



**Kuringa v Kinyothi alias Thomas Niru Mutura & another (Environment and Land Case 26 of 2016) [2024] KEELC 3552 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 3552 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND CASE 26 OF 2016  
A KANIARU, J  
FEBRUARY 15, 2024**

**BETWEEN**

**JECKLIA RWAMBA KURINGA ..... PLAINTIFF**

**AND**

**MUGO KINYOTHI ALIAS THOMAS NIRU MUTURA ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR EMBU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. A Preliminary objection dated 02.11.2022 and filed on the same date is before me for determination. The objection has been brought by the Hon Attorney General on behalf of the 2<sup>nd</sup> Defendant - Land Registrar, Embu. It is brought on the ground that the Plaintiff's Notice of Motion Application dated 24.09.2021 expressly offends the provisions of Section 16 (1) (i) Cap 40 Laws of Kenya.
2. It was agreed that the Preliminary Objection be disposed of by way of written submissions. The 2<sup>nd</sup> defendant filed his submissions on 15.03.2023 whereas the 1<sup>st</sup> defendant did not file any submissions but sought to associate himself with the submissions of the 2<sup>nd</sup> Defendant. It was submitted that, the Plaintiff in his application is seeking orders to have the 2<sup>nd</sup> Defendant directed to cancel an entry regarding land parcel No. Kyeni/Kigumo/651 whereas seeking that order violates Section 16(1) (i) of the *Government Proceedings Act* as it can't be issued against the Government. He set out the provisions of the impugned section of law which provides that

“In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that—



- (i) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties”

3. The 2<sup>nd</sup> defendant further cited the cases of *Mohamed K. Abdulaziz & 2 Others v The Commissioner of Lands being sued thro” the Attorney General & Others* HCC No 50 of 2003 Mombasa (2006) EKLr as well as *Machakos Nursing Home v Officer in Charge Machakos G.K Prison & Anor* (2008) eKLR to support the position that the orders sought by the Plaintiff against the 2<sup>nd</sup> Defendant cannot be issued by virtue of Section 16 of the *Government Proceedings Act*.

4. The Plaintiff’s submissions were filed on 22.03.2023. She gave a background to the case and submitted that the 2<sup>nd</sup> Defendant has failed to establish that there is a contravention of Section 16 of the *Government Proceedings Act*. It was further submitted that the contested application is premised on Section 3A of the *Civil procedure Act* which provides that;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

She further cited the cases of *Munyi Mwangi & Anor* (Civil Appeal 26 of 20117)(2022) KECA 29 (KLR) (4 February 2022) citing the case of *Stephen Boro Gitiba v Family Finance Building Society & 3 others* (2009) Eklr, *Safaricom Ltd v Ocean View Beach Hotel Ltd & 2 others* (2009) Eklr to demonstrate the same position. She urged that the preliminary objection be dismissed in line with Section 3A of the *Civil Procedure Act*.

5. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.

6. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, 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.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a pure point of law. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

7. The 2<sup>nd</sup> Defendant has raised his preliminary objection on the ground that the Plaintiff’s Notice of Motion Application offends the provisions of Section 16 (1) (i) of the *Government Proceedings Act* Cap 40 of the Laws of Kenya. The said application is seeking for the following orders;

- i. That the Honourable court be pleased to direct the Embu County Surveyor to cancel the mutation dated 25.01.2017 in respect of Kyeni/kigumo/651 and the sub division effected on the Registry Index Map (Sheet No. 3) on 21<sup>st</sup> August, 2017 in respect of the said parcel of land.



- ii. That costs of the application be provided for.
8. From the reading of section 16(1) (i), my interpretation of the same is that in civil proceedings against the Government, the court is not at liberty to grant the reliefs of injunction or specific performance but may instead make an order declaratory of the rights of the parties. From the Preliminary Objection raised by the 2<sup>nd</sup> Defendant, he has been very general about what the preliminary objection is all about. It is not clear whether he is complaining that the plaintiff's application is defective because in his view, it is seeking an order of injunction, or is it their view that the plaintiff is seeking an order of specific performance? Please note that the plaintiff is not expressly seeking an order of injunction or specific performance. Assuming that the 2<sup>nd</sup> defendant is implying that the plaintiff is seeking an order of specific performance, the relief of specific performance is an order that is granted when there exists a valid and enforceable contract, which is not the case herein. The doctrine of specific performance was deliberated on in the following cases cited in the case of *QPKA Limited v Kenyatta Hospital Association (KHA) t/a Nairobi Hospital* (Civil Case E648 of 2021) [2021] KEHC 282 (KLR) (Commercial and Tax) (18 November 2021) (Judgment).
9. In *Gharib Suleman Gharib v Abdulrahman Mohamed Agil* LLR No. 750 (CAK) Civil Appeal No. 112 of 1998, the Court held that:-
- “The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”
10. In *Gurder Singh Birdi & Marinder Singh Gatora vs. Abubakar Madhubuti*, Civil Appeal No. 165 of 1996, it was held that the underlying principle in granting the equitable relief of specific performance is that, “the Plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action.”
11. Further, in *Thrift Homes Ltd vs. Kenya Investment Ltd* 2015 eKLR, the court stated that:-
- “Specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction.”
12. It can also not be said that the Plaintiff is seeking for an injunction as their application has been made pursuant to this court's order issued on 09.12.2016 directing the cancellation of registration of the suit land Kyeni/Kigumo/651 in favour of the 1<sup>st</sup> Defendant as the same was found to have been obtained fraudulently. The plaintiff actually seems to be seeking to effectuate a court order. I must also say that the 2<sup>nd</sup> Defendant has been very general in his submissions and in my view he has not made any persuasive arguments for this court to find that the Application complained of is in violation of Section 16 of the *Government Proceedings Act*. He needed to be more specific given that the application does not expressly mention “injunction” or “specific performance”.



13. I therefore find that the Preliminary objection dated 02.11.2022 lacks merit and I hereby dismiss it with costs to the Plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. KANIARU**

**JUDGE – ELC, EMBU**

**15/02/2024**

In the presence of Rose Njeru for defendant, Kiongo for Attorney General's office for 2<sup>nd</sup> 2<sup>nd</sup> defendant and Leadys – Court Assistant.

