



Kombo (Suing in her capacity as a holder of power of attorney on behalf of her husband, Richard Komboi) v Ingonga (Environment & Land Case E001 of 2024) [2024] KEELC 668 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 668 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E001 OF 2024**

**DO OHUNGO, J
FEBRUARY 15, 2024**

BETWEEN

**MARY STELLA NAMAKHULI KOMBO (SUING IN HER CAPACITY AS A
HOLDER OF POWER OF ATTORNEY ON BEHALF OF HER HUSBAND,
RICHARD KOMBOI) PLAINTIFF**

AND

RENSON MULELE INGONGA DEFENDANT

RULING

1. The Plaintiff moved the court through plaint dated 22nd January 2024 wherein she stated that she brings this suit in her capacity as a holder of power of attorney on behalf of her husband Richard Kombo who she averred is the registered proprietor of the parcel of land known as Kakamega Municipality/Block III/168 which is adjacent to land parcel number Kakamega Municipality/Block III/386 owned by the defendant and that the two parcels are served by a six metre access road. She further averred that on 23rd December 2023, the defendant encroached onto 0.01 hectares of land parcel number Kakamega Municipality/Block III/168 and constructed a perimeter wall thus blocking her access and use of the six metre access road.
2. The Plaintiff further averred that she had spent KShs 140,000 to hire alternative transport. She therefore prayed for judgment against the defendant as follows:
 - a. An order of permanent injunction do issue restraining the defendant, his servants, agents and/or employees from further encroaching on the plaintiff's land parcel number Kakamega Municipality/Block III/168 and blocking the six meter access road.
 - b. An order of permanent injunction do issue restraining the defendant, his agents, servants or anyone acting through him from barricading, closing or in any manner whatsoever interfering



with the six meter access road serving land parcel numbers Kakamega Municipality/Block III/168 and Kakamega Municipality/Block III/386.

- c. An order that the beacons delineating land parcel number Kakamega Municipality/Block III/168 be returned to their original positions.
 - d. Special damages of KShs. 140,000/=.
 - e. Costs of the suit.
 - f. Interest on (e) and (f) at court rates.
 - g. Any further order the Honourable Court deems fit and just to grant.
3. Contemporaneously with the plaint, the plaintiff filed Notice of Motion dated 22nd January 2024, through which she sought the following orders:
1. [Spent]
 2. That pending the hearing of this application inter partes the respondent, his agents, servants, employees and/or assigns do demolish forthwith the perimeter wall fence constructed on a six meter access road serving land parcel numbers Kakamega Municipality Block III/168 and Kakamega Municipality Block III/386 and in default the court bailiff is empowered to remove the perimeter wall fence at the respondent's cost.
 3. That a temporary injunction order be and is hereby issued restraining the respondent, his agents, servants, employees and/or assigns from constructing any structure on the access road serving land parcel numbers Kakamega Municipality Block III/168 and Kakamega Municipality Block III/386 pending the hearing and determination of this application and suit.
 4. That the OCS, Kakamega Police Station to ensure compliance with prayer 2 and 3 above.
 5. That costs of the application be provided for.
4. It is manifest that as drawn, prayer 2 of the application stood spent or overtaken by events as of 1st February 2024 when the inter parte hearing took place.
5. The application is supported by an affidavit sworn by Mary Stella Namakhuli Kombo, the plaintiff. She reiterated the averments in the plaint and annexed copies of certificate of lease in respect of land parcel number Kakamega Municipality/Block III/168 and a specific power of attorney donated to her on 19th January 2024 by Richard Kombo.
6. The Plaintiff further deposed that she jointly runs an ECDE centre known as Jabstir Academy with her husband on land parcel number Kakamega Municipality/Block III/168 and that the wall constructed by the defendant had blocked ingress and egress from land parcel number Kakamega Municipality/Block III/168 and encroached on the said parcel as claimed in the plaint. She annexed a copy of a survey report dated January 2024 and signed by Stephen Wasike for the County Director of Survey, Kakamega County. She added that the County Executive Committee Member for Lands, Housing, Urban Areas and Physical Planning wrote a letter dated 12th January 2024 verifying her complaints. That following the blockage, school, buses used to transport pupils to and from the school have no exit and entry and that efforts to get the defendant to bring down the offending wall had been futile since the defendant refused to comply with an enforcement notice. She also stated that the situation was causing her business losses through hire of alternative transport and that she has had to open a small temporary entrance to the school.



