



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ELC JR. CASE NO. 6 OF 2017
IN THE MATTER OF AN APPLIATION BY CLEUS
WATAKO TO APPLY FOR ORDERS OF JUDICIAL REVIEW

AND

IN THE MATTER OF THE LAND DISPUTES TRIBUNALS ACT NO. 18 OF 1990

AND

IN THE MATTER OF MUMIAS DISPUTES TRIBUNAL CASE NO. 17 OF 1996

REPUBLIC.....APPLICANT

AND

THE CHAIRMAN MUMIAS LAND

DISPUTE TRIBUNAL.....1ST RESPONDENT

THE CHIEF MAGISTRATE'S COUR AT KAKAMEGA.....2ND RESPONDENT

EX-PARTE

CLEUS WATAKO LUTTA.....PLAINTIFF

VERSUS

ASMAN MOMBO OKWARO.....DEFENDANT

RULING

The applicant herein Cleus Watako has raised a preliminary objection on a point of Law in the following grounds:-

1. That he has never been served with a bill of costs and or Notice of Taxation from the interested party.
2. That the interested party has neither filed succession letters and does not have Locus Standi to prosecute this case and proceed with execution process.
3. That the purported affidavit of service on record is full of falsehoods and should be put to test.
4. That a party should not be condemned un-heard.

The Interested Party submitted that the matter before the court and the attendant application is functus official. The applicant has all along been aware of the case before court on the basis of the advocates that have been representing him. Ateya Advocate from the previous record and affidavit of service filed in court shows that through his agents and or advocate he was served the bill of costs that which he alleges he was not served. This honourable court proceeded to issue appropriate orders and a certificate of cost and execution was done which raised partial payment. What the applicant owes to the Interested Party in terms of costs is the balance due and owing which still remains unpaid to

date together with other added costs. The issue of non-service cannot therefore arise at this point in time and that he was not served with a bill of cost. On 10th July, 2018 the court gave a ruling on this matter this was after the applicant filed an application dated 29th September, 2015 seeking to bring on record M/s. J.I. Khayumbi & Co. Advocates in place of Ateya & Co. Advocates that application having been determined, whereby the Interested Party was seeking for the recovery of Ksh. 70,050 (seventy thousand and fifty) as costs from the applicant. They had made an application for stay of execution and simultaneously seeking to have J.I. Khayumbi & Co. Advocates to come on record to challenge the dismissal of M/s. Ateya Advocates application dated 22nd July, 2010 asking for judicial review of the decision of Land Dispute Tribunal. In view of that dismissal the Interested Party filed the bill of costs which was faithfully served on his advocate Mr. Ateya Advocate. The court records do show service in each and every stage and at no one time has the applicant not been served either through himself or his advocates on record.

On Locus Standi he submits, the applicant has brought in extraneous issue outside the preview of matters arising in this case that is neither here nor there. The current preliminary objection is therefore unmerited a nonstarter, res judicata and/or functus official which ought to be dismissed with costs to the Interested Party.

This court has considered the preliminary objection and the submissions therein. I have perused the court file and find that the Interested Party filed the bill of costs which was served upon his advocate Mr. Ateya Advocate. The said Interested Party filed the bill of costs upon his advocate Mr. Ateya Advocate who was properly on record. The Interested Party is seeking for the recovery of Ksh. 70,050 (seventy thousand and fifty) as costs from the applicant.. Be that as it may, the applicant has raised the issue of locus standi of the Interested Party. He submits that the Interested Party has neither filed succession letters and does not have Locus Standi to prosecute this case and proceed with execution process as the land in question belonged to his father now deceased.

In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

“---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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”

In the case of *Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR* put it in the following terms:-

“The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt’s Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

Be that as it may, we note that it is the applicant who brought the respondent to court claiming he is a neighbor and an Interested Party way back in 2010. This matter has been concluded and the Interested Party went ahead to tax for costs. The only avenue now is for the applicant to appeal in case he feels aggrieved by the various court orders. The applicant by their own original pleadings are now estopped from bringing in the issue of locus standi. I find this preliminary objection is misconceived and has no merit and I dismiss the same.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE