



REPUBLIC OF KENYA



**Maingi v Director of Surveys of Kenya & another (Environment & Land Case E013 of 2023) [2024] KEELC 4224 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4224 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E013 OF 2023**

**CA OCHIENG, J**

**MAY 15, 2024**

**BETWEEN**

**PETER MUMO MAINGI ..... APPLICANT**

**AND**

**THE DIRECTOR OF SURVEYS OF KENYA ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the Respondents' Notice of Preliminary Objection dated the 12<sup>th</sup> October, 2023 seeking to dismiss the Applicant's suit and is premised on the following grounds:-
  - a. That the suit herein is fatally defective, incompetent and untenable.
  - b. The suit as instituted is in contra-statute and a nullity ab-initio.
  - c. The Plaintiff is not in the category of persons allowed to take up an originating summons under Order 37 Rule 1 of the *Civil procedure Rules*, 2010.
  - d. The suit herein is an abuse to the due process of this Honourable Court.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

**Submissions**

3. The Respondents' in their submissions provided a background of the dispute herein. They contended that this suit is contra-statute thus a nullity as what is before this court falls outside the ambit of issues that can be raised in an Originating Summons. Further, that there are issues pertaining to previous court decisions and overlapping of parcels of land that will entail an in-depth interrogation by the court, as to the creation of the said parcels and ownership. They insisted that, this will entail a



more robust interrogation by the court to determine the validity of the issues raised and will involve the production of documents as well as witness testimony, that is outside the scope of Originating Summons. They reiterated that the Applicant is not in category of persons allowed to institute such proceedings. Further, that the Originating Summons is still incompetent and a non-starter based on the fact that the Applicant has no locus/capacity to institute these proceedings as per Order 37 of the [Civil Procedure Rules](#). Further, it is quite evident from a reading of the Originating Summons that the Applicant has brought the same on his own behalf and of unknown others. They reiterated that the Applicant has not demonstrated that he was given authority to act for the other unknown parties, the capacity he holds in regards to Shida Moja Investment nor the interest he has in respect to L.R No. 337/1077.

4. To buttress their averments, they relied on the following decisions: *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696; *Siasa Pasua & 2 Others Vs Mbaruk Khamis Mohamed & Another* (2012) eKLR; *Mukesh Man Chand Shah & Anoter Vs Priyat Shah & Another*, Mombasa Civil Appeal No. 39 of 2014; *Wakf Commissions vs Mohamed Bin Umaya Bin Abdulmanji Bin Mwijab & Another*, Mombasa Civil Appeal No. 83 of 1983; *Cyril J Haroo & Another Vs Uchumi Services & Others* (2014) eKLR; *Kiburitiri Vs Kibutiri* (1983) KLR 62 and *Kabindi Katana Mwango & Another vs. Cannon Assurance K. Ltd* (2013) eKLR.
5. The Applicant in his submissions claimed he filed an Amended Originating Summons dated the 26<sup>th</sup> January, 2024, as there existed a typing error in the initial one. He submitted that, in light of the amendment, the Notice of Preliminary Objection should be withdrawn and pave way for the Originating Summons to be determined on merit. He made reference to Order 37 of the [Civil Procedure Rules](#) and Part IV of the repealed [Registered Land Act](#) Cap. 300 and insisted that, the claim before court is not fatally defective. He argued that he has a Judgment in his favour, vide Machakos ELC No. 220 of 2008 and clothed with this Judgment, he approached the Chief Land Registrar for issuance of a Certificate of Lease for Mavoko Block 7/53 (Now known as Mavoko Block 7/350) in favour of Shida Moja Investment, but the Land Registrar and Director of Survey have cited an overlap of the FR numbers cited in prayer No. (1) of the Originating Summons (amended) over the Shida Moja Investment, Land. Further, this has stalled the issuance of the titles, thus preventing him from enjoying the fruits of his Judgment. He reiterated that the Amended Originating Summons does not seek declaration of bona fide ownership and the Court has jurisdiction under Order 37 of the [Civil Procedure Rules](#) to issue orders as sought therein.

### **Analysis and Determination**

6. Upon consideration of the instant Notice of Preliminary Objection including the rivalling submissions, the only issue for determination is whether this suit should be dismissed with costs.
7. The Respondents seek to have the Applicant's suit against them, dismissed with costs on the basis that it is fatally defective, incompetent and untenable; is contra-statute and a nullity ab-initio. Further, that the Applicant is not in the category of persons allowed to take up an Originating Summons under Order 37 Rule 1 of the [Civil procedure Rules](#), 2010. The Applicant has opposed the instant Notice of Preliminary Objection and insists that it is properly before Court as he seeks to implement a previous Judgment.
8. The Applicant filed the Originating Summons dated the 6<sup>th</sup> June, 2023 and amended on 26<sup>th</sup> January, 2024 where he sought for the following Orders:-
  1. That the Honourable Court be pleased to order and/or direct the Director of Surveys of Kenya to cancel the overlapping FR Number being FR No. 340/70, FR No. 292/77, FR No.



284/197, FR No. 314/117 and FR No. 294/103 on Plot No. 337/1077 Now Amended as Mavoko Block 7/53.

2. That the Honourable Court be pleased to Order and/ or direct the Chief Land Registrar to cancel the I.R Numbers, LR No. 337/2884, LR No. 337/2731, LR No. 337/2358 – 2359 and LR No. 337/2286, LR. 337/2693 – 2694 in favour of Plot No. 337/1077 now amended as Mavoko Block 7/ 53.
  3. The Honourable Court be pleased to order the Director of Surveys of Kenya to immediately release the Registry Index Map (RIM) for Mavoko Block 7/53 New Number as Mavoko Block 7/350 to Shida Moja Investment.
  4. That the Honourable Court be pleased to issue any other or further relief that it may be deemed fit in the circumstances.
  5. That the cost of this application be provided for.
9. The Respondents' though duly served have failed to file their response to the Originating Summons to controvert the Applicant's averments but instead opted to filed the instant Notice of Preliminary Objection.
10. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that:-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

11. While in the case of *Autar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, the Court held that:-

A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” Emphasis Mine

12. From a perusal of the amended Originating Summons, the Applicant has raised many issues which have not been controverted by the Respondents. It is trite that where a Respondent fails to file a Defence expressly rebutting the Applicant's claim, the said averments remain unopposed.
13. Based on the facts before me, while applying the provisions of Order 37 of the *Civil Procedure Rules* as well as associating myself with the decisions cited, I find that the issues raised in the Amended Originating Summons need to be ascertained and cannot be determined at this interlocutory stage. Further, since there was already a decision in Machakos ELC No. 220 of 2008, in respect to ownership of the suit land, but there is a challenge on implementation of the said decision by the Respondents, culminating in the filing of the instant Originating Summons, it is my considered view that the Respondents should offer explanations on this.
14. From the foregoing, while associating myself with the decisions cited, at this juncture, I will decline to find that this suit is fatally defective, incompetent, untenable, and is in contra-statute, hence a nullity ab-initio. In my view, the Respondents should have filed a Defence first, to controvert the Applicant's allegations before lodging the Notice of Preliminary Objection.



15. In the circumstance, I find the Notice of Preliminary Objection dated the 12<sup>th</sup> October, 2023 premature and will strike it out.
16. I direct the Respondents' to file and serve their responses to the Amended Originating Summons within twenty - one (21) days from the date hereof.
17. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2024.**

**CHRISTINE OCHIENG**

**JUDGE**

**In the presence of;**

Aunga for Respondent

Ms. Lungu holding brief for Kuria for Applicant

Court Assistant – Simon/Ashley