7. The defendant reacted to both the suit and the application by filing a Notice of Preliminary Objection dated 30th January 2024. The grounds of objection as listed therein are:
 1. That the application, plaint and suit herein are bad at law for being premature and offensive to the principle/doctrine exhaustion of pretrial/existent dispute resolution mechanisms and consequently bad for constitutional avoidance and ought to be truck out and or dismissed with costs in view of material non-disclosure of the pending survey and or determination by the Regional Surveyor and the Land Registrar, Kakamega.
 2. That the said application, plaint and suit are bad at law for being both inappropriately initiated by a person without the requisite locus standi as well as non-joinder and ought to be struck out and or dismissed with costs.
 3. That the said application, plaint and or suit are bad at law for being instituted before the Honourable court which lacks the requisite jurisdiction to determine the supposed dispute herein and ought to be struck out and or dismissed altogether with costs.
 4. That still further, the application, plaint and or suit herein are bad at law for having been instituted without the leave of court and ought to be struck out and or dismissed with costs.
8. Additionally, the defendant filed a replying affidavit which he swore on 30th January 2024. He deposed that the application is overtaken by events in view of a survey report dated 29th January 2024 prepared by the Regional Surveyor Western Region, a copy of which he annexed. He stated that the orders sought cannot be granted since doing so would amount to determining the suit at the interlocutory stage and further since the applicant's land and school is served by the State Lodge Road which remains accessible and available for her use. He also deposed that he is registered as a co-proprietor of land parcels number Kakamega Municipality/Block III/385 and Kakamega Municipality/Block III/386 both of which were originally comprised in land parcel number Kakamega Municipality/Block III/169. That Kakamega Municipality/Block III/168 and Kakamega Municipality/Block III/169 were adjacent to each other and were served by State Lodge Road which is tarmacked. He denied that he has blocked any access road and added that the access road is intended to exclusively serve his land parcel number Kakamega Municipality/Block III/385. That the access road was only created on 15th July 2016 and the Registry Index Map amended on 4th November 2016.
9. The defendant further deposed that the plaintiff was aware of his erection of the wall and that he offered the plaintiff three to five months duration to restore her access through State Lodge Road, but the plaintiff rejected the offer. That he received an enforcement notice on 13th January 2024 referring to a strange parcel known as Kakamega Municipality/Block III/386P and that before expiry of the notice period, the plaintiff and her agents demolished his perimeter wall on 14th January 2024 and carried away the debris and that he proceeded to rebuild the wall at additional cost.
10. Pursuant to directions given by the court, the preliminary objection and the application were heard together through oral submissions. This ruling is in respect of both.
11. Mr Abok learned counsel for the plaintiff/applicant argued that the application is merited and that the facts are not in dispute. He referred the court to the defendant's annexure RM1 and pointed out that the defendant admits that the wall has encroached plaintiffs parcel number Kakamega Municipality/Block III/168 by 1.2 meters. That the defendant obtained approval for the construction according to marked boundaries of the parcels then went contrary to what had been approved and ended up blocking the access road. He added that the defendant had not complied with the enforcement notice which required him to demolish the wall. He relied on the authorities in the plaintiff's list of authorities



dated 31st January 2024 and urged the court to allow the application to enable plaintiff's buses to have access.

12. On his part, Mr Shifwoka learned counsel for the defendant/respondent argued that parties are bound by their pleadings and that the plaintiff had not sought demolition in her plaint. That the court does not have jurisdiction and that in view of the enforcement notice, jurisdiction is vested in the County Executive Committee Member in charge of planning pursuant to Section 72 of the [Physical and Land Use Planning Act](#).
13. Counsel further argued that the plaintiff does not have locus standi since the power of attorney that she is relying on does not allow her to sue in her own name. Counsel relied on the cases of Anthony Maina Njiiri (suing as attorney for James Njiiri) v National Bank of Kenya Ltd [2010] eKLR and Mohammed Hassim Pondor & Another v Resident Travel Limited & 3 Others [2013] eKLR and argued that a donee cannot invoke powers which have not been granted in the power of attorney. Counsel went on to argue that the defendant is ready to align the end of the wall in terms of the Regional Surveyor's survey report.
14. In a rejoinder, Mr Abok argued that the Regional Surveyor's report shows admission of fault by the defendant. In further rejoinder, Mr Mulama learned counsel appearing for the plaintiff/applicant alongside Mr Abok argued that the authorities relied on by the defendant refer to situations of a general power of attorney and privity of contract which are different from the situation in this case.
15. I have considered the application, the affidavits, the preliminary objection, and the submissions. The issues for determination are whether the preliminary objection is merited and if not, whether the application should be allowed. I will dispose of the preliminary objection first and then return to the application if the preliminary objection is not upheld.
16. The law relating to preliminary objections was stated Law JA in Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 thus:

