



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. E001. OF 2020 (OS)

JOSEPH MUINDI MUTUA.....1ST APPLICANT

KAVEKE UVOO.....2ND APPLICANT

TABITHA UVOO.....3RD APPLICANT

DUNCAN NGUTU.....4TH APPLICANT

ALICE NDUNDA.....5TH APPLICANT

STEPHEN MUSAU.....6TH APPLICANT

VERSUS

BONIFACE M. MUUNDA.....1ST RESPONDENT

MAKUENI COUNTY SUYVEYOR.....2ND RESPONDENT

RULING

1. This ruling is in respect to the Notice of Preliminary Objection dated 6th April, 2021 and filed by the 1st respondent. The 1st respondent raises a preliminary point of objection on the following grounds: -

1. The suit as filed is defective as it offends the provisions of Order 1 Rules 8 and 13 of the Civil Procedure Rules.
2. The suit is fatally defective as the same is filed against one Boniface M Muunda described as the owner of plot number Mbooni/Itetani/776 whilst the land is registered in the name of Mukiti Muunda (deceased). No letters of administration have been taken out and thus the 1st respondent has no locus standi to be sued.
3. The suit as filed under order 37 of the Civil Procedure Rules is fatally defective as the same does not fall under any of the reliefs and or questions set out under Order 37 Rule 1 of the Civil Procedure Rules.
4. The suit as filed is fatally defective as the 1st applicant herein Joseph Muindi Mutua who has sworn the affidavit in support of the originating summons purports to represent Japheth Muia Mbegei (deceased) the alleged registered proprietor of Mbooni/Itetani/777 an Mbooni/Itetani/780 whilst he has no loci standi for want of letters of administration.
5. The suit herein seeks injunctive orders against the 1st respondent and as filed has not satisfied the principles for grant of injunction as set out in the case of Giella versus Cassman Brown and Company Limited (1973) E.A 358.
6. The suit filed herein is totally defective in that there existed CMCC No. 394 of 2007 J. Muia Mbengei (deceased) and Stephen M. Masua versus Mukiti Muunda (deceased) filed at Machakos and founded on the same cause of action which suit has since abated upon death of the defendant and the 1st plaintiff thereof and thus the suit herein cannot be sustained in line with the provisions of Order 24 Rule 7 of the Civil Procedure Rules.
7. The suit herein is Res Judicata in as far as ownership of plot number 777 and 781 is concerned as the registration of the above plots and ownership thereof was determined in SRMCC No. 5 of 2007 upon adoption of the award in Makueni District Land Dispute Tribunal Case No. 50 of 2006 as judgment of the court on 16th March, 2007 and the said judgment has never

been set aside and/or appealed against.

2. Parties agreed to dispose the notice of preliminary objection by way of written submissions. The 1st respondent filed his written submissions dated 30th April, 2021. It is his submission that the Originating Summons filed offends the provision of Order 1 Rule 8 and 13 of the Civil Procedure Rules which requires that in cases where there is more than one plaintiff/applicant, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding and that the said authority shall be in writing signed by the party giving it and shall be filed in the case.

3. The 1st respondent also submits that land parcel number Mbooni/Itetani/776 is registered in the name of Mukiti Muunda and as is admitted by the 1st applicant in his affidavit sworn on 31st August, 2020 and as such the 1st respondent has no capacity to be sued in respect to land parcel number Mbooni/Itetani/776.

4. The 1st respondent further submits that Order 37 Rule 1 of the **Civil Procedure Rules** describes who may take out Originating Summons and in respect of what matters and, in this case, none of the applicants fits the description and evidently none of the questions under Order 37 Rule 1 (a) to (g) arises in the Originating Summons herein. That the applicants purport to have brought the application under Order 37 Rule 8 the same being an application under the Registered Land Act but the question to be determined does not fall under Rule 1 and neither does the question and or relief sought fall under Land Registration Act.

5. The 1st respondent further submits that the application as filed is fatally defective and has no chances of success for it does not meet the criteria for grant of injunction orders as per **Giella versus Cassman Brown**. The 1st respondent further submits that the 1st plaintiff in CMCC No. 394 of 2007 was the proprietor of land parcel Mbooni/Itetani/777 while the 6th applicant was said to be the registered proprietor of land parcel number Mbooni/Itetani/781 and that the suit abated after the demise of the 1st plaintiff and the defendant in CMCC Number 394 of 2007. It is his submission that no suit can be brought on the same cause of action in line with the provisions of Order 24 Rule 7 (i) and the Originating Summons in regard to the 7th applicant and claim for an on behalf of the late Japheth Muia Mbengei cannot be sustained.

