



**Ngoah v Musolo & 2 others (Environment and Land Appeal
E023 of 2022) [2024] KEELC 836 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIIAYA
ENVIRONMENT AND LAND APPEAL E023 OF 2022
AY KOROSS, J
FEBRUARY 22, 2024**

BETWEEN

MAURICE OLOO NGOAH APPELLANT

AND

PETER MUSOLO 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

DISTRICT LAND REGISTRAR SIIAYA 3RD RESPONDENT

(CM Hon.M.O.Wambani delivered on 23/06/2022 in Siaya SPM ELC Misc. Case No. 71 of 20 21)

JUDGMENT

Background

1. Before this court is an interlocutory appeal challenging the decision of the trial court which dismissed the appellant's preliminary objection (PO) dated 17/09/2021 with costs being in the cause.
2. A brief context of salient facts pertaining to the PO are necessary in order appreciate the appeal. Without filing any substantive pleadings save for a miscellaneous notice of motion dated 19/07/2021, the 1st respondent sought the following substantive relief from the trial court; that pending resolution of a boundary dispute by the land registrar over land parcel no. South Gem/Kaudha 1556 and 1557 (suit properties), restraining orders do issue against the appellant and his cahoots.
3. In questioning the manner in which the 1st respondent had approached the trial court and on the 1st respondent's alleged defective affidavit; the appellant lodged a PO on the following grounds: -
 - a. There are no proceedings known in law in which a notice of motion can originate a suit hence the current suit offends the provisions of Order 3 Rule 1 of the Civil Procedure Rules, 2010.
 - b. The 1st respondent's supporting affidavit is incurably defective.



4. The PO was canvassed by written submissions and upon considering the appellant and 3rd respondent's rival submissions on points of law, the trial court in the ruling that is the subject of this appeal dismissed the PO.
5. In arriving at its decision, the trial court reasoned that bearing in mind the 1st respondents 'factors', the PO was not merited and that it would only be fair and just if the notice of motion was heard on merits.

Appeal to this court

6. The above outcome did not go down well with the appellant and aggrieved by the said ruling, the appellant preferred an appeal to this court on 5 grounds. It must be noted grounds of appeal must be succinct and not contain evidence or arguments as the appeal herein does. Nevertheless, these grounds can be aptly abridged as a singular ground; the learned trial magistrate erred in law in dismissing the appellant's PO.
7. The appeal is canvassed by written submissions. The appellant who is represented by the firm of M/s Lugano & Achura Advocates filed written submissions dated 2/10/2023 while the 1st respondent who is represented by the firm of M/s Agina & Associates Advocates filed submissions dated 7/07/2023. Unfortunately, the 2nd and 3rd respondents did not participate in these proceedings.

Appellant's submissions

8. The appellant's submissions identify the following issues as arising for determination; (a) whether the trial magistrate erred by failing to find that the 1st respondent's motion offends Order 3 Rule 1 of the Civil Procedure Rules (b) whether the trial magistrate erred by failing to find the 1st respondent's supporting affidavit is incurably defective and, (c) what about of costs.
9. On the 1st issue, counsel submits the subject matter that was before the trial court was land which could only be commenced by a substantive suit and not by a motion and relies on the persuasive decision of Proto Energy Limited v Hashi Energy Limited [2019] eKLR which held: -

“ 14. Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaint. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.”

10. On the 2nd issue and while seeking costs on the 3rd issue, counsel submits the impugned supporting affidavit deposed on 21/07/2021 is commissioned by the same law firm that is on record for the 1st respondent thus it contravened Section 4 (1) of the [Oaths and Statutory Declarations Act](#) and to buttress his position, he relies on the persuasive decision of Kenya Federation of Labour & another v Attorney General & 2 others [2014] eKLR which found thus: -

“ A lawyer cannot commission a document drawn by his/her firm. Indeed the further affidavit by the Claimants was defective in form as the jurat was not in conformity with the [Oaths and Statutory Declarations Act](#).”



1st respondent's submissions

11. The 1st respondent's counsel argues his submissions on 2 issues inter alia, (a) whether the PO that is the subject of appeal raises a pure point of law and, (b) what about costs.
12. On the 1st issue and placing reliance on the well cited case of Mukisa Biscuit Manufacturing Company Limited vs. West End Distributors Limited [1969] EA 696 which held that a valid preliminary objection is one that is based on a pure point of law and undisputed facts, counsel submits that because there is a pending boundary dispute over the suit property which by Section 18 (2) and (3) of the [Land Registration Act](#) the land registrar has jurisdiction over and considering the land registrar did not have jurisdiction to issue injunctive orders pending resolution of a boundary dispute, the 1st respondent filed the impugned motion.
13. Further, in counsel's view, the 1st respondent had no choice but move the trial court in the manner he did which he is so empowered by Rules 23(1) (2) and (3) and 24(1) of [the Constitution](#) of Kenya (Protection of rights and fundamental freedoms) Practice and Procedure Rules and Order 40 of the Civil Procedure Rules. In addition, counsel argues the challenged affidavit is curable by Article 159 (2) (d) of [the Constitution](#). Counsel urges this court to dismiss the appeal with costs.

