



**Komu v Principal Magistrates Court at Kerugoya & 2 others (Environment & Land Case E021 of 2023) [2024] KEELC 3319 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3319 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE E021 OF 2023**

**JM MUTUNGI, J**

**APRIL 24, 2024**

**BETWEEN**

**NANCY WANGECI KOMU ..... PLAINTIFF**

**AND**

**THE PRINCIPAL MAGISTRATES COURT AT KERUGOYA ... 1<sup>ST</sup> DEFENDANT**

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

**BENSON KINYUA MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of the 3<sup>rd</sup> Respondent's Notice of Preliminary Objection dated 30<sup>th</sup> October 2023 seeking to strike out the Applicant's Notice of Motion dated 25<sup>th</sup> September 2023, on the grounds:
  1. That the Plaintiff's entire suit is a legal muddle and an abuse of the Court process as orders issued on 24.06.2016 vide Kerugoya PMCC No.74 of 2007 between Geoffrey Muthii Murage Versus Julius Gakuru Komu and which orders were duly executed to excise a portion of 0.40 hectares out of LR Inoi/Kariko/506 and subsequent attachment and sale by public auction of the said portion being LR Inoi/Kariko/4494 can only be challenged by taking out a writ of certiorari in a suit for Judicial Review proceedings within 6 months from the date of the issuance of orders dated 24.06.2016 and not by way of a plaint as in this case.
  2. That this Honourable Court lacks requisite jurisdiction to entertain the orders sought in the plaint dated 25.09.2023 and also in the Application/Notice of Motion dated 25.09.2023 as its inherent jurisdiction has not properly been invoked and the entire Plaintiff's suit is an abuse of the court process.



3. That the Plaintiff/Applicant lacks the requisite locus standi to sustain the suit herein as she is not a party to Kerugoya PMCC No. 74 of 2007 between Geoffrey Muthii Murage Versus Julius Gakuru Komu & Another or even in Kerugoya CMELCC No. E029 of 2023 between Benson Kinyua Mwangi Versus Phyllis Wanjiru Gakuru & John Muriuki Gakuru which suit seeks for vacant possession/eviction orders against the said Defendant.
  4. That the Plaintiff's suit is a non-starter in that, the Honourable Attorney General has not been enjoined in the suit to represent the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and no relevant notice has been issued and served before institution of the suit in breach of Section 13A of the Government Proceedings Act Cap 40 Laws of Kenya.
2. Before I consider the preliminary objections, let me provide the background to this suit so as to contextualise the matter. This suit was instituted by way of Complaint on the 25<sup>th</sup> September 2023 filed simultaneously with a Notice of Motion of even date, filed under a Certificate of Urgency. The Notice of Motion sought for orders as follows:
1. Spent
  2. That this Honourable Court be pleased to order Stay of Proceedings in MCELC E029 OF 2023 between Benson Kinyua Mwangi Versus Phyllis Wanjiru Gakuru & John Muriuki Gakuru pending the hearing and determination of this Application
  3. That this Honourable Court be pleased to order Stay of Proceedings in MCELC E029 OF 2023 between Benson Kinyua Mwangi Versus Phyllis Wanjiru Gakuru & John Muriuki Gakuru pending the hearing and determination of this suit.
  4. That cost of this Application be provided for.
3. The Applicant's motion was predicated upon the annexed affidavit sworn by Nancy Wangeci Komu in which she averred that the 1<sup>st</sup> Respondent had issued illegal and unlawful orders in favour of the 3<sup>rd</sup> Respondent, in Kerugoya PMCC No. 74 of 2007 between Geoffrey Muthii Murage Versus Julius Gakuru Komu & Another, which ordered for the excision of LR Inoi/Kariko/4494 measuring 0.40 hectares from LR Inoi/Kariko/506. The Applicant claimed that the suit land had been owned in common by the Applicant together with her siblings. According to the Applicant, the action by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was an illegality and unlawful for the reason that LR Inoi/Kariko/506 had been held in common, and that severance of the common interest had not been done and as such, it would have been impossible to ascertain the specific share of each shareholder. She consequently prayed for the cancellation of the title to LR Inoi/Kariko/4494 as well as the cancellation of the new entries made in the abstract of title pursuant to the Orders.
4. The 3<sup>rd</sup> Respondent entered appearance and filed a Defence. In the Defence he denied the claims of the Applicant. He pleaded that the orders issued on 24.06.2016 in Kerugoya PMCC No. 74 of 2007 were lawful and legal as they had been issued by a court of competent jurisdiction and that the same had not been challenged by way of review or appeal in any court of law. He further pleaded that the highest bidders, namely Azariah Mwangi Ngareh, Patrick Macharia Ngareh, Dorothy Wangeci Ngareh and Robert Maina Ngareh acquired a clean and indefeasible title to the portion of 0.40 hectares capable of being transferred to the 3<sup>rd</sup> Defendant. He stated that the 2<sup>nd</sup> Respondent exercised its statutory power diligently and lawfully as the share of the judgment debtor Julius Gakuru Komu had been lawfully attached and sold by way of a valid Public Auction to secure payments of the decretal amounts in Kerugoya PMCC No. 74 of 2007. He further stated that the Applicant lacked locus standi for the reason that LR Inoi/Kariko/506 had been subdivided into LR Inoi/Kariko/4493 measuring



