



Onyango (Suing as the Administrator of the Estate of Joseph Oyango Oduor) v Okumu (Administrator of the Estate of the Late Martinus Okumu alias Martin Okumu) & another (Environment & Land Case E006 of 2023) [2024] KEELC 13312 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E006 OF 2023**

**AY KOROSS, J
NOVEMBER 21, 2024**

BETWEEN

STEVE OCHIENG MAC ONYANGO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH OYANGO ODUOR) PLAINTIFF

AND

CHRISPINE OCHIENG OKUMU (THE ADMINISTRATOR OF THE ESTATE OF THE LATE MARTINUS OKUMU ALIAS MARTIN OKUMU) 1ST DEFENDANT

THE HON.ATTORNEY GENERAL (SUING FOR AND ON BEHALF OF THE PRINCIPAL MAGISTRATE, UKWALA) 2ND DEFENDANT

RULING

1. The subject matter for this court’s determination is the 1st defendant’s PO dated 12/03/2024 which is against the main suit and raises the following grounds: -
 - a. The plaint dated 31/10/2023 is bad in law, incompetent, amounts to forum shopping, frivolous, vexatious, misconceived, and abuse of the court’s time and judicial process.
 - b. The suit abuses Article 160 (5) of *the Constitution* of Kenya as the plaintiff has sued the 2nd defendant in her personal capacity.
 - c. The suit contravenes Section 13A (1) and (2) of the *Government Proceedings Act* as no notice of intention to sue has been issued to the government.
 - d. The suit is res judicata.
2. Thus, the 1st defendant urged this court to strike out the suit with costs to him.



Parties' submissions

3. The court directed parties to canvass the PO by brief written submissions. The 1st defendant's counsel on record Mr. Ochanyo B. Ochanyo filed written submissions dated 18/06/2024. Counsel abandoned ground (a) of his PO and only addressed grounds (b), (c) and (d).
4. The plaintiff's law firm on record Ms. Ben Aduol Nyanga & Co. Advocates filed written submissions dated 9/07/2024 and counsel addressed all the grounds of the PO and also addressed the issue of whether the PO had met the legal threshold. The 2nd defendant did not participate in these proceedings.
5. Upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsel's arguments on the particular issue and also bear in mind the judicial precedents that they have both relied upon to buttress their respective arguments.

Issues for determination

6. Accordingly, having carefully considered the grounds of the PO, the plaintiff, and 1st defendant's rival submissions together with authorities relied upon, it is the considered view of this court that the following issues which shall be dealt with consecutively commend themselves for determination: -
 - a. Whether the PO has met the legal threshold.
 - b. What grounds of the PO have met the legal threshold and are they merited?
 - c. What orders should this court issue including an order as to costs?

a. Whether the PO has met the legal threshold.

7. The decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696 has long settled the tests that a PO has to meet and, in this decision, the court held thus: -

“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... 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.”

8. From this decision, it is deduced that for a PO to succeed, it must meet 3 tests which are, it raises a pure point of law, on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In addition, the PO should be capable of disposing of a suit.
9. The 1st defendant's counsel did not address this issue but the plaintiff's counsel contended the PO could not stand as it raised matters of fact. On this, I must agree with the plaintiff's counsel that some of the grounds do not meet the threshold.
10. Grounds (c) and (d) raise matters of facts as this court has to ascertain them. Ground (c) calls on this court to confirm whether the notice to institute proceedings was ever issued and whether the 30-day statutory period lapsed.



11. In any case, and as submitted by the plaintiff's counsel, Section 13A (1) and (2) of the Government Proceedings Act cannot render a suit incompetent. On this, I am bound by the Court of Appeal decision of David Njenga Ngugi v Attorney General [2016] eKLR which had this to say on this issue:-

“It is clear that a suit that has been filed without full compliance with section 13A cannot be said to be incompetent nor can it be rightly struck out. Its competency or otherwise is dependent on considerations of section 13A (supra). It cannot be good law to hold that section 13A which is merely directory, can be regarded as imperative so as to render a competent suit incompetent for failure to fully comply with it.”

12. Similarly, too, ground(d) cannot hold as it raises matters of facts. Further, the plaintiff in his pleadings has disputed some of these facts. Case in point, in paragraph 7 of the plaint, the plaintiff has alluded he was not a party to the proceedings in Ukwala PM ELC No 6 of 2020. I find this ground cannot be sustained.

b. What grounds of the PO have met the legal threshold and are they merited?

13. Ground (a) was abandoned by the 1st defendant and this leaves out ground (b) as the only ground arising for determination.
14. In the exercise of judicial function, Article 160 (5) of the Constitution gives judicial officers immunity for acts done or omitted in good faith. This is in line with the doctrine of separation of powers and judicial independence.
15. I adopt the position aptly held by Gikonyo J in Moses Wamalwa Mukamari vs. John O. Makali & 3 others [2012] which was cited with approval by the Court of Appeal in Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR. In the former decision, the learned judge stated: -

“I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer's fallibility provided under Article 160(5) of the Constitution.”

16. A judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of her jurisdiction otherwise, public interest and confidence would be lost if a judge or a magistrate allows fear or criminal or civil suit to affect her decisions. I must agree with the 1st defendant's counsel and find the suit against the 2nd defendant is incompetently before me and hereby strike it out.
17. Before I conclude, I must mention the PO raises weighty issues on matters of facts that may dispose of the entire suit and it would have been appropriate if the 1st defendant had moved the court by way of a notice of motion as this would have allowed the court to interrogate the facts therein.
18. In the end and for the foregoing reasons, and in addressing issue (c), I hereby sustain ground (b) of the PO dated 12/03/2024 while the other grounds are dismissed. It is trite law costs follow the event and costs shall be in the cause. I therefore issue the following final disposal orders.
- a. Grounds (a), (c), and (d) of the preliminary objection dated 12/03/2024 are hereby dismissed.



b. The suit against the 2nd defendant is hereby struck out.

c. Costs shall be in the cause.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 21ST DAY OF NOVEMBER 2024.

HON. A. Y. KOROSS

JUDGE

21/11/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Nyanga for the plaintiff

N/A for the 1st defendant

N/A for 2nd defendant

Court assistant: Mr. Ishmael Orwa.

Hon. Lady Justice A.Y. Koross

