



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. NO. 35 OF 2017

1. FRANCOLIN LIMITED.....APPLICANT

VERSUS

1. ABDALLA SWALEH RENGWA

2. JUMA ATHUMANI MWAKUSHINDA

3. THE DIRECTOR OF SURVEYS OF KENYA

4. DEPARTMENT OF SURVEYS OF KENYA

5. THE CHIEF LANDS REGISTRAR

6. KWALE DISTRICT LAND REGISTRAR.....RESPONDENTS

RULING

1. This ruling is with respect to the preliminary objection dated 19th January 2019 raised by the 1st respondent that this court lacks jurisdiction to determine the Applicant's Amended Notice of Motion application dated 12th June, 2018; that the said application is sub judice in view of the pendency of Mombasa ELC No.66 of 2014 between the 1st respondent and the applicant pertaining to the same subject matter and that the application is incompetent, incurably and fatally defective for seeking substantive and grave orders on a miscellaneous application instead of being instituted in the manner prescribed and that it is misconceived, bad in law and an abuse of the court process.

2. In the Amended Notice of Motion dated 12th June 2018 and brought under Section 150 of the Land Act, Section 80(1), 86 and 87 of the Land Registration Act, Section 3(1), 13(2)(a) and (d) of the Environment and Land Court Act the Applicant is seeking the following orders:

1. This application be certified as urgent and the same be heard ex-parte on priority basis.

2. This Honourable court be pleased to give the following declaratory orders:

a. That Title Nos. Kwale/Funzi Island/234, 235 and 236 were at all material times relevant to the adjudication of the Msambweni District Land Dispute Tribunal, the property of Mr. Mwatende Hamisi, the first registered owner, and that all subsequent transfers in respect to the said parcels including but not limited to the consolidation into Title No.Kwale/Funzi Island/338 and the subsequent transfer of the same to the applicant were lawful.

b. That the decision of the Msambweni District land Dispute Tribunal determining ownership of title with respect to Title Nos.Kwale/Funzi Island/234, 235 and 236 and the adoption of the same by the Kwale Senior Resident Magistrate's Courts was beyond the scope and jurisdiction of the Tribunal, in violation of the Registered Land Act (repealed) and therefore null and void.

c. That the Land Registrar's decision to reverse Title No.Kwale/Funzi Island/338 registered in the name of the applicant, reopening deed files for Title Nos.Kwale/Funzi Island/234, 235 and 236 and registering the same in the names of third parties without affording the applicant an opportunity to be heard was unconstitutional, illegal and therefore null and void.

3. The 5th and 6th respondents do rectify the land register by cancelling the reversal of Title No.Kwale/Funzi Island/234, 235

and 236 in the name of the 1st respondent and the subsequent transfer of Title Nos. Kwale/Funzi Island/234 and 235 to the 2nd respondent and register the applicant as the sole and absolute proprietor of Title No. Kwale/Funzi Island/338.

4. The 3rd and 4th respondents do rectify the survey map of Funzi Island by cancelling entry No. 6 relating to the reversal of the Title No. Kwale/Funzi Island/338 to Title Nos. Kwale/Funzi Island/234, 235, 236, 332, 333, 334 and 335 to 338 (MUT/228/280/8/06) registered as entry no. 4 on 6th September 2006.

5. That this Honourable Court be pleased to make and grant further and/or other order(s) it may in the interest of justice deem necessary.

6. The costs of the application be in the cause.

3. The application is supported by the affidavit of Mary Ciumburi Mwaniki sworn on 12th June 2018 and the annexures thereto. The applicant's case is that pursuant to an agreement for sale dated 6th June 2012, the applicant purchased the Title Number Kwale/Funzi Island/338 from a company known as Portreiz Company Limited and the property was registered in favour of the Applicant on 19th September, 2012 vide a transfer instrument dated 28th August 2012. That later, the Applicant made an application for a change of user of the property from agricultural to commercial and after publication in the standard newspaper in February 2013, the application was approved by the National Land Commission. That on that basis, the Applicant made the requisite payments for approval fees, land rent, surrender fees and new grant fees and further surrendered its original freehold title over the property to the National Land Commission in compliance with the requirements of the approval of the change of user.

4. The Applicant avers that sometime in the month of July, 2015 it came to the Applicant's knowledge that there had been a reversal of its Title Number Kwale/Funzi Island/338 to plot No. 234, 235, 236 and 365 pursuant to a court order issued on 11th August 2005 in land case no. 23 of 2001 before the Senior Magistrate's Court at Kwale and a Mutation No. Mut/228/548/02/15 dated 17th February 2015. The applicant avers that until July 2015, it was not aware of the said court case and the subsequent reversal of its title which resulted in the rectification of the register. That the applicant was not notified of the proposed rectification of the register neither was it given an opportunity to be heard prior to the rectification of the register which resulted in the reversal of its title.

