



Kiritu & another v Milele Ventures Limited & 2 others (Environment & Land Case 415 & 414 of 2010 (Consolidated)) [2023] KEELC 15849 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 415 & 414 OF 2010 (CONSOLIDATED)
OA ANGOTE, J
FEBRUARY 23, 2023**

BETWEEN

AGNES WAMBUI KIRITU PLAINTIFF

AND

MILELE VENTURES LIMITED DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 414 OF 2010

BETWEEN

ALICE WANGUI MWANIKI PLAINTIFF

AND

MILELE VENTURES LIMITED DEFENDANT

AND

PAUL GATEERE WAMBUGU 1ST OBJECTOR

BEATRICE WANJIRU GATEERE 2ND OBJECTOR

RULING

1. *Vide* a Notice of Motion application dated 11th March, 2022, brought pursuant to the provisions of Sections 1B, 2B, 3A and 28 of the *Civil Procedure Act* and Orders 22 Rules 24, 29, and 52 and Order 51(1) of the *Civil Procedure Rules*, the 1st and 2nd Objectors seek the following reliefs;
 - i. That an order be and is hereby granted declaring that the encroachment and alteration of the boundary beacons by Alice Wangui Mwaniki on LR No 28318/2242 was unlawful and illegal.



- ii. That an order be and is hereby granted declaring that the items removed from LR No 28318/2242 by Alice Wangui Mwaniki at the time of constructing a perimeter wall belongs to the 1st and 2nd Objectors and be returned.
 - iii. That an order be and is hereby granted declaring that Alice Wangui Mwaniki has no legal and/ or equitable interest on LR No 28318/2242 approximately 5 acres which is legally registered under the names of the 1st and 2nd Objectors.
 - iv. That an order be and is hereby granted declaring that Alice Wangui Mwaniki do return 400 fence posts, 10 rolls of barbed wire, and 4 beacons to their original place on LR No 28318/2242, replant all the gum trees which she destroyed when erecting the wall.
 - v. That the costs of the Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Paul Gateere Wambugu, the 1st Objector, of an even date. Mr Wambugu deponed that he has due authority to swear the Affidavit on behalf of the 2nd Objector; that he and the 2nd Objector are joint tenants on LR 28318/2242 as evinced by entry no 2 on the Certificate of Title dated 29th March, 2019 and that vide a Sale Agreement dated 5th April, 2020, they bought 5 acres from the 510 acres of land at the agreed consideration of Kshs 13,000,000.
 3. The 1st Objector deposed that at the execution of the aforesaid Agreement, they paid a deposit of 500,000 with the balance of Kshs 12,500,000 to be paid on or before completion; that on or before 4th May, 2010, the Objectors paid the balance of the purchase price via RTGS and that upon payment of the full purchase, the Objectors received all completion documents including a transfer in triplicate and a copy of the Original Certificate of Title in the name of Milele Venture Limited which were lodged at the lands office on 29th March, 2019 for purposes of effecting a transfer.
 4. According to the deponent, before lodging the transfer documents for registration, they obtained a rent clearance and consent to transfer dated 31st January, 2019 and 1st February, 2019 respectively; that upon lodging the transfer, it was assessed at Kshs. 50,000,000 and stamp duty of Kshs 620,040 and that upon confirmation that all the relevant payments had been made, the documents were booked for registration and the transfer dated 6th March, 2019 was effected.
 5. It was deposed by the 1st Objector that LR No. 109916 and LR No. 4299 were amalgamated by the registered owner, Milele Ventures Limited; that out of the amalgamation, LR No 28318 was created and sub-divided into LR 28318/15, LR 28318/24 and LR 28318/42 which the objectors got; that after further sub-division of LR No 28318/15 which comprised of 60 acre, the Objectors purchased 5 acres with 55 acres remaining in the name of Milele Venture Limited.
 6. It is the Objectors' case that they embarked on planting gum trees along the boundary of the 5 acres and thereafter erected a barbed wire fence to prevent entry; that they had quiet possession of the suit property from 5th April, 2010 up until sometime in mid or end of 2018 when Alice Wangui Mwaniki(hereinafter the 1st Plaintiff) in abuse of the judgment delivered on the 13th May, 2016 and accompanied by policemen from the Ruiru Police Station encroached on their property and brought down the posts, barbed wire, beacons, gum trees, vegetables and temporary iron sheets.
 7. The 1st Objector deposed that after the incident, they sought help from the CID, Ruiru but none was forthcoming as they had been compromised by the 1st Plaintiff; that upon perusing the judgment relied on by the 1st Plaintiff, it became apparent that she had misinterpreted the judgment which did not