1.54 hectares and which had been registered in the names of the Applicants and her siblings David Muriuki, Patrick Mwangi, Gibson Mutugi, while LR Inoi/Kariko/4494 is registered in the name of the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent further pleaded that Judicial Review and/or appeal would have been the appropriate procedure to approach the Court in the instant case.

5. The Court on 31<sup>st</sup> October 2023 gave directions that the Preliminary Objection be disposed of first and that it be canvassed by way of written submissions. The 3<sup>rd</sup> Respondent filed his written submissions on 19<sup>th</sup> February 2024 and the Applicant filed his on 16<sup>th</sup> February 2024.

### **Arguments of Counsel**

6. Mr. Gitau Kahiga, for the 3<sup>rd</sup> Respondent submitted that the Applicant ought to have instituted Judicial Review proceeding as the Applicant was seeking to challenge the orders issued by the 1<sup>st</sup> Defendant. He also submitted that the Applicant lacked locus standi as she was not a party in Kerugoya PMCC No. 74 of 2007 and Kerugoya CMELCC No. E029 of 2023. He relied on the case of Joseph Muriuki Kithinji Versus Peterson Ileri Mwaniki & 3 others (2021) eKLR.
7. Mr. Otuke for the Applicant argued that the Applicant had been one of the legal owner of LR Inoi/Kariko/506 having inherited it together with her siblings from her father Johana Komu Mugo pursuant to Embu Succession Cause No. 10 Of 1982. Counsel further submitted that LR Inoi/Kariko/506 had not been divided as among the siblings at the time LR Inoi/Kariko/4494 was excised from the original suit land and as such having been held in common and/or jointly, it was impossible to ascertain Julius' share. Counsel further submitted that the Applicant was not informed, involved or consulted before it was excised. Counsel submitted the Applicant had a legitimate claim over the suit land and submitted that Judicial Review was not available as the Applicant had not been a party to Kerugoya PMCC No. 74 of 2007. Counsel relied on the Case of Republic Versus Public Procurement Administrative Review Board & 2 Others Exparte Rongo University (2018) eKLR. Counsel further submitted that the failure to enjoin the Attorney General and issue a notice thereof could be cured by an amendment to the Plaint. He relied on the cases of David Njenga Ngugi Versus Attorney General (2016) eKLR and Kenya Bus Service Limited & Another Versus Minister for Transport & 2 Others (2012) eKLR.

