



Mukururo & another v County Government of Nakuru & 3 others (Environment & Land Case E17 of 2023) [2024] KEELC 3856 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E17 OF 2023**

MAO ODENY, J

MAY 16, 2024

BETWEEN

CHARLES MUCHERU MUKURURO 1ST PLAINTIFF

JEREMIAH MUKURURO MUCHERU 2ND PLAINTIFF

AND

COUNTY GOVERNMENT OF NAKURU 1ST DEFENDANT

LAND REGISTRAR, NAKURU 2ND DEFENDANT

BAVUNI MUGWATI WATER PROJECT 3RD DEFENDANT

JOSEPH NDERITU 4TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated 25th January 2024 by the 1st defendant on the following grounds:
 - i. That the 1st plaintiff lacks the requisite locus standi to move the honorable court.
 - ii. That the honorable court is precluded from entertaining, hearing and/or determining the instant matter by dint of the doctrine of estoppel.
 - iii. That in any case the instant suit is vexatious, bad in law and abuse of the court process.
 - iv. Any other reason(s) to be adduced at the hearing thereof.
2. The preliminary objection was canvassed by way of written submissions.



1St Defendant's Submissions

3. Counsel relied on the cases of *Law Society of Kenya V Commissioner of Lands & 2 Others* [2001] eKLR, *Christopher Mutiambu Machimbo & 3 Others versus County Surveyor, Trans Nzoia & 4 others* [2022] eKLR and submitted that the plaintiff lacks the requisite locus standi to file and prosecute the present case. Counsel argued that the suit property was registered in the name of the 1st plaintiff's father and that he had not demonstrated whether he had any interest in the property.
4. Counsel further submitted that the plaintiffs were barred by the doctrine of estoppel to pursue the present matter as they had acknowledged the existence of an agreement where they sanctioned the drilling of the Bavuni/Muguathi Borehole on the suit property which was confirmed by the Water Project Agreement dated 22nd April 2008 that was attached to the plaintiffs list of documents. Counsel relied on the case of *Sarah Njeri Mwabi versus John Kimani Njoroge* [2013] eKLR.
5. It was counsel's submissions that the 1st plaintiff who is one of the children of the 2nd plaintiff is a direct beneficiary of the said borehole and cannot therefore claim encroachment. Counsel urged the court uphold the preliminary objection and strike out the suit.

1St Plaintiff's Submissions

6. The 1st plaintiff submitted that his father the 2nd plaintiff was born in 1922 and was therefore a senior citizen who was advanced in age and could not appear in the present matter.
7. It was the 1st plaintiff's submissions that he had sued the 1st defendant herein in ELC Petition No. 10 of 2019 alongside his father but the 1st defendant did not raise any preliminary objection and the matter proceeded up to its conclusion.
8. The 1st plaintiff submitted that his father is well conversant with the matter and had given him his blessings to proceed as he was struggling with age related illness. He relied on the case of *Khelef Khalifa El-Busaidy vs Commissioner of Land & 2 Others* [2002] eKLR and Article 50(2) of *the Constitution* of Kenya.

Analysis And Determination

9. The issues for determination are whether the 1st plaintiff has the locus standi to file this suit and whether the doctrine of estoppel precludes this court from hearing and determining the present matter.
10. The 1st plaintiff admitted that the suit property was registered in the name of the 2nd plaintiff who is his father. That the 2nd plaintiff is alive but old and struggling with age related ailments and cannot therefore participate in the present proceedings. The 1st plaintiff stated that the 2nd plaintiff had given him a written authority to institute the present proceedings.
11. Order 1 rule 10(2) of the Civil Procedure Rules provides as follows:

“(2)The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”



12. The court in the case of *Law Society of Kenya v Commissioner of Lands & 2 others* [2001] eKLR held as follows:

“Locus-standi signified a right to be heard. A person must have a sufficiency of interest to sustain his standing to sue in a Court of law. That was the holding in *BV Narayana Reddy –vs- State of Kamataka* Air (1985) Kan 99, 106 (*The Constitution* of India, ARD 226). I adopt the same as a correct proposition of the law and I so hold.”

