



REPUBLIC OF KENYA



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**Mbitha v Bromine Investments Limited & 6 others (Civil Appeal (Application)
E002 of 2022) [2024] KECA 111 (KLR) (9 February 2024) (Ruling)**

Neutral citation: [2024] KECA 111 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) E002 OF 2022
AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA
FEBRUARY 9, 2024**

BETWEEN

KALUME KARISA MBITHA APPLICANT

AND

BROMINE INVESTMENTS LIMITED 1ST RESPONDENT

**THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 2ND
RESPONDENT**

**DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER -
KILIFI 3RD RESPONDENT**

DIRECTOR OF SURVEY 4TH RESPONDENT

DISTRICT SURVEYOR - KILIFI 5TH RESPONDENT

THE DISTRICT LAND REGISTRAR - KILIFI 6TH RESPONDENT

THE ATTORNEY GENERAL 7TH RESPONDENT

(An application to amend the memorandum of appeal in an appeal from the judgment and decree of the Environment and Land Court at Malindi (J. O. Olola, J.) delivered on 6th May 2020 in ELC Case No. 119 of 2 2016 (Original No. 272 of 2014-Mombasa))

RULING

1. By a Notice of motion dated 10th November 2022 brought pursuant to section 3A and 3B of the [Appellate Jurisdiction Act](#), Cap 9, rules 16, 29, 30, 31, 44 and 64(2) of the Court of Appeal Rules, 2010 and the Court of Appeal Practice Directions, 2015 the applicant, Kalume Karisa Mbitha seeks: i) leave to amend the memorandum of appeal in terms of the proposed amended memorandum of appeal;



- and ii) that the annexed proposed memorandum of appeal be deemed as duly filed and served upon payment of the requisite fees.
2. The Motion is brought pursuant to the grounds on its face, and supported by the applicant's sworn affidavit in which he contended that the amendment is necessary to enable determination of all issues in controversy with finality and on merit, particularly in respect of the lawful ownership of the Plot No. Kilifi/ Mtondia/61 (*Mtondia/61*); and that the orders now sought in the proposed memorandum of appeal were inadvertently excluded from the initial memorandum of appeal through honest mistake. It was deponed that the new grounds founded on evidence adduced and canvassed before the Environment and Land Court are anchored on the evidence, analysis and findings of the trial Judge including, *inter alia*, that the Judge failed to consider that the records held by the Settlement Fund Trustees (SFT) did not show any allocation or discharge in favour of Zakharia Orwa, the transferee of Mtondia/61 to the 1st respondent, or how he came to be the registered proprietor of Mtondia/61 when he did not have a title for the subject plot; that the learned Judge also failed to consider the circumstances under which Zakharia Orwa was issued with a title, and yet the charge over Mtondia/61 with SFT was never discharged; that the Judge did not also consider that the lease to Zakharia Orwa was in respect of Plot No. 61/Dtezo/Roka, which was a different settlement scheme from Mtondia settlement scheme.
 3. It was further contended that the initial memorandum of appeal did not also address the questions relating to the parcel of land now known as Plot No. Kilifi/Mtondia/48 (Mtondia/48) Settlement Scheme, and which was originally albeit erroneously recorded as Plot No. Kilifi/Mtondia/61 Settlement Scheme by the SFT. Finally, it was deponed that no prejudice will be suffered by the respondents, who will have a chance to challenge the merits of the new grounds of appeal.
 4. The 1st respondent filed a preliminary objection dated 20th March 2023 challenging the jurisdiction of this Court on the grounds that it is functus officio, having made a finding on the ownership of Mtondia/61 in Civil Appeal No. 26 of 2013 on 17th July 2014; that both the High Court in HCCC No. 606 of 2001 and this Court in Civil Appeal No. 26 of 2013 considered the question as to whether the 1st respondent's land is Mtondia/61 or Plot No. 61/Dtezo/Roka; that all issues between the applicant and the 1st respondent relating to
 5. Mtondia/61 or Plot No. 61/Dtezo/Roka ought to have been part of HCCC No. 606 of 2001 and become the subject of determination in Civil Appeal No. 26 of 2013; that this Court has no jurisdiction to entertain litigation of a dispute on land ownership by instalments; and that it would amount to a judicial absurdity and an abuse of court process to invite a bench of this Court differently constituted to determine the ownership of Mtondia/61 or Plot No. 61/DTezo/Roka which issue was already determined by the Court in Civil Appeal No. 26 of 2013. For this reason, it was contended that the appeal ought to be struck out with costs.
 6. When the application came up for hearing on 21st March 2023 before this Court sitting as a single Judge, the Court (P. Nyamweya, JA.) directed the parties to file their respective submissions, and that the matter be placed before a full Bench for determination in light of the challenge on the Court's jurisdiction to entertain the appeal.
 7. The applicant filed written submissions in respect of the preliminary objection and the application to amend the memorandum of appeal, while the respondent filed submissions in respect of the preliminary objection.
 8. In the submissions in support of their preliminary objection, learned counsel Mr. Mogaka for the 1st respondent submitted that the dispute revolved around ownership of Mtondia/61, which was



