



Mbogo & another v Njunge; Ambassador US Embassy Kenya (Interested Party) (Civil Appeal E036 of 2024) [2024] KEHC 14087 (KLR) (13 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14087 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E036 OF 2024
LM NJUGUNA, J
NOVEMBER 13, 2024**

BETWEEN

SARAH MWENDIA MBOGO 1ST APPELLANT

MESHERK IRERI MBOGO 2ND APPELLANT

AND

EPHANTUS NJAGI NJUNGE RESPONDENT

AND

THE AMBASSADOR US EMBASSY KENYA INTERESTED PARTY

*(Appeal arising from the decision of Hon. Francis Kyambia CM
in Embu CMCC No. 157 of 2023 delivered on 14th March 2024)*

JUDGMENT

1. The appellants have filed a memorandum of appeal dated 12th April 2024 seeking the following orders:
 - a. That the appeal be allowed;
 - b. That the ruling of the trial court be set aside in its entirety;
 - c. That the costs of the appeal herein be borne by the respondent; and
 - d. That the court grants such other orders as it may be deemed necessary.
2. The appeal is premised on the grounds that the trial magistrate erred in law and in fact:
 - a. By finding that the honourable Chief Magistrate’s Court has jurisdiction over the subject matter in the plaint as the claim falls within the exclusive jurisdiction of the United States of America;



- b. By finding that the honourable Chief Magistrate’s Court has jurisdiction over the subject matter in the plaint as the claim pertains to cases initiated within the United States of America framework by American Attorneys on behalf of the affected individuals; and
 - c. By finding that the honourable Chief Magistrate’s Court has jurisdiction over the subject matter in the plaint as the United States Embassy was specifically designated as the primary entity responsible for addressing and compensating the victims.
3. Through a plaint dated 25th August 2023, the respondent sought judgment against the appellants for the following prayers:
 - a. An order compelling the appellants to disclose and provide the information required by the interested party for the respondent to be compensated and release of the respondent’s entitled payment forthwith;
 - b. An order restraining the appellants and interested party from withholding funds entitled to the plaintiff;
 - c. Costs of the suit;
 - d. Interest at court rates; and
 - e. Any other relief that the court will deem fit to grant.
4. It was his case that he is the only surviving brother of Francis Mbogo Njunge who died through the 1998 bomb blast incident while he was employed by the American Embassy. That the respondent was listed as the deceased’s next of kin who would be entitled to the compensation offered by the interested party to the families of its deceased staff. That the appellants, who are the wife and son of the deceased have been collecting the compensation monies since 2016, excluding him as the only surviving brother of the deceased. He demanded that the appellants disclose his share of the compensation.
5. The appellants filed their statement of defence denying the allegations made in the plaint and also challenging the jurisdiction of the trial court on the issue. They also filed a preliminary objection further challenging the jurisdiction of the trial court since the claims were initiated on behalf of the deceased and all the other victims by American lawyers, filed in American courts. They stated that the suit is incompetent, fatally defective and the same ought to be struck out.
6. The preliminary objection was canvassed by way of written submissions. In his submissions, the respondent relied on the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) eKLR and sections 3A of the *Civil Procedure Act* and section 5 of the Magistrates Court Act and argued that the trial court had jurisdiction to determine the claim before it. He also cited the case of Peter Mungai v Joseph Ngaba Kuria & Another; Leah Njeri Ndichu (Interested Party) [2022] eKLR and urged that the preliminary objection does not meet the required standard for it to succeed. He stated that he is a bona fide beneficiary of the estate of the deceased and is therefore entitled to the compensation offered by the interested party and he relied on the case of Otolu Margaret Kanini & 16 others v Attorney General & 4 others (2022) eKLR.
7. On their part, the appellants also relied on section 5 of the Magistrates Court Act and the case of Samuel Kamau Macharia & Another v. Kenya. Commercial Bank & 2 Others, SC Application No. 2 of 2011; (2012) eKLR and argued that the jurisdiction of a court flows from law and a court cannot arrogate jurisdiction to itself. They argued that the issues of compensation for victims of the bomb blast incident was being handled by an American law firm on behalf of the victims. That the respondent



