



**Barasa v Mutoro & 5 others (Environment and Land Appeal
27 of 2022) [2024] KEELC 3274 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 27 OF 2022**

EC CHERONO, J

APRIL 11, 2024

BETWEEN

RICHARD BARASA APPELLANT

AND

CALISTUS MUTORO 1ST RESPONDENT

KENNEDY WAMALWA ALIAS CHRIS JUMA 2ND RESPONDENT

ALEX JUMA 3RD RESPONDENT

PETER MUNJARU 4TH RESPONDENT

JOSEPH SIKUKU 5TH RESPONDENT

GODFREY MUCHELE 6TH RESPONDENT

(Being an Appeal arising from the decision by HON. C.A.S MUTAI Senior Principal Magistrate (BUNGOMA) delivered on 10/12/2021 in CM-ELC Case NO.74 of 2020)

JUDGMENT

Background

1. The Appellant, Richard Barasa Mutoro was the plaintiff in the former suit being CM-ELC Case NO.74 of 2020(Bungoma) while the Respondents were defendants. In the former suit, the plaintiff/appellant *vide* a plaint dated 13th October, 2020 sought a Permanent injunction order restraining the defendants by themselves, their agents, servants or any other persons claiming through them from demarcating or putting up fresh boundaries on land parcel NO. W.bukusu/S.myanga/192. The suit was filed contemporaneously with a Notice of Motion application dated the same date. After perusing the said Notice of Motion application, the Duty Court certified as urgent and temporary injunction orders issued pending inter-parte hearing 29/10/2020. The Defendants through the firm of M/S



P.L Natwati & Company Advocates in response to the suit and the said application filed a Replying affidavit sworn on 23/11/2020 and statement of Defence dated the same date. The Respondents also filed a Notice of Preliminary Objection dated 2nd October, 2020. The said Notice of Preliminary Objection raised the following three (3) grounds;

- a. That the application is fatally defective, incompetent and should be refused.
 - b. That the suit herein is bad in law and incompetent.
 - c. That the plaintiff/applicant has no locus and or lacks capacity to bring the instant application and suit as he has no letters of administration in respect of the estate of his deceased father.
2. When the said Notice of Motion application came up for hearing, the parties agreed to hear the Preliminary Objection dated 2nd December, 2020 first which was also agreed to be canvassed by way of written submissions.
 3. In its Ruling delivered on 10th December 2020, the trial Magistrate upheld the said Preliminary Objection thereby striking out both the suit as well as the Notice of Motion application dated 13th October 2020 with costs.
 4. Aggrieved by the said order, the appellant preferred the present appeal vide a Memorandum of Appeal dated 24/10/2022 on the following 18 grounds;
 1. The learnt trial Magistrate erred in law and fact when the failed it hold the suit before court was statute barred under limitations of actions act.
 2. The learnt trial Magistrate erred in law and fact by shifting a burden basing on technicalities ruling
 3. The learnt trial Magistrate erred in law and fact by failing to take action i.e respondents despite issuing court orders and serving them no action was taken.
 4. The trial Magistrate erred in law and facts by avoiding to implement court condemned orders issued by court i.e 21st March 2021
 5. The trial Magistrate erred in law and fact by giving misdirection by a ruling when defendant at no time save advocates agents who were requesting extension attendant court.
 6. The learnt trial Magistrate erred in law and fact by failing to give any considerate to my learned advocate Otsiula submission which have attach a copy.
 7. The learnt trial Magistrate in law and fact by not setting hearing despite my witnesses attending court on set dates. i.e plot holders.
 8. Al copies i.e court condemned orders submissions are attached.
 9. The learnt trial Magistrate erred in law and facts by failures look at confirmation of distribution in the replying after David no. 11 done on 20/1/2004 as well of the late plot owner the late Valent Wamalwa Mutoro the father.
 10. The learnt trial Magistrate erred in law and order by failures affirm the information by the advocate Otsiula that sub-divided plots no 1046 south Myanga 1046 and 192 not south Myanga not 151/. It was a typing error.
 11. The trial of Magistrate erred in law and order by avoiding observe the defence of affidavit the measurements.



12. That the learned trial magistrate erred in law order of by giving different bills which are different attached are copies.
13. That the learnt trials magistrate erred in law and order in proceeding having fraudulent information e.g Calistus Mutoro, Peter Munjaru, Joseph Sikuku were in Nairobi not attending court.
14. That state that the only is property a waiting distribution 10% deduction Mumias sugar company kill 2 million are in custody of Calistus respond let the court give order to be given for distribution directives.
15. That both replying and defence affidavit bear names of Chrispinus Juma Mutoro who is the late has and no relationship to late Valent Wamalwa.
16. I humbly request the investigation over the fraud the id/Certificate of academic
17. That the trial Magistrate fraud in law and order all the witnesses who were reporting for hearing.
18. That I pray that the ruling by trial magistrate be set aside and substituted by this appeal.