13. Similarly, in the case of *Grace Mwakiria Mugambi v Philip Kimani* [2018] eKLR held as follows:

“21. Thus to have locus standi, a party must be able to demonstrate to the Court sufficient connection to support that party’s participation in the case. Traditionally therefore locus standi arises where a party stands to directly and/or personally suffer some harm, injury or prejudice as a result of the situation which gives rise to the relief being sought.”

14. A perusal of the court record shows that on 13th March 2023, the plaintiffs filed an Authority to sue on behalf of the 2nd plaintiff dated 3rd March 2023 that has the thumb print of the 2nd plaintiff. It was filed under Order 1 Rule 13(1) of the Civil Procedure Rules which provides as follows:

“(1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.”

15. It is evident that both the 1st and 2nd Plaintiffs are parties to the suit. The 2nd Plaintiff has authorized the 1st plaintiff to file plead and give evidence on his behalf. He is still a party to the suit and even if we were to remove the 1st plaintiff the suit will still stand. The defendant has also acknowledged the interconnectedness in the transaction by both plaintiffs and that is why the defendant wants them to be estopped from bringing this suit.

16. It is strange that the 1st defendant wants the court to find that the 1st plaintiff lacks the locus standi to file the present matter as he has no proprietary interest in the suit property. In the same breath, the 1st defendant alleged that the 1st plaintiff as a child of the 2nd plaintiff actively participated in the negotiations that led to the activation of the borehole project which is the subject matter of this case.

17. In the case of *Sunda (Kenya) Construction and Engineering Group Limited v Goldrock Development Limited & another (Commercial Civil Case E005 of 2020)* [2022] KEHC 16590 (KLR) (Commercial and Tax) (8 December 2022) (Ruling) held as follows:

17. The principle emerging from the above cited case is that the striking out the name of a party from a suit should be approached with caution. The 1st defendant’s position is that it had no dealings with the plaintiff. I however find that the plaintiff and the 2nd defendant have sufficiently explained the applicant’s involvement in the subject matter of the suit through the sub-contract. It is therefore my considered view that the issue of the rights and obligations of the parties under the various contracts is a matter that can only be unpacked at the hearing of the case.

18. I am therefore not persuaded that striking out the name of the applicant from this suit will serve the wider interest of justice. I say so because should it turn out, at the end of the case, that the applicant was wrongly enjoined in the suit, then any inconvenience caused to it can be remedied by an award of cost.”



18. Consequently, I find that the 1st defendant has failed to demonstrate that the 1st plaintiff lacks the locus standi to file this suit and therefore this limb of the preliminary objection fails.
19. The other ground on the 1st defendant's preliminary objection was that this court is precluded from hearing the present matter by dint of the doctrine of estoppel. The 1st defendant argued that the plaintiffs acknowledged that there was an agreement that sanctioned the drilling of the borehole on the suit property and they cannot therefore claim that there was encroachment.
20. In the case of Margaret Njeri Gitau v Julius Mburu Gitau & 2 others [2022] eKLR the court held as follows:

“It is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion. The Court will also take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of Oraro... Vs...Mbaja (2005) 1KLR 141, where it was held that:

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”. (Emphasis Mine)

21. The 1st defendant has introduced an agreement supposedly entered into by the Plaintiffs in respect of the borehole/water project hence the plaintiffs are estopped from denying the agreement. This cannot fall under a preliminary objection, as preliminary objections must not deal with disputed facts, as the information including the agreement has to be tested by way of evidence. All the issues raised on whether there was an agreement, which estopped the plaintiffs from claiming an encroachment will be heard during the trial.
22. Consequently, I find that the preliminary objection has no merit and is therefore dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 16TH DAY OF MAY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

