*, *Samuel Mwanagi v Jeremiah M'itobu* (2012) eKLR, *Lilian Mosonik & another v Management Committee of AGC Riverside Church* (2022) eKLR.
9. I have considered the objection as raised, the authorities attached by the plaintiff and the written submissions by the parties. I have also looked at the suit as filed. A preliminary objection was described



in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd*. (1969) EA 696, where it was held as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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.....“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 has to be ascertained or if what is sought is the exercise of judicial discretion.

10. It therefore follows that for a point to suffice as a preliminary objection, it ought to be one that raises a pure point of law as defined in the case of *Mukbisa Biscuits (supra)*. The preliminary objection should also be one that if argued is capable of disposing of the suit. See the case of *Quick Enterprises Ltd .v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999.
11. The defendants have raised the issue of locus standi. *Locus standi* is defined in [*Black's Law Dictionary*](#), 9th Edition (page 1026) as “the right to bring an action or to be heard in a given forum”. In the case of [*Alfred Njau and others ..v. City Council of Nairobi*](#) (1982) KAR 229, the court held;-

“the term Locus Standi means a right to appear in court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
12. A claim that a party lacks locus standi therefore is a pure point of law and one that may be raised as a preliminary point at the earliest.
13. The defendant’s preliminary point is founded on section 82 of the [*Law of Succession Act*](#) which gives the personal representatives of a deceased person’s estate the power to “enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death of his personal representative”.
14. The plaintiffs on the other hand argue that they are the son and wife of the registered owner who is since deceased. They admitted to not having obtained any grant prior to institution of this suit but submit that they bring this suit in their own capacity having been affected by the actions of the defendant’s. It is the plaintiff’s argument that the requirement for obtaining a grant as envisaged before the succession act is not required for a suit filed for recovery as a result of trespass.
15. It is not in contention that the plaintiffs are in occupation of the suit land and they have erected structures therein. I am therefore guided by section 10 of the of the [*Trespass Act*](#) provides that;

‘Proceedings for an offence under this Act may be instituted by the occupier of private land or the owner of a fence, as the case may be’
16. This means that where a party wishes to file suit for trespass, he/she need not necessarily be the proprietor of and/or owner of the subject property, but the mere occupation of the same is sufficient locus to commence a suit for trespass. Winfield and Jolowicz state in their book “Tort” (12th Edition @ p. 361):

“Possession in fact confers no actual right of property, but a possessor may nevertheless maintain trespass against anyone who interferes who cannot himself show that he has the right to recover possession immediately. A stranger cannot rely in his defence upon another person’s right to possess (the “jus tertii”) unless he can prove that he acted with that person’s



authority. Even wrongful possession, such as that acquired by a squatter, will, in principle, be protected except against the owner of the land or someone acting lawfully on his behalf.”

17. This position was confirmed by the court of Appeal in the case of *Samuel Mwangi v Jeremiah M’itobu* [2012] eKLR. In the instant matter, the plaintiff is not seeking for ownership of the land but for injunction against the respondent for trespass and therefore the issue of whether or not he has locus standi does not arise. I therefore find that the plaintiffs have locus standi to be commence this suit.
18. On the issue whether the 1st and 3rd defendants have been properly enjoined, the plaintiffs in their pleadings and submission admit that that they seek no personal liability as against the said Defendants, and therefore are suing the two from acts arising from execution of their office as Governor of Bungoma County and Chief Officer, Roads and Infrastructure, Bungoma County. There is thus a question of law raised as to whether in the circumstances the 1st and 3rd defendants can be sued in their personal capacity.
19. The Court in this regard notes that section 133 of the *County Government Act* (No 17 of 2012) provides that members, staff and servants of a county government are exempted from personal civil liability for any act done in good faith in the execution of their duty or upon directions. Article 176 of the *Constitution* in this respect states that a county government for each county shall consist of a county assembly and a county executive, and under article 179 the Governor is a member of the county executive committee and also the chief executive of the county. To this extent the Governor and the Chief Officer are both members and staff of the county government and they are to be afforded the protection in section 133 of the *County Government Act*.
20. The suit against the 1st and 3rd defendants is therefore improperly brought and is hereby struck out with costs to the 1st and 3rd defendants.
21. It is so ordered.

DATED AND SIGNED AT BUNGOMA THIS 5TH DAY OF OCTOBER, 2023.

HON.E.C CHERONO

ELC JUDGE

