



Al-Busaidy & another v National Oil Corporation of Kenya (Environment & Land Case E042 of 2023) [2024] KEELC 1466 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E042 OF 2023
NA MATHEKA, J
MARCH 19, 2024**

BETWEEN

FATHIYA HAFIDH AL-BUSAIDY 1ST PLAINTIFF

THELMA SALIM AL-BUSAIDY 2ND PLAINTIFF

AND

NATIONAL OIL CORPORATION OF KENYA DEFENDANT

RULING

1. The defendant has raised a preliminary objection dated November 30, 2023 on the following grounds:
 1. That the suit is in breach of the provisions of section 48 (1) of the [Land Registration Act](#).
 2. That Winifred Waithanji (the Deponent of the Verifying Affidavit), has no legal capacity to institute the suit on behalf of the plaintiffs.
 3. That the suit is fatally defective and irregular, and ought to be struck out with costs.
2. Counsel for both parties filed their submissions starting with the defendant and followed by the plaintiffs dated January 24, 2024 and January 30, 2024 respectively. Counsel for the defendants submitted that the preliminary objection was raised on a point of law which is that one Samir Salim Said Al-Busaidi on behalf of the plaintiffs donated specific power of attorney to Winifred Waithanji. Counsel submits that the normal practice or the rule of law is that the plaintiffs ought to have donated a general power of attorney to the said Samir Salim Said Al-Busaidi to enable him donate the special power of attorney to the said Winifred Waithanji.
3. Counsel for the plaintiffs argues that section 48 (1) of the [Land Registration Act](#) ought to be read together with section 45 of the same Act as they are intertwined. They submitted that section 48 provides for verification of the power of attorney by the land registrar while section 45 (3) gives exceptions when the verification can be dispensed with. They vehemently deny that the said Samir



Salim Said Al -Busaidy was not given general powers of attorney and referred to page 1-6 of the plaintiff's further list of documents dated 1st November 2023. The said documents attached there are registered general powers of attorney from the 1st and 2nd plaintiffs registered as P.A 202xx and P.A 220xx respectively and registered on August 27, 2019 and December 22, 2022 respectively.

4. On the second ground of the said preliminary objection, counsel relied on provision of order 9 rule 2 of the *Civil Procedure Rules* and the case of *Loice Wanjiru Meru & 3 others vs John Migui Meru* (2017) eKLR and submitted that Winifred Waithanji was acting for a disclosed principal and a specific power of attorney is documented in court which confirms that she had the requisite legal capacity to institute the suit and sign documents on behalf of the plaintiffs.
5. Having considered the said preliminary objection and the submissions thereto, the court has found the issue for determination as whether or not the said Winifred Waithanji has the locus standi to institute the suit on behalf of the plaintiffs?
6. The court reminds itself of the legal threshold of a preliminary objection as was stated in *Mukisa Biscuit Manufacturing Co. Ltd vs West Distributors* (1969) EA 969 on preliminary objections where it was stated that:

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.”

7. In *Oraro vs Mbaja* (2005) KLR Justice Ojwang (Rtd) echoed the definition of a preliminary objection and that such should only succeed if it raises a point of law and stated that:

A "Preliminary Objection " correctly understood is now well defined as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

8. The pure point of law being relied on by the defendant is that the said Samir Salim does not have general power of attorney from the plaintiff and thus cannot donate specific power of attorney to Winifred Waithanji. Who consequently does not have *locus standi*. In *Alfred Njau and others vs City Council of Nairobi* (1982) KAR 229, the Court held that;

the term Locus Standi means a right to appear in Court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings”.

9. The point of law being fronted by the defendant is being disputed by the plaintiffs and it clear on record that the afore mentioned plaintiffs' list of documents, there are general powers of attorney donated to the said Samir Salim Said Al-Busaidi.



10. In *Johnson Gitbaiga Nderitu & 4 others v Nicholas Nderitu Muita & 3 others* (2013) eKLR the court of appeal held as follows:

A cursory glance at the pleadings indicates that triable issues of fact have been raised by both parties. For instance, whether the power of attorney was used fraudulently or in excess of authority; whether the 1st plaintiff was to be consulted despite the existence of the power of attorney; whether the plaintiffs have locus standi to institute the proceedings; whether the defendants acquired the suit property bona fides; whether a donee can exercise a power attorney to the exclusion of the donor and successfully challenge the authority of the donor. It is our considered view that these issues cannot be summarily disposed off by way of preliminary objection.”

11. The plaintiff has satisfied the court that the said Winifred Wathanja is possessed of satisfactory legal capacity to institute the suit. In conclusion I rely on *DT Dobie & Co. (Kenya) Ltd vs Muchina*, Civil Appeal 37 of 1978, the court of appeal expressed itself as follows: -

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case.....”.

12. I find that the preliminary objection is not merited and I overrule the same. Costs to be borne by the defendant.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF MARCH 2024.

N.A. MATHEKA

JUDGE