- allow a random takeover of their property but directed the them to carve out 5 acres and 35 acres from LR 28318/15 which comprised of the remainder of 55 acres.
8. In response to the application, the Objectors filed Grounds of Opposition together with a Notice of Preliminary objection dated 26th April, 2022 premised on the grounds that;
- i. The 1st and 2nd Objectors (hereinafter referred to as the ‘the Objectors’) lack the *locus standi* to raise the Notice of Objection as well as the Notice of Motion Application dated 11th March 2022 (Hereinafter referred as the ‘Objectors’ Application).
 - ii. Further to the above, the Objectors’ a pplication is otherwise frivolous, vexatious and an outright abuse of this Honourable Court’s process.
 - iii. The Objectors’ application offends the doctrine of finality and is tantamount to re-opening litigation the matter having been conclusively determined at the Court of Appeal under Civil Appeal No. 139 of 2014.
 - iv. That the Objectors’ application is a sham, as the context and content thereof may be discerned as a mere attempt by the Objectors to enjoin themselves in the suit surreptitiously, with the actual knowledge that they were not permitted by this Honourable court vide the ruling of the Honourable Justice J. Obaga, issued on 31st October, 2019 as appearing in the Court record and thus be adjudged as mere strangers in the instant suit and thus an abuse of this Honourable Court’s Process.
 - v. The Honourable Court does not have the requisite jurisdiction to hear the current objection proceedings as the same seeks to stop/stay/set aside and/or vary the Judgment of the Court of Appeal delivered on 13th May 2016 in Civil Appeal No. 139 of 2014.
 - vi. The Objectors’ application offends the provisions of section 7 of the *Civil Procedure Act*.
 - vii. The Objectors’ Application herein is res judicata as their Notice of Motion Application dated 3rd December, 2018 with similar intent as their current application; the erstwhile application was adjudicated upon by this Honourable Court on 31st October, 2019.
 - viii. The Objectors’ Application is fatally defective in substance and form, incompetent at the very least, as the provisions the Objectors Application are brought have no co-relation to the execution of the Decree, as there is no attachment occurring or decreed by this Honourable Court.
 - ix. It is in the interest of justice that the Notice of Objection and Notice of Motion originated by the Objectors herein and both dated 11th March, 2022 be dismissed with costs on the above-stated grounds.
9. In his submissions, counsel for the objector reiterated the factual background of the case stating that vide its judgment of 13th May, 2016, the Court of Appeal directed the Plaintiffs to carve out portions of 5 acres and 35 acres respectively from the suit property and that contrary to the aforesaid orders, the 1st Plaintiff, assisted by police officers encroached on the Objectors’ property digging trenches on part of her property.
10. Counsel submitted that the Court in *Onyango Oloo v Attorney General* [1987-1989] EA 456 stated that the rules of natural justice apply to administrative action in as far as it affects the rights of the Plaintiffs’ legitimate expectation; that the rules of natural justice demand that a registered owner of the



land is entitled to quiet possession thereof; that the 1st Plaintiff's actions violated this principle causing the Objectors to suffer and that the Objectors are entitled to the orders sought.

11. The 1st Plaintiff's counsel submitted that vide an application dated 3rd December, 2018, the Objectors sought to be enjoined in this suit; that vide the Ruling delivered on 31st October, 2019, the Court declined to grant the application noting that the matter was already at the Appellate Court and it was too late for the joinder sought and that the Ruling of 31st October, 2019 essentially barred the Objectors from these proceedings and to hold otherwise would contravene the principle of stare decisis.
12. It was submitted that whereas indeed the issue of locus has been brought by way of a preliminary objection which ought to be premised on a pure point of law, the Court is permitted to peruse the Court file and such perusal does not amount to ascertainment of facts. Reliance in this regard was placed on the case of *George W.M Omondi & Another v National Bank & 2 Others* [2001] eKLR, where the Court affirmed that questions on locus and res judicata are pure points of law and the Court is at liberty to look at pleadings and all other relevant matters in its records.
13. According to counsel, the motion is unmeritorious, vexatious and an abuse of the Court's process and the same ought to be dismissed with costs because the Objectors not only lack locus, but the same has no legal foundation; that for Order 22 Rule 51 of the *Civil Procedure Rules* to be operative, there must have been attachment and that in the instance case, no attachment was and is active.

