



REPUBLIC OF KENYA



**Ing'oka v County Governemnt of Makueni & 2 others (Environment & Land
Petition 11 of 2020) [2024] KEELC 4552 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND PETITION 11 OF 2020**

TW MURIGI, J

JUNE 6, 2024

BETWEEN

ONESMUS KISINGA ING'OKA PETITIONER

AND

THE COUNTY GOVERNEMNT OF MAKUENI 1ST RESPONDENT

**DENIS WAMBUA MASAVU, MEMBER OF COUNTY ASSEMBLY KITETA
KISAU WARD 2ND RESPONDENT**

THE KENYA FOREST SERVICE 3RD RESPONDENT

RULING

1. This ruling is in respect of the Preliminary Objection dated 8/2/2023 raised by the 1st Respondent on the following grounds: -
 - i. That the Petition in its entirety is defective, bad in law, incompetent, unmeritorious and an abuse of the court process.
 - ii. That the Petitioner is not the registered owner of the suit property known as LR No Kiteta/ Ngiluni/957.
 - iii. That the Petitioner purports that proprietary rights over the suit property are vested in his grandparents Monica Muthini Nzivo & Philip Mwaniki Kitavi but has failed to adduce the title deed or any other ownership document in support of his assertions thereof.
 - iv. That the Petitioner further lacks the capacity to institute these proceedings on behalf of the alleged registered owners, as he has neither obtained a power of attorney should the alleged registered owners be alive nor letter of administration in the event that they are deceased.



- v. That in view of the facts herein above, the Petition is unmeritorious as the threshold to grant the prayers sought cannot be met.
2. The parties were directed to canvass the preliminary objection by way of written submissions.
3. As at the time of writing this ruling, the 1st Respondent had not filed its submissions as directed.

The Petitioner's Submissions

4. The Petitioner's submissions were filed on 5th May, 2023.
5. On his behalf, Counsel identified the following issues for the court's determination: -
 - a. Whether the preliminary objection as filed is proper before this Honourable Court; and
 - b. Whether the Petitioner has *locus standi* to maintain the instant Petition.
6. Counsel submitted that the preliminary objection is based on factual issues of ownership and proprietary interest over the suit property which would require an interrogation of the facts of the case.
7. On whether the Petitioner has capacity to institute this Petition, Counsel submitted that the Petition herein has been filed in accordance with the provisions of Articles 22 and 258 of the [Constitution](#) which grants every person the right to institute court proceedings claiming a violation of fundamental rights and freedoms while acting on their behalf or behalf of another person who cannot act in their own name.
8. Urging the Court to dismiss the preliminary objection with costs, Counsel relied on the following authorities: -
 - i. [Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others](#) [2013] eKLR
 - ii. [International Community of Women Living With HIV Registered Trustees v Co-ordination Board & 2 others; Teresia Otieno \(Interested Party\)](#) [2021] eKLR

Analysis And Determination

9. The law on Preliminary Objection is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 Law JA stated as follows:-

“In 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 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 arbitration.”

10. In the same case, Sir Charles Newbold, P. held as follows:

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 had 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 issue. The improper practice should stop.”

11. In *Oraro v Mbaja* [2005] eKLR, J. B. Ojwang J. (as he then was) described it as follows: -

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
12. Having considered the preliminary objection in light of the pleadings and the Petitioner’s submissions, the only issue that arises for determination is whether the Petitioner has capacity to institute this Petition.
13. The 1st Respondent contended that the Petitioner has no capacity to institute this Petition since he has not obtained a power of attorney to sue on behalf of the registered proprietors of the suit property or a grant of letters of administration in the event that they are deceased. The 1st Respondent further contended that the Petitioner is not the registered proprietor of the suit property.
14. On his part, the Petitioner submitted that the preliminary objection is based on disputed facts which can only be ascertained by way of evidence.
15. The issue of *locus standi* is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is satisfied that the 1st Respondent’s Preliminary Objection is based on a pure point of law.
16. This court is called upon to determine whether the Petitioner has *locus standi* to institute this Petition.
17. *Locus standi* is defined in *Black’s Law Dictionary* 9th Edition as “the right to bring an action or to be heard in a given forum.”
18. In the case of *Alfred Njau and others v City Council of Nairobi* [1982] KAR 229, the Court defined the term *locus standi* as follows;-

“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.”
19. Further in the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No 464 of 2000, the Court held that;

“*locus standi* signifies a right to be heard, A person must have sufficiency.”
20. The 1st Respondent contended that the Petitioner has no *locus standi* to institute the Petition herein. The basis of this argument is that the Petitioner has not obtained a power of attorney from the registered proprietors to sue on their behalf or a grant of letters of administration in the event that they are deceased. On his part, the Petitioner argued that Article 22 and 258 Constitution grants every person the right to institute proceedings claiming that a right or fundamental freedom has been denied, violated or is threatened with violation. He asserted that the instant Petition is a public interest



litigation as it represents all those whose constitutional rights are threatened with violation by the acts and omissions of the Respondents herein.

21. Article 22(2)(b) of the Constitution provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

22. Similarly, Article 258 of the Constitution provides that:-

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.

23. In Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR the court observed as follows:-

“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of *locus standi* in Kenya. Articles 22 and 258 have empowered every person whether corporate or non incorporated to move the court contesting any contravention of the Bill of Rights or the Constitution in general”.

24. The Petitioner articulated the acts which constitute a violation of his Constitutional rights. In paragraph 11 of the Petition, the Petitioner alleges violation of his fundamental rights under Articles 23, 40, 47, 67 and 186 of the Constitution.

25. To that extent, I find that the Petitioner has the requisite *locus standi* to institute these proceedings. The Petitioner is not motivated by malice or bad faith in filing this Petition. From the foregoing, it is clear that the Petitioner has capacity to institute this Petition. The 1st Respondent’s argument that the Petitioner lacks capacity to institute these proceedings is rendered moot in view of provisions of Articles 22 and 258 of the Constitution and the above case law.

26. The 1st Respondent alleged that the Petitioner is not the registered owner of the suit property. The issue of ownership is a fact which must be proved by way of evidence. A preliminary objection cannot be raised if any fact has to be proved by adducing evidence.

27. In the end I find that the Preliminary Objection dated 8th February 2023 is devoid of merit and the same is hereby dismissed with costs.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF JUNE, 2024.



In the presence of:

Ochieng for the Petitioners.

Court assistant Alfred.