determined by this Court in Malindi Civil Appeal No. 26 of 2013, and which decision has neither been reviewed nor appealed against in the Supreme Court. Citing the case of Peter Nganga Muiruri v Credit Bank Ltd & 3 others [2008] eKLR, counsel contended that public policy demanded finality to litigation in respect of a matter heard on its merits; and that to allow re-litigation would result in a multiplicity of suits which would erode public confidence.

9. It was further submitted that since the judgments in HCCC No 606 of 2001 and in Civil Appeal No. 26 of 2013, the Mtondia Scheme Map Layout had been subjected to changes resulting in the issuance of a Letter of Allotment on 27th November 2013 and a title on 26th August 2014 in favour of the applicant in respect of Mtondia/61, purportedly registered as Mtondia/48, all of which were unlawful and intended to defeat the lawful judgments; that, thereafter, the applicant filed another case before the Environment and Land Court, which was struck out as being res judicata, which determination is the subject of the proceedings before this Court.
10. Regarding the motion to amend the memorandum of appeal, counsel stated that they were not opposed to the application.
11. In their submissions, learned counsel for the applicant, Ms. Njoroge holding brief for Ms. Katasi, opposed the preliminary objection and submitted that the appeal raises issues that were not determined in Malindi Civil Appeal No. 26 of 2013; that, in addition to the unresolved issue concerning the distinct variance between the parcel of land allocated to the late Zakaria Orwa and the one bought by the applicant from the late Charo Randu Nzai, there were other issues enumerated in the proposed draft amended memorandum of appeal which remained unresolved, including the factual contestations between the applicant and the 1st respondent, and the non- commonality of the issues and parties in the various suits; that, this being a dispute that concerned the ownership of Mtondia/61, it was not a fit case for determination by way of a preliminary objection.
12. Counsel further submitted that, though camouflaged as a preliminary objection, the 1st respondent's objection amounted to an application to strike out the appeal under rule 84 of the Court of Appeal rules, and should have been brought before the expiry of thirty (30) days from the date of service of the notice of appeal or record of appeal which was not the case.
13. As a brief background, the 1st respondent filed a suit against the applicant being HCCC No. 606 of 2001 where it claimed ownership, possession and occupation of land known as Mtondia/61 measuring 14 acres. It claimed that, sometime in 1993, the applicant trespassed on the land and began cultivating, erecting structures and mining coral bricks to the 1st respondent's detriment. It sought an injunction to restrain the applicant from continuing to occupy the plot.
14. The applicant filed a defence and counter-claim denying the claims of the 1st respondent's ownership of the subject plot and, instead, asserted that he was the lawful owner of Mtondia/61 (old plot No. 445D) in Mtondia Settlement Scheme, having purchased it in 1990 from one Charo Randu Nzai, the allottee by the SFT. It was further pleaded that the 1st respondent purportedly bought plot No. 61/Dtezo/Roka Settlement Scheme from one Zakaria Orwa, which was a completely different property, and had employed fraudulent and mischievous methods to have Mtondia/61 registered and transferred into its name.
15. In a counter-claim, the applicant claimed that the 1st respondent fraudulently obtained registration of plot No. Mtondia/61 instead of plot No. 61/DTezo/Roka Settlement Scheme. He sought an order for rectification of the register and a declaration that he was the lawful owner.
16. Upon considering the case, the trial Judge allowed the 1st respondent's case and dismissed the applicant's claim.