Analysis & Determination

14. Having considered the Motion, responses and submissions, the issues that arise for determination are:
 - i. Whether the Application is competent and if so,
 - ii. Whether the Objectors are entitled to the orders sought?
15. Before delving into the issues at hand, a brief background is necessary. This matter began as a dispute between the Plaintiffs, separately and individually on one hand and the Defendant on the other hand. It was the Plaintiffs' claim that they entered into an agreement for the purchase of different portions of the suit property from the Defendant; that despite paying the full purchase price, the Defendant did not issue them with completion documents to facilitate the transfer of their property and that the Defendant was in the process of disposing off the same to third parties. The Plaintiffs sought among others permanent injunctive orders and orders of specific performance.
16. In response, the Defendant averred that the Plaintiffs had never paid the full balance of the purchase price and that subsequently, they were allocated land in accordance with the amount of monies paid. The trial court found that the Plaintiffs were not entitled to specific performance not having proved payment of the full purchase price but were entitled to 5 acres and 35 acres respectively,
17. Unsatisfied with this decision, the Plaintiffs lodged an appeal at the Court of Appeal. The Court of Appeal agreed with the findings of the trial court but directed that the 5 acres and 35 acres due to the Plaintiffs should be carved out of LR 28318/15. It is the Objectors contention that in an attempt to actualize the decision by the Court of Appeal, the 1st Plaintiff has encroached onto their property necessitating the present Application.
18. At the onset, the court notes that in response to the Motion, the 1st Plaintiff filed a combined Notice of Preliminary Objection and Grounds of Opposition. It is common ground that facts deponed in an affidavit can only be disputed or controverted through a Replying Affidavit or by way of cross examination. This position was affirmed by the Court of Appeal in *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR which cited with approval the expression by the Court in *Peter O.*



Nyakundi & 68 Others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Another [2016] eKLR as follows:

“...Grounds of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath....Failure to file a Replying Affidavit can only mean that those facts are admitted...”

19. The Preliminary Objection and Grounds of Opposition by the Plaintiffs only address issues of law and the court will proceed on the assumption that the facts are uncontested.
20. *Vide* the Preliminary Objection and Grounds of Opposition, the 1st Plaintiff has questioned the jurisdiction of this Court to determine the application and the Objectors locus to institute the application. The 1st Plaintiff also asserts that the application offends the principles of res judicata; is an attempt to re-open litigation; is fatally defective as there exists no order of attachment and generally constitutes an abuse of court process.
21. It is trite that jurisdiction is everything. The exposition by Nyarangi, J.A. in *Owners of Motor Vessel Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 still holds true. He stated as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”
22. According to the Plaintiffs, this Court does not have the requisite jurisdiction to hear the current motion as it seeks to set aside and/or vary the Judgment of the Court of Appeal delivered on 13th May, 2016 in Civil.
23. No submissions were made on this point. What is before the Court are Objector proceedings. By their nature, these proceedings, instigated at the execution stage of a case, are a means through which a party who claims to have a legal equitable interest in the whole or part of any property attached in execution of a decree may be heard.
24. In this instance, it is this Court that is carrying out execution in accordance with the decision of the Court of Appeal. It therefore follows that this Court is vested with jurisdiction to handle any matters appertaining to the execution, such as the present Application. This objection therefore fails.
25. Locus standi is defined by the *Black's Law Dictionary* 9th Edition as:

“The right to bring an action or to be heard in a given forum.”
26. The Court in the case of *Alfred Njau and Others v City Council of Nairobi* [1982] KAR 229, defined locus standi thus;

“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.”
27. According to the 1st Plaintiff, vide an application dated 3rd December, 2018, the Objectors sought to be enjoined in this suit; that the application was rejected with the Court noting that it was too late to enjoin them because the Court of Appeal had already rendered a decision and that having already been barred from joining the suit, they should not be allowed into the proceedings as that would contravene the principle of *stare decisis*.



28. As aforesaid, the present proceedings are Objector proceedings which provide an opportunity for any person who claims an interest in any property attached in execution of a decree to be heard on the same. It is apparent therefore that for one to have locus in such proceedings, all that is required is for him to “claim an interest in any property attached in execution of a decree.” The legitimacy or otherwise of the Objectors’ claim is for determination by the Court. To the extent that these are objection proceedings and nothing more, the court finds that the Objectors have the requisite locus.
29. The next limb of the objection is with respect to the principle of *res judicata*. The plea of *res judicata* is anchored on Section 7 of the [Civil Procedure Act](#) which provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.
30. The Court of Appeal in the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR, held that:
- “The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”
31. In outlining the rationale behind the doctrine of *res judicata*, the Court of Appeal in [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2015] eKLR stated thus;
- “the rationale behind *res judicata* is based on the public interest that there should be an end to litigation over the same matter. *Res judicata* ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”
32. The 1st Plaintiff asserts that the present Application is *res judicata* the Objectors application of 3rd December, 2018. The Court has perused the record. The application of 3rd December, 2018 sought to have the Objectors (then intended interested parties) enjoined in the proceedings post judgment as interested parties.
33. Whereas both applications rely on the same set of facts, the issues cannot be said to be similar, one application being for joinder and another being an objector application. In the same vein, the application for joinder was declined meaning there was no merited determination on the legitimacy of any claim the Objectors had on the suit property. It cannot therefore be said that the Ruling delivered on 13th October, 2019 finally determined the issues herein. Accordingly, the plea of *res judicata* fails and is disallowed.



