



Kudate v District Land Registrar; Nampaso & another (Applicant) (Environment & Land Miscellaneous Case E002 of 2021) [2022] KEELC 12785 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 12785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND MISCELLANEOUS CASE E002 OF 2021**

CG MBOGO, J

OCTOBER 4, 2022

BETWEEN

SIMON KISHANTO KUDATE PLAINTIFF

AND

DISTRICT LAND REGISTRAR DEFENDANT

AND

TIKOISHI OLE NAMPASO APPLICANT

KIPAILOI OLE MUNKA APPLICANT

RULING

1. Before this court for determination is a notice of preliminary objection dated June 27, 2022 filed by the 1st respondent and brought pursuant to order 51 rule 14 (1a & c) of the [Civil Procedure Rules](#) challenging the notice of motion application dated May 10, 2022 on the following grounds: -
 1. That this application offends section 7 of the [Civil Procedure Act](#).
 2. That this honourable court is functus officio in respect to this matter.
 3. That the application is incurably defective, has no basis in law and is an abuse of the court process.
 4. That this honourable court had already pronounced itself clearly to the issue raised in the application by the applicant.
2. Parties agreed to dispose off the notice of preliminary objection by way of written submissions.
3. The 1st respondent filed undated written submissions on July 15, 2022. The 1st respondent submitted that the notice of preliminary objection is informed on the need to prevent the interested parties from



having a second bite at the cherry and more importantly from undermining the very facets that inscribe the rules of finality and conclusion on matters before court. The 1st respondent submitted that the application is bathed with scenarios articulated under section 7 of the Civil Procedure Act as the issues raised therein are directly and substantially the same issues litigated between the parties before this court in Miscellaneous Application No 2 of 2021 and the dismissed interested parties preliminary objection dated July 6, 2021 where a ruling was delivered on February 24, 2022 and as such the notice of motion application dated May 10, 2022 is res judicata. The 1st respondent relied on the case of Garden Square Ltd versus Kogo & Another [2003] eKLR and Electoral & Boundaries Commission versus Maina Kiai & 5 Others [2017] eKLR.

4. The 1st respondent further submitted that the court is functus officio and that the present application is an attempt by the applicant to reopen the case and obtain orders that have already been decided by this court. While relying on the case of Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Ltd) [2014] eKLR and Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR the 1st respondent submitted that the applicant is zealous to engage the court in a circus of filing one application after another in the hope that the court will render a different decision and further, that the applicant has all along participated in this present case and cannot be seen to be hiding in the shadows of his current application.
5. The applicants filed written submissions dated July 27, 2022. They submitted that this matter is not res-judicata as it is not a fresh suit that seeks to introduce new or fresh issues, but that the application seeks to correct a mistake on the face of the ruling and that the court having pronounced itself that it lacked jurisdiction failed to expressly state its position on the inhibition that had been placed over their parcel of land and that when they presented the district land registrar with the ruling of the court, the district land registrar stated that there was nothing directing/ordering him to have the said inhibition removed.
6. The applicants further submitted that the application does not offend the legal principle of functus officio as it is aimed at correcting an error made by the court to avoid adjudication of the parties and that the general rule is that the court becomes functus officio upon delivery of judgment. The applicants relied on the case of Republic versus Attorney General & 15 Others Ex-parte Kenya Seed Company Ltd & 5 Others [2010] eKLR and section 99 of the Civil Procedure Act. The applicants submitted that this court had power to correct judgment or ruling upon its own motion or on application by the parties in order to correct omissions apparent mistakes with the aim of achieving justice to the litigants. The applicants relied on the case of Jersey Evening Post Limited v Al Thani [2002] JLR 542-550 and Lakhamshi Brothers Limited v R Raja & Sons [1966] EA 313.
7. I have considered the notice of preliminary objection and the written submissions filed by both parties and the issue for determination is whether the application offends section 7 of the Civil Procedure Act.
8. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In Mukisa Biscuit Manufacturing Co Ltd v West End Distributors ltd [1969] EA 696, the court stated as follows: -

'So far as I'm 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.'



This was followed up by the judgment of Sir Charles Newbold in the same case:

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 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

9. In this case, this court delivered a ruling on February 24, 2022 which ruling dismissed the notice of preliminary objection dated July 6, 2021. In the said ruling the court noted that on March 12, 2020 upon perusal of the pleadings, it lacked jurisdiction to hear and determine the dispute as it was a succession matter and proceeded to transfer the same to the high court. Thereafter, this court on January 28, 2021 vide an application dated January 27, 2021 granted an inhibition order against the property known as Cis-Mara/Oleleshwa/162.
10. It is the applicant’s submission that the ruling delivered by this court on February 24, 2022 did not vacate the said orders which prompted the filing of the application dated May 10, 2022. It should be noted that in granting the orders of inhibition, the court was aware of the two pending court cases i.e ELC Appeal No 10 of 2019 and Succession Appeal No 1 of 2018 as is deponed in supporting affidavit of Simon Kishanto Kudate sworn on January 27, 2021.
11. I do recognise that whereas this court noted that it lacked jurisdiction to entertain the matter as the issue was on succession, it retained jurisdiction to grant orders of inhibition by virtue of section 68 of the *Land Registration Act* of 2012. Really, there is no error apparent on the face of the ruling delivered February 24, 2022 to warrant correction as submitted by interested parties.
12. Arising from the above, I find that the notice of preliminary objection partially succeeds in terms of grounds 1,3 and 4. The notice of motion application dated May 10, 2022 is hereby dismissed with costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 4TH DAY OF OCTOBER, 2022.

HON MBOGO CG

JUDGE

October 4, 2022

In the presence of:

Mr Chuma/CA