Respondent's Submissions

5. The Respondent through the firm of M/S P L Natwati & Company Advocates combined ground 1, 2 and 5 and submitted that the question of locus standi in a suit is very crucial as it can be raised as a preliminary point before a matter is heard or during the trial of a case.
6. She relied in the celebrated case of *Mukisa Biscuit v West End Distributors Ltd* (1969) EA, *Omondi v National Bank of Kenya Ltd and Others* (2001) 1 E.A 177; *Njau & Others v City Council of Nairobi* (1976-1985)1 E.A 407. She further submitted that the Appellant filed a former suit simultaneously with an application seeking a temporary and a permanent injunction against the Respondents over land parcel NO. W.Bukusu/S.Myanga/192. She submitted that from the records availed before the trial court, the said property was registered in the name of Valent Wamalwa Mutoro (Deceased) and that at the time of filing the former suit, the Appellant had not obtained a grant of letters of administration to enable him file a suit. She submitted that a person who wishes to enforce an action in respect of an estate of a deceased person can only do so on obtaining a grant of representation issued under section 82 of the *Law of Succession Act* CAP 160 Laws of Kenya. She also relied in the case of *Quick Enterprises v Kenya Railways Corporation* (Kisumu High Court case NO. 22 of 1999) and urged that the Appellant lacked *locus standi* to institute proceedings on behalf of Valent Wamalwa Mutoro (Deceased) and neither did he have authority to sue on behalf of others as provided for under Order 1 Rule *CPR*
7. The Counsel also referred to grounds NO. 3,4,6,7,8,9,10,11,12,13,14,15,16,17 & 18 and submitted that those grounds raise new issues which were not dealt with by the trial court and therefore not subject to this appeal. She submitted that these grounds are baseless and do not form grounds for the subject of this appeal. In conclusion, the learned Counsel urged this Honourable Court to find this appeal unmerited and have it dismissed with costs.

Analysis And Decision

8. I have considered the extract of appeal, proceedings, pleading and documentary evidence before the trial court including the Order by the trial Magistrate issued on 10/12/2021 which is the subject of this appeal. I am reminded that the duty of this Court as the first appellate Court is re-analyse, re-evaluate and reconsider the evidence adduced before the trial court and after thorough scrutiny, come up with



my own conclusion but taking into account the fact that I did not see, hear the witnesses nor visited the locus (see *Selle v Associated Motor Boat Company Ltd* (1968) E.A 123 and *Williamson Diamonds Ltd v Brown* (1970) E.A 1)

9. The background to this appeal is that vide a plaint dated 13th October 2020, the appellant sued the respondents for a permanent injunction restraining them from or any person claiming under them from demarcating, and/or putting up fresh boundaries on land parcel NO. W.Bukusu/S.Myanga/192. The said suit was filed simultaneously with a Notice of Motion seeking interlocutory injunction orders pending hearing and determination of the main suit. In response to the said Notice of Motion, the Respondent filed a Notice of Preliminary Objection dated 2nd December 2020 which raised the following grounds;
 - a. That the application is fatally defective, incompetent and should be refused.
 - b. That the suit herein is bad in law and incompetent.
 - c. That the plaintiff/applicant has no locus and or lacks capacity to bring the instant application and suit as he has no letters of administration in respect of the estate of his deceased father.
10. During the hearing of the said application, the parties agreed to first argue the preliminary objection. It was also agreed that the said Preliminary objection be canvassed by written submissions. After filing their respective written submissions, the trial court delivered its ruling on 10th December, 2021 by upholding the preliminary objection with costs. The appellant was aggrieved and preferred the present appeal on the following grounds;
 1. The learned trial Magistrate erred in law and fact when he failed to hold the suit before court was statute barred under limitations of action Act.
 2. The learned trial Magistrate erred in law and fact by shifting a burden basing on technicalities ruling.
 3. The learned trial Magistrate erred in law and facts by failing to take action i.e respondents despite issuing court orders and serving them no action was taken.
 4. The trial Magistrate erred in law and facts by avoiding to implement court condemned orders issued by court i.e 21st March 2021
 5. The trial Magistrate erred in law and fact by giving misdirection by a ruling when defendant at no time save advocates agents who were requesting extension attendant court.
 6. The trial Magistrate erred in law and fact by failing to give any considerate to my learned advocate Otsiula submission which have attach a copy.
 7. The learned trial Magistrate erred in law and fact by not setting hearing despite my witnesses attending court on set dates. i.e plot holders.
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11. The learned trial Magistrate erred in law and order by avoiding observe the defence of affidavit the measurements.
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 15. That both replying and defence affidavits bear names of Chrispinus Juma Mutoro who is the late has and no relationship to late Valent Wamalwa.
 16. I humbly request the investigation over the fraud the I/D Certificates of academic.
 17. That the trial magistrate fraud in law and order all the witnesses who were reporting for hearing
 18. That I pray that the ruling by trial magistrate be set aside and substituted by this appeal.
11. When this matter came up for directions on 14/11/2023, the parties agreed to canvass the appeal by written submissions with each party being granted 14 days to file and serve their respective submissions. By the time this court withdrew to write this judgment, neither the appellant nor the respondent had filed their submissions. The Defendant/Respondent had raised a Notice of Preliminary objection before the trial Court arguing that the Appellant/plaintiff had no locus standi to institute the former suit since he had not taken out letters of administration for the Estate of his deceased father. The appellant has set out 18 grounds of appeal and nowhere has he said that he has a grant of letters of administration to agitate any rights or interest on behalf of the estate of his deceased father. The appellant has not shown how the trial Magistrate misdirected herself or erred either in law or in fact in upholding the preliminary objection. All the 18 grounds of appeal in my view are not challenging the order by trial magistrate in upholding the preliminary objection.
 12. The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed with costs.

Orders accordingly.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS
11TH DAY OF APRIL, 2024**

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HON. E.C CHERONO

ELC JUDGE

In the presence of;

Appellant-present

Respondent/advocate-absent

Bett C/A