- had an opportunity to meet with the American lawyers in Kenya to air his grievances but he failed to take the opportunity.
8. The trial court determined the preliminary objection through its ruling delivered on 14th March 2024, finding itself clothed with jurisdiction to determine the suit. This ruling is the subject of the appeal herein.
 9. The appeal herein was canvassed by way of written submissions.
 10. The appellants submitted on the same terms as they did before the trial court and added that the interested party was the designated body tasked with compensating the bomb blast victims, a process that was initiated in the American courts. They relied on the case of Kenya Revenue Authority v. Yaya Towers Limited (2008) eKLR where the court of appeal held that the nature of the parties and the claim determines the jurisdiction of a court. That specialized claims and those involving international parties fall within the jurisdiction of the High Court or international arbitration forums. They relied on the case of Republic v. Chief Magistrates Court at Mombasa exparte Kenya Ports Authority (2019) eKLR and argued that claims against the US Embassy fall outside the jurisdiction of Magistrates Courts.
 11. The respondent also submitted in the same terms as he did before the trial court, adding that Article 48 of *the Constitution* guarantees every person access to justice. He argued that the appellants' argument that the matter was litigated within the American courts is a matter of fact which should not be raised within a preliminary objection. It was his case that the trial court bears jurisdiction to determine the issues in the plaint since they pertain to the appellants withholding his rights to compensation from him.
 12. The issue for determination is whether the appeal has merit.
 13. The trial court determined that it bears jurisdiction to determine the suit. The appellants raised their objection stating that the subject matter of the plaint was initiated in American courts thus, local courts have no jurisdiction to determine the issues raised. Preliminary objections are limited to points of law as was determined in the case of Mukisa Biscuit Manufacturing Co Ltd v. West End Distributors (1969) EA 696. Determination of the preliminary objection herein would need the trial court to look at the appellant's arguments wholesomely in light of the plaint. Following the events that led to the death of the deceased, the American government, working with the Kenyan government, took up the matter and vowed to compensate the victims of the bomb blast incident. The American law firm of Musolino & Dessel, PLLC has been litigating the victim's claims in American courts for more than 25 years, with the approval of many bodies including the Law Society of Kenya.
 14. In Kenya, the National Assembly has an ongoing ad hoc committee that is keeping track of the issue of compensation of victims. This committee has been following up on the cases and receiving reports on the matter from all stakeholders. The latest report was for April 2024 and is titled "Progress Report of The Ad Hoc Committee on The Compensation to The Kenyan Victims of the 1998 Bombing of The United States of America Embassy in Nairobi". These documents have been made public through the Kenyan Senate's website (<http://www.parliament.go.ke/node/21789>).
 15. A perusal of the plaint and its accompanying documents shows that the respondent's advocate wrote to the American law firm of Musolino & Dessel, PLLC on 27th January 2022, enquiring about his client's claim, acknowledging that the matter is being handled outside any Kenyan Court. In fact, if any compensation was remitted to the appellants, it was as result of judgments entered in American courts through the interested party. I do agree with the appellants that the matter is within the purview of American courts and that the trial court has no jurisdiction to entertain the issues raised in the plaint so long as they are crafted in the manner that they are.



16. While the respondent may have a case before the Kenyan courts, it is important to know, against whom? One of the prayers sought through the plaint is an order restraining the interested party, which is an Embassy. An Embassy in Kenya is a diplomatic body that cannot be sued unless with consent. In the case of *Ministry of Defence of the Government of the United Kingdom v. Joel Ndegwa (1983) eKLR*, the Court of Appeal struck out proceedings against the appellant stating that it could not be held vicariously liable in civil proceedings. It held:

“except by consent, the courts in this country will not issue process so as to entertain a claim against a foreign sovereign as they could be called to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee.”

17. Even though this embassy is the body tasked with completing compensation for the victims or their estates, it is legally unconscionable to seek a restraining order against it without regard to the procedures for suing an embassy and/or Ambassador, who enjoys diplomatic immunity.

18. As I sign off, I do note that the appellants and the respondent had indicated to the court that they were pursuing a settlement out of court shortly before the date for this judgment was given. I encourage them to continue pursuing that route given the circumstances of the case herein. That is not to say that they cannot pursue further recourse in the courts so long as the correct procedures are followed.

19. It is, therefore, my finding that the appeal is meritorious and it is hereby allowed with orders thus:

- a. The ruling of the trial court delivered on 14th March 2024 is hereby set aside;
- b. The preliminary objection dated 18th December 2023 is hereby found to have merit and it entirely succeeds;
- c. No orders as to costs.

20. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the 1st Appellant

.....for the 2nd Appellant

.....for the Respondent

.....for the Interested Party

