



Nyambu (Suing on his Own and on behalf of the Residents of Baba Dogo Community) v Kenafric Properties Limited & 3 others (Environment and Land Case Civil Suit E185 of 2022) [2023] KEELC 875 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E185 OF 2022
J OMANGE, J
JANUARY 19, 2023**

BETWEEN

SHADRACK JAMES NYAMBU (SUING ON HIS OWN AND ON BEHALF OF THE RESIDENTS OF BABA DOGO COMMUNITY) PLAINTIFF

AND

KENAFRIC PROPERTIES LIMITED 1ST DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

ATTORNEY GENERAL 4TH DEFENDANT

RULING

1. The Preliminary Objection filed by the 3rd Defendant/ Respondent is brought on the following grounds;
 - a. The plaintiff herein lacks capacity to institute this suit on his own behalf or on behalf of Baba Dogo Community under the [Societies Act](#) Cap 108 of the Laws of Kenya rendering the instant suit and the application fatally defective.
 - b. That the plaintiff cannot purport to institute a suit on behalf of the residents of Baba Dogo Community without their written consent to appear plead or act pursuant to Order 1 Rule 13 (1) and (2) of the [Civil Procedure Rules](#).
 - c. The suit is time barred under the provisions of section 4 and 7 of the [Limitations of Act](#)
 - d. This suit is *res judicata* in view of ELC 1971 of 1999, Mario Majane Kimani and 12 others versus Nairobi City Council & 2 others determined November 7, 2019.



- e. The suit is an abuse of the process of the court.
2. The court directed that the preliminary objection be canvassed by way of written submissions.
 3. Counsel for the 1st Respondent filed written submissions. Counsel commenced the submissions by citing authorities in which the courts have defined the standard for a preliminary objection. Counsel submitted that the Preliminary objection in this case met the standard set out in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“....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.”
 4. Counsel summed up the test for a preliminary objection to be; Firstly, it should raise a pure point of law; secondly it should be argued on the assumption that all the other facts pleaded by the other side are correct and finally it cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion. A valid preliminary objection should if successful dispose of the suit.
 5. The first issue raised by counsel for the 1st Defendant is that the applicant has no *locus standi* to bring the suit on behalf of Baba Dogo Community as he has not complied with the provisions of Section 41 of the [Societies Act](#). Counsel has cited several authorities on this point which the court has considered.
 6. The second limb of the Preliminary Objection is that the Plaintiffs case is time barred. The Defendants contention is that from the pleadings, the cause of action arose either in 1980 when the Land LR Number 336/65 was donated to the applicant by Mr. Jose Antonio Remedio or in 2001 when the Nairobi City County allocated the land to the 1st Respondent. Either way, it is the contention of the 1st Defendant that the suit is time barred.
 7. The 1st Defendant further claims that the suit is *res judicata* as similar issues had been determined in ELC 1971 of 1999, Mario Majane Kimani and 12 others versus Nairobi City Council & 2 others determined November 7, 2019.
 8. The 1st Defendant concludes the submissions by averring that the entire suit is inherently bad in law, incompetent and otherwise an abuse of the process of the court.
 9. In response counsel for the plaintiff filed submissions addressing the points raised by the 1st Defendant. The plaintiff contends that the preliminary objection should be dismissed as it does not meet the standard set out for a preliminary objection. The plaintiff cites authorities that enunciate the principle that any preliminary objection that raises issues that require factual determination does not meet the set criteria for a preliminary objection. Counsel then proceeds to consider each limb of the preliminary objection as canvassed by the 1st Defendants counsel.
 10. The plaintiff submits that the plaintiff is suing on his own behalf and as a resident of Baba Dogo Community. As such the provisions of Order 1 Rule 13 (1) and 2 of the Civil Procedure Rules do not apply. In this regard, counsel argues that the plaintiff who was born and grew up playing and training in the disputed land and currently works as a professional footballer is entitled to file suit on behalf of the community. Counsel disputes that the [Societies Act](#) applies as he states that the 1st Defendant has not provided any evidence to show that Baba Dogo Community is registered as a society.



11. On the question of Limitation, it is the plaintiffs case that the plaintiffs cause of action is based on illegality and irregularity which accrue from the date the fraud was discovered which in this case was when the eviction notice was issued.
12. Regarding the limb of *res judicata* it is the contention of the plaintiff applicant that the objection does not satisfy the criteria set out in the case of *Independent Electoral and Boundaries Commission v Maina Kiai and 5 others* (2017) eKLR.
13. As at the time of writing this Ruling none of the other parties had filed any submissions on the Preliminary Objection. I have carefully considered the submissions of both parties and the authorities they have cited. The issues that lend themselves for determination by the court are;
 - i. Does the Preliminary Objection meet the standard for a Preliminary Objection?
 - ii. Does the plaintiff have capacity to institute this suit on his own behalf and on behalf of Baba Dogo community?
 - iii. Is the suit time barred?
 - iv. Is the suit Res Judicata?
 - v. Is the suit an abuse of the process of the court?
14. The threshold for a preliminary objection was set out by the Court of Appeal in the locus classicus case of *Mukhisa Biscuits Manufacturing Co. Limited vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that;

“...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.”
15. Newbold, P further held as follows:

“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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”
16. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shabbal & 2 Others*, Petition NO. 10 OF 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa Case stating as follows:

“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.”