17. Dissatisfied with the judgment, the applicant filed an appeal to this Court being Malindi Civil Appeal No. 26 of 2013. The applicant also filed another suit being Malindi ELC Case No. 119 of 2016 (Original Mombasa ELC No. 272 of 2014) seeking a declaration that he is not in occupation of Mtondia/61; a declaration that he is in occupation of Mtondia/48; and an injunction restraining the 1st respondent by itself, agents or his authorized persons from evicting him from Mtondia/48. On 13th September 2011, the applicant filed *Mombasa High Court Constitutional Petition No. 57 of 2011* against the Director of Land Adjudication and the Kilifi County Adjudication Officer seeking: a declaration that his rights under *the Constitution* have been breached; a declaration that he was the rightful owner of Mtondia/61 in Mtondia Settlement Scheme; and an order of Judicial Review by way of mandamus to compel them to register him as the rightful owner of Mtondia/61.
18. In response, the 1st respondent sought to be joined in the suit and filed a cross petition in which it also joined the Director of Survey, the Kilifi District Surveyor and the District Land Registrar Kilifi alleging collusion with the applicant to amend the map layout for Mtondia area to reflect and exchange the location of Mtondia/61 with Mtondia/48 to justify the unlawful allotment and registration of the subject plot in favour of the applicant.
19. When the parties appeared before Emukule, J. on 16th March 2015 in regard to Constitutional Petition No. 57 of 2011, the court was informed that the applicant did not intend to proceed with the Petition, and it was marked as withdrawn. The court also ordered that the cross petition be marked as a civil suit to be determined together with Mombasa ELC No. 272 of 2014.
20. After considering both the cross petition and the suit, the trial Judge dismissed the applicant's suit and allowed the 1st respondent's claim.
21. The applicant was again dissatisfied by the decision of the High Court and filed an appeal to this Court. The grounds in the amended Memorandum of appeal are to the effect that: the learned Judge erred in law and fact in finding and holding that the applicant's suit was *res judicata* on account of HCCC No. 606 of 2001- Bromine Investments Limited v Kalume Karisa Mbitha & another *and* Malindi Civil Appeal No.26 of 2013 Kalume Karisa Mbitha & another v Bromine Investments Limited, // and that the suit was therefore an abuse of the court process; in finding that the process of re-parcellation and amendment of the Maps for Mtondia Settlement Scheme was unlawful and intended to assist the applicant steal a march and defeat the 1st respondent's rights and interest in Mtondia/61; in finding that the amendments to the Maps for Mtondia Settlement Scheme and the accompanying numbering were aimed at vesting the subject plot in the applicant without due process being followed; in failing to analyze the entire evidence adduced by the applicant and the 1st respondent; and in assessing and awarding the 1st respondent general damages of Ksh.1,500,000 without any evidence having been adduced.
22. We have considered the preliminary objection, the application to amend the memorandum of appeal and the submissions. It is apparent that two issues are for determination. These are: whether or not to allow the preliminary objection; and whether to grant the applicant leave to lodge an amended memorandum of appeal.
23. Addressing first the preliminary objection, the 1st respondent challenges the jurisdiction of this Court on the basis that it is *functus officio* for having rendered a judgment in *Civil Appeal No. 26 of 2013* on 17th July 2014 on the ownership of Mtondia/61.



Black's Law Dictionary, 11th Edition defines a "preliminary objection" as:

"... an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary."

The celebrated case of Mukisa Biscuit Manufacturing Company v West End Distributors Limited [1969] EA provided a succinct definition of a preliminary objection thus:

"... 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 on 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."

24. While *functus officio* is defined in Black's Law Dictionary, 11th Edition as:

"The general meaning of the term has historically been understood to be that an officer or official body once having accomplished its intended task loses its authority or legal competence..."

25. Expounding on the doctrine of *functus officio*, the Supreme Court of Kenya in Election Petitions Nos. 3, 4 & 5 Raila Odinga & Others v IEBC & Others [2013] eKLR cited with approval an excerpt from an article by Daniel Mala Pretorius entitled "The Origins of the *functus officio* Doctrine, with Special Reference to its Application in Administrative Law", in South African Law Journal, Vol. 122 (2005), at p. 832, stated that:

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

26. In view of the foregoing, it is clear that for a preliminary objection to succeed, it requires to have raised a point of law. A review of the applicant's Memorandum of appeal shows that the grounds of appeal revolve around the question of *res judicata* and the ownership of Mtondia/61 amongst other issues. The appeal is yet to be heard and, therefore, the issue of *res judicata* has not been determined.

"*Res judicata*" is defined under the Black's Law as Dictionary, 11th edition

"An issue that has been definitively settled by judicial decision. 2. An affirmative defence barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or a series of transactions and that could have- but was not - raised in the first suit, issue cannot be contested again."