### **Analysis and Determination**

8. I have considered the pleadings herein, the arguments of Counsel and the authorities cited by Counsel. The 3<sup>rd</sup> Respondent raised four grounds in his Preliminary Objections:
  1. Whether the Applicant has locus standi to institute the present suit.
  2. Whether this suit is properly instituted before this Court
  3. Whether this Court has jurisdiction to hear and determine this suit.
  4. Whether failure by the Applicant to enjoin the Attorney General to represent the 1<sup>st</sup> and 2<sup>nd</sup> Respondent warrants this Court to strike out this suit.
9. The Court of Appeal in the Case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 established the threshold for determining what would constitute a valid Preliminary Objection. A Preliminary Objection to be valid must be on a point of law and must be founded on facts



that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the Mukisa Biscuit Case (supra) Law, JA stated as follow: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 the arbitration.”

### **Locus Standi**

10. The 3<sup>rd</sup> Respondent contends that the Applicant lacks the requisite locus standi as she is neither a party in Kerugoya PMCC No. 74 of 2007 nor Kerugoya CMELCC No. E029 of 2023. For her part, the Applicant contends that she was one of the owners in common of the suit land that was affected and therefore is properly entitled to protect her interest in the property.
11. 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”. In the case of 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”.
12. A claim that one has no locus standi challenges a party’s right to be heard before a court and if a determination is made in the affirmative then this issue has the capability of disposing of the suit. A claim that a party lacks locus standi therefore is a pure point of law and one that needs to be raised and determined at the earliest opportunity.
13. It is not in dispute that the Applicant was not a party in Kerugoya PMCC No. 74 of 2007 and was not a party in CMELC No. E029 of 2023. The Applicant contends that she however has interest over the suit land as she was one of the co-owners. She claims proprietary interest over the suit land. The title abstract for LR. No. Inoi/Kariko/506 (original parcel) shows the Applicant was a co-owner with her brothers. The Applicant would thus have locus standi to institute proceedings alleging violation to their proprietary rights over the suit property. The Preliminary Objection on the ground of lack of locus standi thus fails.
14. In regard to issues 2,3 and 4, the 3<sup>rd</sup> Respondent argues that the only way that the Applicant could challenge the decision of the 1<sup>st</sup> Respondent was through Judicial Review proceedings, for certiorari to issue to quash the decision. On the other hand, the Applicant argues that the avenue for Judicial Review was not available to her as she was not a party to Kerugoya PMCC No. 74 of 2007.
15. There is no doubt that the Applicant and her siblings were on 11.9.1985 registered as proprietors in common as evidenced in the abstract of title (green card), of the LR Inoi/Kariko/506. It is also not disputed that the 1st Defendant ordered land parcel Inoi/Kariko/506 to be partitioned to hive out a portion of 1 acre purportedly belonging to one of the co-owners that was sold by Public Auction and ordered to be transferred to Azariah Mwangi Ndare & 3 Others in execution of a Court Decree as per the orders issued by the 1<sup>st</sup> Respondent on 24/6/2016. Consequent to this order, the original suit land was partitioned into two portions being LR Inoi/Kariko/4493 and 4494. LR Inoi/Kariko/4494 was transferred to Azariah Mwangi Ngareh and 3 others on 23rd November 2022, but they later sold and transferred the land parcel LR Inoi/Kariko/4494 to 3<sup>rd</sup> Defendant and on 23rd December 2022 he was



issued with the title deed. The Applicant argues she and the other Co-owners had not consented to the original parcel of land being partitioned and were not consulted. she contends the orders given by the 1<sup>st</sup> Respondent on 24/6/2016 were unlawful and illegal.

