



Runya & 3 others v Mugo & 5 others (Environment & Land Case 17 of 2020) [2024] KEELC 13883 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13883 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 17 OF 2020
LL NAIKUNI, J
DECEMBER 18, 2024**

BETWEEN

**FITINA RUNYA 1ST PLAINTIFF
NGOA MWACHOMBO 2ND PLAINTIFF
CHARO FIKIRI 3RD PLAINTIFF
YUSUF MWANGIRA 4TH PLAINTIFF**

AND

**DAVID MUCHIRI MUGO 1ST RESPONDENT
ATHMAN SWALEH 2ND RESPONDENT
COUNTY COMMANDANT MOMBASA COUNTY 3RD RESPONDENT
O.C.S BAMBURI POLICE STATION 4TH RESPONDENT
DEPUTY COUNTY COMMISSIONER KISAUNI 5TH RESPONDENT
O.C.S KIEMBENI POLICE STATION 6TH RESPONDENT**

RULING

I. Introduction

1. Before this Honourable Court for its determination is a Notice of Preliminary Objection dated 26th November 2024 filed by the Law firm of Messrs. Mutisya & Associates Advocates on behalf of the 1st Defendant herein.
2. Although, the 1st Defendant herein never cited any particular provisions of the Law, apparently, the objection relied on the facts of the case. Thus, it is imperative that the Honourable Court briefly embarks on the history of the suit as that would best explain the emergence of said objection.



3. On 13th October 2022, this suit by the Plaintiffs herein was dismissed under the provision of Order 12 Rule 1 and Order 17 Rule 1 & 3 of the Civil Procedure Rules, 2010 for non attendance and want of prosecution by the Plaintiffs and their advocate on record on the material date. Subsequently, the suit proceeded on “Ex – Parte” hearing of the Counter – Claim instituted by the 1st Defendant herein. Indeed, direction were given for filing of submissions and a Judgement date was set down. On 21st February 2024, the Honourable Court delivered its Judgement in favour of the 1st Defendant and against the Plaintiffs who failed to prove their case.
4. However, some Interested Parties herein through the Law firm of Advocates, Messrs, Lillian Sindi Advocates vide an application dated 6th May, 2024 moved this Court seeking to be joined as parties in the suit, setting aside the Judgement and the re-instatement of the suit respectively. On 29th September, 2024 the Court allowed the application upon fulfilment of certain Pre – conditions thereof. In a well detailed ruling on 23rd September, 2024, the court granted the intended interested parties leeway by setting aside the afore stated Judgment and joining the intended interested parties to the suit together with various other conditions.
5. Thus, the main gist of this objection, therefore, is as a result of allegedly failure by the Interested Parties to comply with some of the Pre - Conditions set down by this Court and which will be discussed hereafter.

II. The 1st Defendant’s case

6. The 1st Defendant raised a preliminary objection and sought for the following orders:
 - a. The Intended Interested Parties should not be heard.
 - b. The orders issued on 23/9/2024 to be vacated and set aside.
7. For clarity purposes the comprehensive orders issued by this court contained in the ruling of 23rd September 2024 were as follows:
 - a. That the Notice of Motion application by the Intended Interested Parties be and is hereby found to have merit and is hereby allowed.
 - b. That leave be and is hereby granted to the firm of Mkan & Co. Advocates to come on record on behalf of the Interested parties.
 - c. That this Honourable Court do and hereby issues an order setting aside the judgment of this court delivered on 21st February, 2024 and any consequential orders thereof.
 - d. That leave be and is hereby granted joining into the record of this court the interested parties.
 - e. That the Interested parties are hereby granted leave to file the necessary pleadings together with all the necessary documents and witness statements within the next 21 days.
 - f. That the interested parties to pay the 1st Defendant a thrown away costs of Kenyan Shillings Fifty Thousand (Kshs. 50,000/=) within the next 14 days from the date of the delivery of this Ruling hereof.
 - g. That the Plaintiffs and Defendants be and are hereby granted corresponding leave to file their responses within the next 14 days.