27. As to whether or not the appeal can be adjudged as *res judicata* will require the Court to interrogate the pleadings in H.C.C. No. 606 of 2001- Bromine Investments Limited v Kalume Karisa Mbitha & Another and Malindi Civil Appeal No.26 of 2013 Kalume Karisa Mbitha & Another v Bromine Investments Limited, as well as ELC Case No. 119 of 2016 (Original No. 272 of 2014, Mombasa) so as to determine the question of ownership of Mtondia/61. Essentially, the basis of such determination



would be the facts and evidence that were before the trial court. Additionally, a determination of whether this Court is *functus officio*, would also necessitate an analysis of the evidence. In view of the process to be undertaken to determine the preliminary objection as presented, it becomes evident to us that it does not raise a matter of law only, but would involve an interrogation of the facts surrounding the dispute. On this basis alone, it must fail, and we so find.

28. On the application seeking to amend the memorandum of appeal, the applicant argued that the amendment is necessary for the determination of all issues in controversy, and that the prayers now sought were inadvertently excluded in the initial memorandum of appeal through honest mistake of the applicant's former advocate.
29. Our review of the draft amended memorandum of appeal discloses that the new grounds seek to challenge, *inter alia*, the findings of the learned Judge, on the question of the lawful ownership of Mtondia/61, including the question as to how Zakharia Owra came to be the registered owner as well as the applicant's relationship to the parcel of land now known as Mtondia/48 Settlement Scheme, supposedly originally recorded as Mtondia/61 Settlement Scheme by the SFT. For its part, the 1st respondent does not oppose the application for amendment of the memorandum of appeal.
30. Rule 44 of this Court rules deals with applications seeking leave to amend documents. It provides:
 - “ (1) Whenever a formal application is made to the Court for leave to amend any document, the amendment for which leave is sought shall be set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application or, if that is not practicable, handed to the Court and to the respondent at the time of the hearing.
 2. Where the Court gives leave for the amendment of any document, whether on a formal or an informal application, the amendment shall be made or an amended version of the document be lodged within such time as the Court when giving leave may specify and if no time is so specified then within forty-eight hours of the giving of leave and on failure to comply with the requirements of this sub-rule, the leave so given shall determine.”
31. **Rule 44(1)** empowers this Court to exercise its discretion to grant leave to amend any document. In the case of *Kenya Hotels Limited v Oriental Commercial Bank Limited* [2018] eKLR, this Court, when determining an application for leave to amend the memorandum of appeal so as to introduce a new ground had this to say:

“Whether or not to allow an amendment will also depend on the nature and extent of the amendment. If the applicant is merely introducing a ground of appeal that is properly founded on the evidence that was adduced and canvassed before the trial court, which it is alleged the trial judge ignored or misapplied, the Court will more readily allow the amendment. Different considerations will however apply if the applicant is seeking to introduce a totally new ground of appeal that was not pleaded, evidence adduced, canvassed and determined by the trial court. Thus for example, in exercising its discretion in the former type of case involving an amendment that did not entail introduction of an entirely new point, the Court, in *Kanawal Sarjit Singh Dhim v. Keshavji Jivraj Shah* (supra) took into account a number of considerations such as that the dispute involved a prime and valuable property in Nairobi, the judgment the subject of appeal had been obtained *ex parte*; the need to afford the applicant an opportunity to ventilate all the issues that he wished to raise on appeal; the fact that the intended amendment was not irrelevant to the appeal; and that the respondent stood to suffer no prejudice as he had the opportunity to oppose the appeal...”



- 31. In distilling the above excerpt, whether or not to allow an application of this nature, requires a court to take into account the nature and extent of the amendment, and whether it will assist in the just determination of the real questions in dispute between the parties. In advancing the application, the applicant must demonstrate that it is brought in good faith, and that sufficient facts have been placed before the court to justify the orders sought. Also of importance is that the application should have been brought within a reasonable time. Above all, such determination should take into account whether the interests of justice will be served.
- 32. In the instant application, the new grounds raised in the amended memorandum are matters of law anchored on the decision of the learned Judge, the subject of the appeal. Since the appeal is still pending hearing and determination, it can be considered to have been brought within a reasonable time. It would also seem that the amendments sought are necessitated by the change in the applicant's advocates. In the result, all the afore-stated aspects considered, we are satisfied that the application is merited and, as such, we hereby exercise our discretion to allow the applicant leave to file the amended memorandum of appeal.
- 33. In sum, we order and direct that the preliminary objection is accordingly dismissed, and the proposed memorandum of appeal annexed to the application dated 10th November 2022 be deemed as duly filed and served upon payment of the requisite court fees.
- 34. Since the application was unopposed, we order each party to bear their own costs.
- 35. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