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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
17. Thus, a valid preliminary objection must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the other side are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The preliminary objection herein will therefore be determined based squarely on the pleadings and facts placed before the court by the plaintiff in her plaint, her bundle of documents as well as her application, her affidavits, and annexures thereto.
18. One of the issues raised in the preliminary objection is whether the plaintiff has locus standi. Locus standi is defined in Black's Law Dictionary, 9th Edition (page 1026) as "the right to bring an action or to be heard in a given forum".



19. At the core of the dispute on locus standi in this case is the specific power of attorney donated to the plaintiff on 19th January 2024 by Richard Kombo which states that:

Power given is limited to the following ... Donee has power to do the following specific acts in the name of the donor: To sue and or defend in legal proceedings with respect to land parcel number Kakamega Municipality/Block III/168. [Emphasis supplied]

20. The power of attorney further goes on to state:

The Donor Hereby Appoint(s) the Donee to be the attorney of the Donor and to perform the specific acts noted above in relation to the Donor's interest in the above-mentioned Title and within this scope in the name of the Donor to execute all such instruments and to do all such acts, matters and things as may be necessary or expedient for carrying out the powers hereby given. [Emphasis added]

21. It is manifest that the power of attorney is extremely specific on what the donee can do and how to do it. The donee must act in the name of the donor.

22. The Court of Appeal had the following to say in *Cornel L. Shisanya v Ngambeni Nursery School & 5 others* [2014] eKLR regarding the effect of a power of attorney on locus standi:

... The application was opposed by Mr. Sitonik counsel for the respondent who submitted that the application was incompetent, as the applicant had projected himself as a party when he was only a donee of a power of attorney. In his ruling, the single Judge dismissed the application, first, on the grounds that the jurisdiction of the court had not been properly invoked as no notice of appeal was lodged ... Further, that the applicant had no locus standi to make the application before the Court as he is not an advocate nor does the general power of attorney given to him qualify him to be substituted in place of the plaintiff. The single judge therefore struck out the application as being incompetent and an abuse of the Court process. ... We have carefully perused the application now before us, and the ruling of the single judge. We are satisfied that the single judge properly exercised his discretion in considering the application and that the order striking out the application was justified.

23. A similar position was taken in the cases of *Anthony Maina Njiiri (suing as attorney for James Njiiri) v National Bank of Kenya Ltd* [2010] eKLR and *Mohammed Hassim Pondor & Another v Resident Travel Limited & 3 Others* [2013] eKLR which the defendant has cited.

24. The power of attorney herein is specific that the donee is to act in the name of the donor. In the plaint herein, the plaintiff is Mary Stella Namakhuli Kombo and not Richard Kombo. Under the power of attorney, she can only file the plaint in the name of Richard Kombo. She can also sign pleadings, but such pleadings must be drawn in the name of Richard Kombo and not in her own name. I am alive to the fact that she has stated in the plaint that she is suing in her capacity as a holder of power of attorney on behalf of her husband Richard Kombo. While that may have been her intention, the power of attorney does not permit her to pose as the plaintiff. Pursuant to the power of attorney, only Richard Kombo, the registered proprietor of land parcel number Kakamega Municipality/Block III/168, can be the plaintiff. Mary Stella Namakhuli Kombo can only sign pleadings and documents prepared in the name of Richard Kombo.

25. I am persuaded that the plaintiff lacks locus standi and to that extent the preliminary objection is upheld. The suit is for striking out. The plaintiff may have to start afresh while keeping fidelity to the specific power of attorney. Considering that the defendant acknowledged in the survey report dated



29th January 2024 prepared by the Regional Surveyor Western Region that the wall encroaches parcel number Kakamega Municipality/Block III/168 at the entrance by 1.2 metres and further considering his counsel's submissions that he is ready to align that part of the wall, I do not consider it to appropriate to burden the plaintiff with costs.

26. In the end, I strike out the suit with no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF FEBRUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Abok for the Plaintiff

Mr Shifwoka and Ms Kegehi for the Defendant

Court Assistant: E. Juma