- h. That the Honourable Court do and are hereby orders that there shall be strict timeframes in the hearing and determination of this suit which should be concluded within the 60 days with no room for adjournment.
 - i. That for the sake of expediency, the matter to be heard and finalized on 4th December, 2024 and Judgment delivered on 3rd February, 2025 thereof.
 - j. That there shall be no orders as to costs.
8. The grounds relied on by the 1st Defendant were briefly summarized and which the court paraphrases as follows:
- a. That the intended interested parties failed to comply with the orders (e) and (f) which were lapsing on 3rd November, 2024 and 7th October 2024 respectively.
 - b. That the court ordered strict adherence to timelines by allowing the Interested Parties application.

III. The Plaintiff's reply

9. On 4th December, 2024, when the matter was slated for full trial it could not proceed at the instant of the filed objection by the 1st Defendant. The Honourable Court felt for good order that the objection be disposed off as a matter of precedence. Ideally, both the counsel appeared in court where Mr. Mutisya Advocate informed the court about the instant notice of Preliminary Objection. In response, Mr. Mkan Advocate indicated that his clients had been unable to pay the afore stated amount and they had communicated the same to Mr. Mutisya. However, he held that they had only partially complied by filing of documents but not made the payment of the thrown away costs of a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/=) as directed by this Court.

IV. The responses by the 1st Defendant

10. The 1st Defendant contended that this being a Court order it ought to be obeyed, set aside or varied but not to be breached. They suggested that the Interested parties had an option of making an application for leave to extend time. He further elucidated that the documents which they claimed to have filed had not been served upon him. Thus the 1st Defendant impressed upon the court that the Interested Parties who were close to 150 people had not shown any commitment to the matter and ought to be disregarded.
11. Pursuant to this, the Honourable Court directed that it would give a short ruling after considering the notice of preliminary objection.

V. Analysis and Determination

12. I have keenly considered the said notice of preliminary objection, the presentation by the Learned Counsels, the relevant provisions of the Constitution of Kenya, 2010 and the statutes. In order to reach an informed, reasonable and fair decision, the Honourable Court will rely on the following three (3) issues for its determination. These are:-
- a. Whether the Preliminary Objection dated 26th November, 2024 by the 1st Defendant meets the required threshold of an objection by Law and Precedents.
 - b. Whether the Notice of Preliminary Objection dated 26th November, 2024 by the 1st Defendant herein has merit or not?



- c. Who will bear the costs of the application?

Issue No. a). Whether the Preliminary Objection dated 26th November, 2024 by the 1st Defendant meets the required threshold of an objection by Law and Precedents.

13. According to the *Black Law Dictionary* a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

14. For abundance of caution, I have decided to cite several authorities in support of tis subject matter herein. To begin with, a notice of preliminary of objection is described aptly in the famous case of “*Mukisa Biscuits Manufacturing Co. Limited _ Versus - West End Distributors Ltd* (1969) EA 696” to mean: -

“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”.

Further Sir Charles Newbold, JA stated 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 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

15. Similarly, in the case of “*Nitin Properties Ltd v Jagjit S. Kalsi & another* Court of Appeal No. 132 of 1989[1995-1998] 2EA 257 where the Court held, “inter alia”:

“A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”

16. Additionally, in the case of: “*United Insurance Company Limited v Scholastica A Odera* Kisumu HCC Appeal No. 6 of 2005 (2005) LLR 7396”, the Court held that:-

“A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed.”



17. Finally, in the case of:- “*Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others*, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:-

“Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

18. Therefore, in a nutshell, the requirements for an objection to succeed, it must be on a pure point of law and undisputed facts arising from pleadings. On a face value and by all given standards, this Honourable Court discerns that the objection raised herein by the 1st Defendant fails to meet the above set out threshold. To me its not a Preliminary Objection at all.

Issue No. b). Whether the Notice of Preliminary Objection dated 26th November, 2024 by the 1st Defendant herein has merit or not?