34. The 1st Plaintiff asserts that the fact that there is no attachment in respect to this suit renders the application fatally defective. Order 22 Rule 51 of the *Civil Procedure Rules* offers protection to persons whose properties are being attached in execution of a court decree. In the instant case, the Court of Appeal adjudged the Plaintiffs to be the owners of land to be excised from a larger portion being LR 28318/15 belonging to Milele Ventures Limited. In excising the portion of LR 28318/15, the Plaintiffs will be executing or enforcing the decree of this court. Therefore, if the Plaintiff, in enforcing the court decree, encroaches on the Objectors' property, the Objectors have a right under Order 22 Rule 51 of the *Civil Procedure Rules* to challenge the execution that transcends into their property.
35. The argument by the 1st Plaintiff takes a limited view of attachment for execution as provided for under Order 22 Rule 51 of the *Civil Procedure Rules*. The Plaintiffs seems to view the execution provided therein as only happening where an attachment is first made, presumably by an auctioneer, through a proclamation, which is not always the case, in this case, it will be foolhardy to expect the party to attach the property in the manner argued by the Plaintiffs considering that the property in issue is land.
36. The protection of a party from execution of this court's decree by way of taking possession of his property falls under Order 22 Rule 51 of the *Civil Procedure Rules*. The objection proceedings are therefore properly before the court.
37. The Objectors have sought, inter-alia for a declaration that the encroachment and alteration of their boundary beacons are illegal; that the 1st Plaintiff has no legal and/or equitable interest in LR No 28318/2242 and that the items removed from LR No 28318/2242 by the 1st Plaintiff at the time of constructing a perimeter wall including 400 fence posts, 10 rolls of barbed wire and 4 beacons be returned to them. They assert that the 1st Plaintiff has encroached on their property purportedly in actualizing the judgement by the Court of Appeal.
38. At the core of objector proceedings is Order 22 Rule 51, which requires an applicant to demonstrate that he has the legal title or equitable interest in whole or in part of the attached property in execution of a decree. In *Arun C. Sharma v Ashana Raikundalia T/A A. Raikundalia & Co. Advocates & 4 others* [2014] eKLR the court held as follows:
- “The objector bears the burden of proving that he is entitled to or has legal or equitable interest on the whole or part of the attached property. The key words are; entitled to or to have a legal or equitable interest in the whole or part of the property.”
39. In *Precast Portal Structures v Kenya Pencil Company Ltd & 2 Others* [1993] eKLR it was held as follows:
- “The burden is on the objector to prove and establish his right to have the attached property released from the attachment. On the evidential material before the court, a release from attachment may be made if the court is satisfied.
- i) That the property was not when attached, held by the Judgment-Debtor for himself or by some other person in trust for the Judgment-Debtor, or.
- ii) That the objector holds that property on his own account.”
40. The court further observed that: -
- “But where the court is satisfied that the property was, at the time of attachment, held by the Judgment Debtor as his own and not on account of any other person, or that it



was held by some other person in trust for the Judgment-Debtor or that ownership has changed whereby the Judgement-Debtor has been divested of the property in order to evade execution or the change is tainted with fraud, the court shall dismiss the objection.”

41. The principle that emerges from the above cited decisions is that once the Objector proves his interest in the attached property, the Court then makes an order raising the attachment as to the whole or a portion of the property subject to the attachment.
42. The Objectors have keenly annexed documents showing their proprietorship of the suit property. The Court of Appeal found the Plaintiffs are entitled to portions of LR 28318/15. The Objectors assert that the Plaintiffs have encroached onto their parcel being LR 28318/24. Strictly speaking, this is a boundary dispute and it was upon the Objectors to clearly establish the boundary of their land and how it has been encroached on. A surveyor’s report would have been critical in this regard. This was not done.
43. The Objectors have also sought for the return of several items that were purportedly carted away or destroyed during execution of the Judgment of the Court of Appeal. However, no evidence was produced of the alleged carting away of the said items and that the said items were indeed on their land. Having not proven the allegations raised in the grounds of the application and the supporting affidavit, the objectors’ claim fail.
44. For those reasons, the application dated 11th March, 2022 is dismissed with costs.

Dated, signed and delivered virtually in Nairobi this 23rd day of February, 2023.

O. A. Angote

Judge

In the presence of;

Mr. Muturi for Plaintiff

Ms Kiiru for Thuita for Defendant

Court Assistant - June