Issues for determination, analysis and determination

14. As this is a first appeal, this court is called upon to re-evaluate, re-examine and reassess the evidence from the trial court and come up with its own deduction. Madan, JA (as he then was) succinctly stated the role of an appellate court in United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898 as follows:

“The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

15. Having evaluated the records and parties' rival submissions including relevant provisions of law and well cited precedents, the issues which arise for resolution and shall be addressed simultaneously are as follows:-
 - i. Whether the PO raises pure points of law.
 - ii. If (I) is in the affirmative, whether the motion is competent.
 - iii. If (I) is in the affirmative, whether 1st respondent's supporting affidavit is incurably defective.
 - iv. What about costs.

I. Whether the PO raises pure points of law.

16. The trial magistrate did not exert herself on this issue and as an appellate court, this court will exercise its mind on it. The case of Mukisa Biscuit (Supra) has been the subject of interpretation in several



decisions and its principles are well summarised in the Court of Appeal decision of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR as follows:

“That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

17. Black’s Law Dictionary, 11th edition defines a PO as: -

“...an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary. An objection to the courts jurisdiction is an example of a preliminary objection”

18. The appellant’s PO attacks the 1st respondent’s motion and affidavit on two grounds which touch on their competency. If this court were to uphold the contention that the motion could not be filed without it being anchored on a substantive originating suit or finds the 1st respondent’s affidavit flouts relevant provisions of law, no doubt, the motion and affidavit will be struck out without having to resort to ascertaining the facts.

19. Accordingly, the significance of this is that as the circumstances be, the 1st respondent will neither be heard on the prayers sought in the motion and on the averments made in his affidavit. Thus, I find and hold the PO that was before the trial court raised pure points of law and met the threshold of Mukisa Biscuit (Supra).

II. Whether the motion is competent

20. Section 19 of the [Civil Procedure Act](#) provides as follows;

‘Every suit shall be instituted in such manner as may be prescribed by rules.’

21. The significance of this provision of law is that a suit must be instituted within stipulated provisions of law. Ordinarily, a suit is instituted by a plaint (see Order 3 Rule 1 (1) of the Civil Procedure Rules). In instances of special circumstances such as a constitutional petition, [the Constitution](#) of Kenya Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013 governs it or in other special circumstances, one institutes suit by way of an originating summons (see Order 37 of the Civil Procedure Rules).

22. Further, in exceptional cases, a suit can be commenced by a notice motion as the 1st respondent did on condition that there is a particular statute governing the procedure of moving the court in such a manner (see Abdi Abdullahi Somo –vs- Ben Chikamai & 2 Others [2016] eKLR). In addition, where a statute does not provide a procedure for a particular proceeding, the court can be moved by an originating motion. (See Saint Benoist Plantations Ltd vs Jean Emile Adrien Felix (CA No 25 of 1954).

23. Thus, in the absence of the trial court applying its mind on this issue, this court has to examine it. In considering the motion that was before the trial court, it is unquestionable there is no substantive originating suit. The 1st respondent’s counsel’s arguments that he (1st respondent) is empowered by [the Constitution](#) of Kenya Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 to move the court in the manner he did does not hold since these provisions only apply to constitution petitions and not otherwise.

24. It is noted the [Land Registration Act](#) is silent on the procedure for moving the court and its Section 101 merely mentions this court has jurisdiction over land matters.



25. In the circumstances of this case, it is only upon resolution of a boundary dispute by the land registrar in accordance with Section 18 and 19 of this same Act that the 1st respondent could move this court in an appropriate manner such as by an appeal, judicial review or plaint as the case be, and not otherwise. I find and hold that the appellant's PO is merited on the ground that the motion is incompetent and find the trial court erred in dismissing it.

III. Whether 1st respondent's supporting affidavit is incurably defective

26. The impugned ruling is silent on this pure point of law. Therefore, this court is called upon to interrogate and establish if the PO on this ground is merited. The appellant invoked Section 4 (1) of the Oaths and Statutory Declaration Act which provides as follows: -

“ A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court:

Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.” Emphasis added.

27. Thus, it arises that with this clear provision of law, Mr. Agina, who is the 1st respondent's counsel and whose law firm Agina & Associates Advocates has drawn the motion, is barred from commissioning the affidavit that is sworn on 21/07/2021.

28. Consequently, having breached the law by doing so, it ensues the affidavit is incompetent and defective as it offends provisions of law. See Kenya Federation of Labour & another (Supra). The 1st respondent's counsel's contention that it is a mere irregularity and curable by Article 159(2)(d) of the Constitution is superfluous. I find and hold that the appellant's PO is merited on the ground that the affidavit deposed by the 1st respondent on 21/07/2021 is incompetent and find the trial court erred in dismissing it.

29. Nevertheless, I must hasten to add that contrary to the appellant's contention that the striking out of the motion would render the motion hopeless, the mere striking of the affidavit would still have rendered the motion capable of being considered since it is not necessary for an application to be supported by an affidavit.

30. Ultimately, in agreeing with the appellant and for the reasons and findings stated above, I find the appeal succeeds and since costs follow the event, I award the appellant costs of the appeal. The impugned ruling dated 23/06/2022 is set aside and substituted with an order upholding the PO dated 17/09/2021 and striking out the notice of motion dated 19/07/2021 together with the supporting affidavit deposed on 21/07/2021 with costs to the appellant.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 22ND DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

22/2/2024



Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

N/A for the appellant

Mr. Agina for the 1st respondent

N/A for the 2nd and 3rd respondents

Court assistant: Ishmael Orwa