19. Critically speaking, under this sub – heading, and as already stated above, the instant case bears no issue based on pure point of law or pure question of law is lacking in this circumstance. Failing to abide by conditions in a Judgment is not a pure point of law but a pure question of facts which the court has observed has been vigorously contested by Mr. Mkan Advocate.
20. It is instructive to note that there are facts which Mr. Mutisya Advocate confirmed had been accepted by Mr. Mkan Advocate, For instance, he stated that the Interested parties have not managed to make the payment of the thrown away Cost for a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000.00/=) but had filed the necessary documents to help in prosecuting the case. At this juncture, I noted that the Interested Parties causally only stated their inability to make payment without imparting any reason whatsoever. Further, they never came back seeking for extension of time or any fathomable adjustments to make the payments. To me this never aided their Defence or level of commitment to be heard.
21. In the given circumstances, the Honourable Court holds that the 1st Defendant ought to have moved Court under a notice of motion application under the provision of Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 instead of raising an objection in this form. For these reason, therefore, the notice of preliminary objection has only one fate which is its dismissal for being null and void, abnitio.
22. However, the court has certain unfettered powers under its jurisdiction in accordance with the provisions of Section 3 & 13 (5) & 18 of the *Environment and Land Court*, No. 19 of 2011; Sections 101 of the *Land Registration Act*, No. 3 of 2012 and Section 150 of the *Land Act*, No. 6 of 2012, and the principle of justice as dictated in Amos 5:24 which states:

“But let judgment run down as waters, and righteousness as a mighty stream”

In addition, the court is empowered by the guiding principles under the provision of Article 159 (2) (b) that justice shall not be delayed, this court is empowered to make orders as shall follow hereunder. This Court has on umpteenth times stated that Court orders are not a formality nor cosmetic. They are not issued in vain. They have to be obeyed at all costs. The only remedy available if a party feels aggrieved by the said order is to move Court for the setting aside, varying or review or better still preferring of an appeal. By all means, I dare say, litigation must come to an end. Clearly, from their conduct and demeanor of the parties in this matter, they are no longer keen nor interested in prosecuting their case having been accorded such magnanimity and opportunity by Court contrary to the right for fair hearing enshrined under the provision of Article 25 (c) and 50 (1) and (2) of the *Constitution* of



Kenya, 2010 whatsoever. This suit must be concluded through re – instating the Judgement delivered on 21st February, 2024.

Issue No. b). Who will bear the costs of the application?

- 23. It is trite law that the issue of costs is at the discretion of the Court,. Costs are the award that is granted to a party at the conclusion of any legal action or proceeding in any litigation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 provides that this court has the power to determine who bears the costs and it usually follows the event unless there is sufficient or good reason to depart from this section.
- 24. In the case of:- “*Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ibururu Dairy Farmers Co-operative Society Limited* Judicial Review application no 6 of 2014” this court held as follows: -

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”
- 25. Hence, in the instant case, the 1st Defendant having failed to prove the merits of the notice of preliminary objection, the Interested parties are entitled to costs.

VI. Conclusion and directions

- 26. In conclusion, having caused such an elaborate analysis to the framed issues herein, the Honorable Court based on the Preponderance of Probabilities and the balance of convenience, it holds that the 1st Defendant have failed to establish their case. Thus, I proceed to make the following orders: -
 - a. That the Notice of Preliminary Objection dated 26th November 2024 by the 1st Defendant be and is hereby dismissed with costs.
 - b. That the court on its own motion has set aside the ruling dated 23rd September 2024 and proceeded to reinstate the previous Judgment delivered on 21st February 2024 for the reason that the Interested Parties have failed, neglected and/or refused to abide by the conditions of prescribed by this Honourable Court in the aforesaid ruling.
 - c. That costs of the Preliminary Objection be awarded to the Interested Parties to be borne by the 1st Defendant.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS AND SIGNED ON THIS 18TH DAY OF DECEMBER 2024

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HON. JUSTICE MR. L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Mkan Advocate for the Plaintiffs



c. Mr. Mutisya Advocate for the 1st Defendant.

d. No appearance for the 2nd, 3rd, 4th & 5th Defendants.