17. I note that the Defendants objection is based on four points of law. I will apply this test to each of the objections as I consider them. The first limb of the objection is on *locus standi*. This is an issue that is a point of law that is pleaded in the pleadings and may dispose of the suit if proved. As such it is an issue that the court can properly determine as a preliminary objection.

18. The plaintiff in this case depones in paragraph 1 of the plaint;

“The plaintiff is an adult male of sound mind and disposition working for gain and residing in Baba Dogo within the Republic of Kenya. He brings this suit on his own behalf and on behalf of the residents of Baba Dogo Community....”

The plaintiff has clearly brought the suit on his own behalf and also on behalf of the residents of Baba Dogo Community. The Residents of Baba Dogo Community all have an interest. The suit is thus brought on behalf of other persons who have a stake in the outcome.

19. The Civil Procedure Rules envisage circumstances in which there can be more than one person with an interest in a claim and makes provision for how the court is to be moved in such instances;

a. Order 1, rule 1 of the Rules provide...” All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”

From my reading of this section Plaintiffs suing under this Rule would sue in their own names.

20. Order 1, rule 8 makes provision for another scenario in which the court may be moved in a case with several plaintiffs;

“(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.”

The clear interpretation of this Rule is that a notice would be issued to all parties before filing suit who would then have an opportunity to apply to be enjoined in the suit.

21. Lastly Order 1, rule 13 provides;

“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.

2. The authority shall be in writing signed by the party giving it and shall be filed in the case.”

This rule requires that where one is filing on behalf of other plaintiffs there should be a written authority. It is noteworthy that Order 1 Rule 13 (2) is couched in mandatory terms. This is the section that forms the basis of the Preliminary Objection of the 1st Defendant.

22. Having determined from the outset that the plaintiff has brought this suit in which others have an interest, the question then is whether the plaintiff has complied with the provisions of Order 4 Rule 4 Order 4, rule 4 of the Civil Procedure Rules which provides that “Where the plaintiff sues in a representative capacity the plaintiff shall state the capacity in which he sues and where the defendant is sued in a representative capacity the plaintiff shall state the capacity in which he is sued, and in both cases it shall be stated how that capacity arises” .
23. The 1st Defendant contends that the Plaintiff has brought this suit on behalf of Baba Dogo Society and should have complied with the provisions of the Societies Act which require a person appearing on behalf of a society to be appointed in writing. The Plaintiff through his counsel argues that the 1st Defendant has not led evidence to show that Baba Dogo Community is registered as a society. A look at the plaint and application and supporting documents clearly indicate that while the plaintiff has not come out clearly as representing Baba Dogo Society, the Society comes up severally in his own documents that he has filed. This points to a lack of candour in the argument that the Baba Dogo Community has no relationship to the Baba Dogo Society as far as this suit is concerned.
24. However even assuming that the suit has been brought on behalf of Residents and the Baba Dogo Community and not the Society, has the plaintiff met any of the requirements for filing a suit on behalf of other persons as envisaged by order 1 summarized above? Under Order 4 Rule 4 it was incumbent on the plaintiff to clearly indicate in the plaint the capacity in which he filed on behalf of the community. This has not been done.
25. The court must now grapple with the import of this omission. Is it a procedural technicality which might be curable by amendment? Order 1 Rule 8 and Rule 13 require that the notice and the authorization respectively be given prior to the filing of the suit. The Rules are couched in mandatory terms that cannot be side stepped and then cured after the fact.
26. It was contended by counsel for the plaintiff, that the plaintiff who is a resident and has grown up in the area has brought the suit on his own behalf. However, the proposition that the plaintiff may have a claim distinct from the community is discounted by the plaint. All the declarations sought on ownership of the land are in respect of the community not the plaintiff as an individual. Clearly the land is claimed for the community and unending contestation if the court were to make orders in favour of or against persons who are not clearly identified. Considering the emotive nature of land ownership in this country there would be great confusion.
27. The court in the case cited by the plaintiff of Kipisiwo Self Help Group Vs Attorney General & 6 others (2013) Eklr underscored the importance of clearly defining who the plaintiff in a particular suit is thus; Kipisiwo Self Help Group had no capacity to institute action in its own name. A person recognized in law had to sue on behalf of members of Kipisiwo Self Help Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who



seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order. (emphasis mine).

28. Having considered the foregoing, I find that it is not clear from the pleadings who the residents of Baba Dogo Community are who will benefit from any orders the court makes as sought by the plaintiff. By failing to obtain authorization of the members of the Baba Dogo Community, the plaintiff has not gained locus to be heard on their behalf. Consequently, I find that he has no locus standi to file this suit and the application.
29. The objection on the Limitation of Action would require the court to delve into the arena of what exactly is the cause of action in this case. This would require some factual determination which would be premature at this stage of a preliminary objection.
30. Similarly, on the question of Res Judicata, I note that the pleadings and determination in the matter alleged to have been determined are not before the court so as to enable the court to determine whether indeed the matter is res judicata.
31. The upshot of the foregoing is that I find that the 1st limb of the Preliminary Objection has merit. Consequently, the notice of motion application dated May 24, 2022 and the plaint is struck out with costs to the 1st and 2nd Respondent who had filed responses to the suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF JANUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

M/s Kimani for the 1st Defendant

Mr. Njenga for 2nd Defendant