5. The applicant states that its searches on the resultant Title Numbers Kwale/Funzi Island/234-236 and 365 following the reversal of its Title Number Kwale/Funzi Island/338 cannot also be traced at the Kwale District land Registry. It is the Applicant's contention that the resultant rectification of the land register from the rectification of the register set out above has jeopardized the applicant's right to its property as there is no record of any proprietary interest in favour of the Applicant. That unless this court intervenes and the application is heard on priority basis, the proprietary interests of the Applicant in Title Number Kwale/Funzi Island/338 will continue to be prejudiced.

6. In opposing the preliminary objection by the 1st respondent, the applicant filed statement of grounds of opposition dated 20th March, 2013 in which he states inter alia; that the objection does not raise pure points of law; that the issues arising in the Amended Notice of Motion cannot be factually ascertained and determined without evidence being adduced; that this court has jurisdiction to hear and determine the matter; that the dispute set out in the applicant's notice of motion application is based on contended issues of ownership and legal rights of the applicant which the court is vested with jurisdiction to deal with by dint of Section 13 of the Environment and Land Court Act, Section 150 of the Land Act and Sections 80(1), 86 and 87 of the Land Registration Act. The applicant avers that the 1st respondent's preliminary objection on the ground of sub judice is an attempt to obfuscate the issues for determination in the present suit with those in ELC Cause No. 66 of 2016, adding that the matters in issue in the applicant's notice of motion are not directly and substantially in issue in ELC Cause No. 66 of 2014 and that the two matters are not between the same parties and that the remedies sought in both suits differ.

7. The preliminary objection was canvassed by way of written submissions. The 1st respondent filed his submissions on 24th July 2019 in which it was submitted that the suit herein is sub judice as the Applicant herein is named as the defendant in the other suit while the plaintiff is the 1st respondent herein and the subject matter is Land Parcel No. Kwale/Funzi Island/236 which is one of the properties in contention in this application. The 1st respondent cited Section 6 of the Civil Procedure Act and relied on the case of **Republic –v- Registrar of Societies – Kenya & 2 Others Ex parte Moses Kirima & 2 Others (2017) eKLR** and **Thiba Min. Hydro Co. Ltd –v- Josphat Karu Ndwiga (2013) eKLR**.

8. The 1st respondent further submitted that the orders sought by the applicant which are declaratory orders in respect of the suit property, cannot be granted until there is a proper suit instituted either by way of petition, plaint or originating summons. The 1st respondent's counsel relied on the case of **Samuel Chege Thari & Another –v- Eddah Wanjiru Wangari & 3 Others (2018) eKLR** which quoted speaker of the **National Assembly –v- Karume (2008) eKLR 425 and FCS Ltd –v- Odhiambo & 9 Others (1987) KLR 182-188**. The 1st Respondent submitted that the failure to institute the application in the prescribed manner is contrary to the Civil Procedure Act and cannot be considered as a technicality that cannot be cured by Article 159(2)(d) of the Constitution. The 1st Respondent further submitted that the preliminary objection raises pure points of law as stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd –v- West End Distributor Ltd (1969) EA 696** and urged the court to allow the objection with costs.

9. The applicant filed its submission on 20th May 2019 in which it was submitted inter alia, that the objection raised does not relate to pure points or questions of law, and that it does not meet the threshold set out in the **Mukisa Biscuit Case (supra)**. The applicant also relied on the case of **Transcend Media Group Limited –v- Independent Electoral and Boundaries Commission (IEBC)** where it was held that a court should never strike out a case if it has chances of success or if it can be injected with real life by an amendment, and that the court ought not engage in a minute and protracted examination of facts and documents before the matter proceeds for hearing. The applicant also cited the case of **Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others (2015) eKLR** and **Kenya Union of Commercial Food and Allied Workers –v- Water Resource Management Authority & Another (2015) eKLR**. The applicant submitted that the court has jurisdiction to hear and determine the Amended Notice of Motion and cited the celebrated case of **Owners of**

Motor Vessel “Lillian S”-v- Caltex Oil (Kenya) Ltd (1989)KLR 1.

10. On whether the applicant’s Amended Application herein is sub judice, the Applicant submitted that the law on sub judice has been cited out of context by the 1st respondent. The applicant stated that there is no evidence that the cause of action in ELC No.66 of 2014 is the same as in the present application or that the applicant has an opportunity of getting the same reliefs in ELC No.66 of 2014 in which the 1st Respondent herein seeks the removal of a caution as a remedy whereas the present suit seeks rectification of the land register and restoration of the Applicant’s title as the main remedy. Further, the parties to the suit in ELC No.66 of 2014 being the 1st respondent herein as plaintiff and the applicant and 6th Respondent are the only common parties in both suits. The applicant argued that the issue of ownership of the suit property must be determined by this court before the matter in ELC No.66 of 2014 can be determined and that the plea of sub judice has not been properly invoked. The applicant further submitted that there is no specific normative prescribed procedure set out for seeking the orders sought by the applicant in its amended Notice of Motion dated 12th June 2018 and therefore the application falls under Order 51 Rule 1 of the Civil Procedure Rules. The applicant cited the case of **Richard Ncharpi Leiyagu –v- Independent Electoral and Boundaries Commission & 2 Others CA No.18 of 2013 Nyeri**. The applicant implored upon the court to dismiss the 1st respondent’s notice of preliminary objection with costs.