16. From the record and more specifically having regard to the Court order issued by the Court in Kerugoya PMCC No. 74 of 2007 it is evident that Julius Gakuru Komu's interest in LR No. Inoi/Kariko/506 was attached and sold by public auction in execution of decree against him. The Public Auction was conducted on 22<sup>nd</sup> July, 2010 as per the certificate of sale exhibited in the 3<sup>rd</sup> Defendants bundle of documents. The orders issued by the Court on 24<sup>th</sup> June 2016 were given effect and the original parcel of land LR No. Inoi/Kariko/506 was partitioned and the portion of 1 Acre ordered to be transferred to the purchasers at the auction and was duly transferred.
17. The Applicant and indeed any of the other co-owners had the option and right to object to the attachment of the suit land as provided under Order 22 of the Civil Procedure Rules but apparently they did not. The attachment and sale of their brother's portion of 1 Acre was by Public Auction and it is not possible that they were not aware that their brother's interest in their common property was under process of attachment.
18. Even assuming, the Applicant was unaware of the process of attachment and she became aware when she claims she did, the appropriate action would not have been to file a fresh suit to seek the cancellation of the impugned orders that resulted in the partition of the original land parcel LR. No. Inoi/Kariko/506 but rather should perhaps have sought to have the Court review the order under the provisions of Section 80 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, and Order 45 Rule (1) of the Civil Procedure Rules. The Applicant has argued that she could not apply for review since she was not a party in the suit where the impugned orders were made. However, under Section 80 of the [Civil Procedure Act](#), one need not have been party in the suit to apply for review of an order or decree. A party only need to be aggrieved by the order and to be affected by the order to qualify to apply for review. Section 80 of the [Civil Procedure Act](#) provides as follows:-

“ 80 Review Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
19. The Applicant equally if she considered the jurisdiction of the Lower Court had been invoked unlawfully could have approached the High Court for Judicial Review under Order 53 of the Civil Procedure Rules for redress. However filing a fresh action in another Court, not by way of appeal and/or Judicial Review was not an option available to the Applicant. The orders of a competent Court cannot be invalidated by filing of fresh action before a higher Court but must be challenged either by way of review before the same Court, or by way of Appeal before the higher Court; and/or by way of Judicial Review.
20. In the case of *Florence Nyaboche Machani v Mogere Amosi Ombui & 2 others* (2015) eKLR, the Court held that:

“It is trite law that a valid Judgment of a Court unless overturned by an appellate court remains a Judgment of Court and is enforceable, the issue of jurisdiction notwithstanding. The Plaintiff had all avenues to impugn the award as well as the Judgment. He did nothing. As sarcastically put by counsel for the Defendants in his submissions, the Plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter



was over. In the mean-time the 1<sup>st</sup> defendant's rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The Plaintiff has come to Court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the Plaintiff to impugn a valid Court Judgment and decree."

21. Finally, and before I conclude this Ruling I take note that the Applicant has argued that the partition of the suit land was unlawfully and illegally carried out since all the registered co-owners had not consented to the same. It is true that in ordinary circumstances all the registered proprietors of a common interest ought to consent before any dealing with the interest by any of them. The consent however should not be unreasonably withheld. Section 91(6) of the Land Registration Act, 2012 provides as follows:-

"91.(6) No tenant in common shall deal with the undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld."

22. Under the Section 94 (1) of the Land Registration Act, any tenant in common can apply to the Land Registrar with the consent of the other tenants in common to have the land subdivided. Under Section 94(2) of the Land Registration Act, the Land Registrar is given discretion to order partition in certain instances without consent of all the tenants in common having regard to the factors set out under Section 94 (3) of the Act.

Section 94 (2) provides as follows:-

"94. (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—

- (a) any one or more of the tenants in common without the consent of all the tenants in common; or
- (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree."

23. The Lower Court in my view properly made the order for the partition of the land since the interest of one of the co-tenants had been attached in execution of a decree and his portion had to be severed.

24. In the premises I uphold the Preliminary Objection on the ground that the jurisdiction of this Court has not been properly invoked. The suit is unsustainable and the same is ordered struck out.

25. I order that each party bears their own costs for the application and the struck out suit.

26. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK AT KERUGOYA THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**J. M. MUTUNGI**

**ELC- JUDGE**