6. The 1st respondent submits that ownership of land parcel numbers Mbooni Itetani/777 and 781 was determined in SRMCC No. 5 of 2007 upon adoption of the award of the Makueni district Land Disputes Tribunal, Case Number 50 of 2006. It is his submission that the judgment in SRMCC No. 5 of 2007 has never been appealed against, reviewed and or set aside and the current application cannot therefore sustain.

7. The applicant filed written submissions dated 16th June, 2021 in opposition to the notice of preliminary objection. The applicant submits that each of the applicants herein has their own case against the respondents and that he has sworn the supporting affidavit on his own behalf and that of the other applicants and that this court has discretion to allow them comply with the said Order 1 of Civil Procedure Rules as it is merely procedural. It is also their submission that the requirement as per Order 1 Rule 13 (2) does not provide that it shall be filed at the commencement of the suit and submit that the authority shall be in writing signed by the party giving it and shall be filed in the case. The applicants rely on the case of **Eldoret ELC No. 361 of 2015 Hazekia Kipkorir Martin & 10 Others versus Philip Kipkoech Tenai & 2 Others and Nairobi HCCC No. 192 of 2015-Peeraji General Trading & Contracting Company Limited & Another versus Mumias Sugar Company Limited**.

8. The Applicant also submits that the 1st respondent is sued in his personal capacity as he has blocked the access to the applicants' properties. He is sued as a tortfeasor. That the dispute between the parties does not relate to ownership of the land but to blockage of access road by the 1st respondent.

9. It is the applicant's submission that their claim is valid and properly brought under **Order 38 Rule 8** of the **Civil Procedure Rules**. It is his submission that he has the locus standi to institute the suit because his right of access has been curtailed by the 1st respondent and the claim is fortified by the summons letter issued by the Land Registrar, Makueni. It is the 1st applicant's submission that he has sued the 1st respondent in his personal capacity and not on behalf of the estate of the deceased because ownership is not in dispute.

10. The applicants submit that the ownership of the properties namely, Mbooni /Itetani / 574, 589, 777, 778, 779, 780, 781 and 1062 has not been controverted and the fact that the claim of access of the roads to their properties is blocked and the evidence from the Land's Registrar, Makueni summoning the parties to avail themselves at the site over the matter in which the 1st respondent never turned up. It is the applicant's submission that the applicants instant suit is fresh and does not seek to revive either CMCC No. 394 of 2007, that the parties are different in this suit as compared to CMCC No. 394 of 2007 and SPMCC Number 5 of 2007, that the parcel of the land in the suits are different and the cause of action and relief sought in the instant suit are different from the cause of action and relief sought in CMCC No. 394 of 2007 and SPMCC No. 5 of 2007. The objection that the instant suit fails as it is res judicata cannot stand.

11. I have carefully analyzed the notice of the Preliminary Objection and the submissions filed by both parties. The 1st respondent filed his submissions and in conclusion stated as follows: -

“For ease of reference, I do file herewith the following copies: -

(i) Copy of plaint dated 7th May, 2007 in CMCC No. 394 of 2007

(ii) Copy of statement of defence in CMCC No. 394 of 2007

(iii) Copy of proceedings and award in tribunal case No. 50 of 2006.

(iv) Copy of judgment adopting award of tribunal as judgment of the court in SRMCC No. 5 of 2007.

12. It appears to me that the 1st respondent attempted to introduce evidence in his written submissions. I strongly condemn this manner of practice in the strongest terms possible and I will not entertain it at all. As stated by the Court of Appeal in **Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR**:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”

13. The Court of Appeal in **Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997** held that no judgement can be based on written submissions and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules* [now Order 18 rule 2 of the *Civil Procedure Rules*]. The same Court in **Muchami Mugeni vs. Elizabeth Wanjugu Mungara & Another Civil Appeal No. 141 of 1998** found the practice of making awards on the basis of the submissions rather than the evidence deplorable.

14. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean:-

“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 pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of Further Sir Charles Nebbold, JA stated 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. The improper practice should stop”.

15. This Court having cited the Mukisa case on the description of what constitutes a Preliminary Objection, it is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. Further, in the case of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

16. It is this court’s opinion that in determining a Preliminary Objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of **Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

17. Before the court embarks on determining the merit of the notice of preliminary objection, it has to first determine whether what has been raised herein satisfy the ingredients of a Preliminary Objection. As the Court determines whether what the 1st respondent has filed amounts to a Preliminary Objection or not, it will also be persuaded by the findings in the case of **Oraro Vs Mbaja (2005) 1KLR 141**, where the Court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

18. In the instant suit, the 1st respondent has raised 7 grounds namely: -

1. The suit as filed is defective as it offends the provisions of Order 1 Rules 8 and 13 of the Civil Procedure Rules.

2. The suit is fatally defective as the same is filed against one Boniface M Muunda described as the owner of plot number Mbooni/Itetani/776 whilst the land is registered in the name of Mukiti Muunda (deceased). No letters of administration have been taken out and thus the 1st respondent has no locus standi to be sued.

3. The suit as filed under order 37 of the Civil Procedure Rules is fatally defective as the same does not fall under any of the reliefs and or questions set out under Order 37 Rule 1 of the Civil Procedure Rules.

4. The suit as filed is fatally defective as the 1st applicant herein Joseph Muindi Mutua who has sworn the affidavit in support of the originating summons purports to represent Japheth Muia Mbegei (deceased) the alleged registered proprietor

of Mbooni/Itetani/777 an Mbooni/Itetani/780 whilst he has no loci standi for want of letters of administration.

5. The suit herein seeks injunctive orders against the 1st respondent and as filed has not satisfied the principles for grant of injunction as set out in the case of *Giella versus Cassman Brown and Company Limited* (1973) E.A 358.

6. The suit filed herein is totally defective in that there existed CMCC No. 394 of 2007 *J. Muia Mbengei (deceased) and Stephen M. Masua versus Mukiti Muunda (deceased)* filed at Machakos and founded on the same cause of action which suit has since abated upon death of the defendant and the 1st plaintiff thereof and thus the suit herein cannot be sustained in line with the provisions of Order 24 Rule 7 of the Civil Procedure Rules.

7. The suit herein is *Res Judicata* in as far as ownership of plot number 777 and 781 is concerned as the registration of the above plots and ownership thereof was determined in SRMCC No. 5 of 2007 upon adoption of the award in *Makueni District Land Dispute Tribunal Case No. 50 of 2006* as judgment of the court on 16th March, 2007 and the said judgment has never been set aside and/or appealed against.

19. I have also perused the Originating Summons dated 31st August, 2020 and I am of the view that the only ground which would qualify for determination before this court is ground one. All the other grounds do not meet the criteria as per the authorities cited above.

20. Order 1 Rule 8 (1) of the Civil Procedure Rules provides as follows:

“(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

21. On the other hand, Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules provides as follows:

“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”

22. In the instant case, the 1st Applicant herein, Joseph Muindi Mutua swore an affidavit dated 31st August, 2021 in which he deposes in paragraph one that he has the authority of the other applicants to swear this affidavit on their behalf and therefore duly competent to do so. In my view, the applicants complied with one part of the order, however much the as 1st applicant claims that he was well in order, the law must be followed to the latter. In this case, the applicants would have also complied with **Order 1 Rule 13 (2)** of the **Civil Procedure Rules**.

23. However, it is my view that failure to file an authority to plead to accompany the Originating Summons has not prejudiced the 1st respondent in any way. No prejudice has been alluded to. The applicants can still regularize this anomaly without the court necessarily striking out the originating summons which would cause delay, increase the costs and prejudice to the applicants due to a mere slip by the applicants' counsel. Besides, this being a Preliminary Objection and on the authority of **Mukisa Biscuits** case, only a pure point of law which does not seek the exercise of judicial discretion may be raised.

24. In conclusion, I find the notice of preliminary objection dated 6th April, 2021 unmeritorious and the same is dismissed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8TH DAY OF FEBRUARY, 2022.

Mbogo C.G

Judge

8/2/2022

In the presence of: -

CA: T.Chuma