11. I have considered the preliminary objection, the filed submission and the authorities cited. I have also looked at the pleadings herein. In the leading case of *Mukisa Biscuit Manufacturers Ltd –v- West End Distributors Ltd (supra)*, Law J. A. stated a preliminary objection to be thus:

“So far as I am aware, preliminary objection consists of a point of law 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 submission that the parties are bound by the contract giving rise to the contract giving rise to the suit to refer the dispute to arbitration.”

12. In the same judgment Sir Charles Newbold, President stated as follows:

“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.”

13. In this case, the 1st respondent does not seek the exercise of judicial discretion. What the preliminary objection seeks to do is determine the issue whether there is a cause of action in limine, and whether there is a proper suit before court it is well taken because if it succeeds, the court will be saved the cost of a lengthy trial and attendant expenses on either side.

14. In the Amended Motion dated 12th June, 2018, the Applicant seeks inter alia, an order to rectify the land register by cancelling the reversal of title No. Kwale/funzi island/338 together with all entries relating to the subsequent registration of Title Nos. Kwale/Funzi Island/234, 235 and 236 in the name of the 1st respondent and the subsequent transfer of Title Nos. Kwale/Funzi Island/234 and 235 to the 2nd respondent and register the applicant as the sole and absolute proprietor of Title No.Kwale/Funzi Island/338. The material that has been placed before me overwhelmingly points to the existence of another suit ELC No.66 of 2014 where the 1st Respondent herein is the plaintiff and the 1st respondent and 6th Respondent are also parties. Whereas the parties have not placed the pleadings in ELC No. 66 of 2014 before this court, what has emerged and is not in dispute is that in that suit, the 1st Respondent herein seeks the removal of a caution as a remedy over the suit property whereas the applicant in the present proceedings seeks rectification of the land register and restoration of the Applicants title.

15. In Order to succeed in a claim of sub judice, the 1st Respondent must satisfy the conditions set out in Section 6 of the Civil Procedure Act, in particular; i) that the matter issue is also directly and substantially in issue in the previously instituted suit, ii) that the suit is between the same parties, or between parties under whom they or any of them, litigating under the same title; and iii) that the suits are in the same or any other court having jurisdiction in Kenya to grant the relief claimed. Although ELC No.66 of 2014 may have other parties, it is clear that the applicant and the 1st respondent as well as the 6th respondent are really the same litigants and the claim herein can perfectly be litigated in suit ELC No. 66 of 2014 before this court. As was stated in **Thiba Min. Hydro Co. Ltd –v- Josephat Karu Ndwiga (supra)**, “it is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit....and there can be no justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub judice rule but would also be in violation of the overriding objective of the civil procedure Act which require under Section 1B that there be an efficient use of the available judicial and administrative resources.” Having considered all the above and the facts that have emerged, I am satisfied that the plea of sub judice has properly been invoked in this case.

16. I have also looked at the annexures in the affidavit in support of the applicant’s amended Notice of Motion. The material therein points to the suit properties having been registered in favour of the 1st Respondent pursuant to a court order in Kwale SRMCC Land Case No.23 of 2001. There is no indication that that order has been set aside. I am in agreement with the 1st Respondent that the dispute herein cannot be resolved through an application such as the one filed by the Applicant herein. The parties should be given an opportunity to have their respective claims over the suit property determined on merit in a court of competent jurisdiction. I am of the view that these proceedings would not be the best forum to determine the said claims. There are competing interests of right of ownership of the suit properties which require adduction of oral evidence for the court to determine with certainty those competing interest. The miscellaneous application before this court is not suitable for purposes of determining the dispute on merit between the parties over the ownership of the suit properties. I am of the view that the applicant will have to file a proper suit or a claim in ELC No.66 of 2014 for determining the issues raised in the application herein. I think that that would be the best forum for determining on merit the validity of the applicant’s claim over the suit properties. In my view, the declaratory orders sought in respect of the suit property cannot be adequately dealt with through this miscellaneous cause.

17. By reason of the foregoing, I find that the preliminary objection is merited and the same is upheld. I find that the Amended Notice of Motion dated 12th June, 2018 is not only sub judice but incompetent and an abuse of the court process. The same is struck out with costs to the respondent.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of November, 2019.

C. K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Nafula holding brief for Khalid for 1st and 2nd respondents

No appearance for applicants.

No appearance for AG for 3rd – 6th respondents

Yumna Court Assistant

C.K. YANO

JUDGE