



**Lengeny & 15 others v Nyauma (Environment & Land Case  
E003 of 2021) [2023] KEELC 15658 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15658 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E003 OF 2021  
CG MBOGO, J  
FEBRUARY 21, 2023**

**BETWEEN**

**SIKANY OLE LENGENY & 15 OTHERS ..... PLAINTIFF**

**AND**

**JOHN RAFFLES NYAUMA ..... DEFENDANT**

**RULING**

1. The defendant filed a notice of preliminary objection dated October 28, 2022 in opposition to the plaint dated February 1, 2021 on the following grounds: -
  1. That the claim for trespass and other rights as pleaded by the plaintiffs' can't be legally sustained as the plaintiffs' have lost all the legal rights of ownership as relates to the suit properties following the recent decision by the court in ELC Case No 107 of 2013 at Nakuru on June 15, 2021 that effectively set aside the *ex-parte* judgment delivered in favour of the plaintiffs on March 10, 2016.
  2. That the plaintiffs have lost all the necessary *locus standi* to prosecute this suit and seek any justifiable legal right as pertains to the suit property having lost the right to ownership.
  3. That the plaintiffs' will simply be in court on a fishing expedition if this suit were to proceed since they lack any tangible evidence save for the now obvious shaky hope that they may be successful in the substantive suit being ELC Case No 207 of 2013 wherein they will be seeking reinstatement of their prescriptive right of adverse possession as relates to the suit land.
  4. That the legal effect of setting aside judgment by a court of law is that parties revert to the original position before judgment. As such in the above case it means that the suit land being land parcel no CisMara/Nkobon/147 and all the subdivisions occasioned on it creating the various parcels of land effectively revert to the original owner John Sala Koguls until a contrary



decision is made following the hearing and determination of ELC Case No 207 of 2013 at Nakuru.

5. That the orders of the court effectively transferred ELC Case No 207 of 2013 to Narok wherein it currently registered as ELC Case (OS) No 9 of 2021.
6. That the current suit as presently instituted by the plaintiff's is speculative and a blatant abuse of the court process and the same ought to be dismissed with costs to the defendant.
2. This court directed that the notice of preliminary objection be canvassed by way of written submissions. The defendant filed written submissions dated November 21, 2022. The defendant raised two issues for determination as follows:-
  1. Whether the plaintiff have the locus standi to prosecute this suit.
  2. What is the effect of setting aside an *ex-parte* judgment.
3. On the first issue, the defendant submitted that it is worth noting that the plaintiffs had filed the suit in ELC Case No 207 of 2013 at Nakuru and proceeded *ex-parte* without serving the defendant and the defendant John Sala Koguls filed an application seeking to set aside the *ex-parte* judgment issued on March 10, 2016 and vide a ruling delivered on June 15, 2021 Mutungi J, set aside the judgment. It is on this basis that the defendant submitted that the current suit by the plaintiff is not only ill-advised but was calculated to ensure that the defendant is barred from occupying the suit land.
4. The defendant further submitted that this court ought not to be used to perpetuate an illegality that is disguised as a genuine suit of a litigant claiming right of trespass as is in the present suit. The defendant relied on the cases of *Law Society of Kenya versus Commissioner of Lands & Others*, Nakuru High Court Civil Case No 464 of 2000, *Mukisa Biscuits Manufacturing Ltd versus West End Distributors Ltd* (1969) EA 696 and *Orao versus Ombaja* [2005] eKLR.
5. On the second issue, the defendant submitted that the ruling delivered by Mutungi J found that the *ex-parte* judgment to have been irregular and set aside the same vide its ruling on March 15, 2021 and in that case the plaintiffs' have lost all the rights of ownership by way of adverse possession to the suit land. Therefore, the current suit as instituted is largely speculative as the plaintiffs' right to ownership of the suit land herein can only be determined once ELC Case no 207 of 2013 at Nakuru currently registered as ELC Case No 9 of 2021 (OS) at Narok is heard and determined in their favour. The defendant relied on the case of *Pilot Technical Services Ltd versus Amenan Electrical Services Ltd* [2011] eKLR and *Kenya Power and Lighting Co Ltd versus Abdulhakim Abdulla Mohamed & Another*.....
6. The plaintiffs filed written submissions dated January 19, 2023. The plaintiffs raised two issues for determination as follows: -
  - a. Whether the preliminary objection meets the threshold set out in the case of *Mukisa Biscuit Manufacturing Co Ltd versus West End Distributors* (1969) EA 696.
  - b. Whether the objection was filed competently; and deserves the prayers sought.
7. On the first issue, the plaintiffs' submitted that it is their firm belief that the defendant has filed this objection with a view of dragging the matter and slowing down the wheels of justice as the proper thing to do would have been to appeal and or review the decision of this court.
8. On the second issue, the plaintiffs' submitted that the instant preliminary objection is a replica of the grounds of opposition dated June 27, 2021 which opposed an already determined application. That this court, vide its ruling dated March 16, 2022, substantively dealt with and subsequently issued orders



which remain in force as they have never been reversed let alone appealed by the defendants herein. The plaintiffs relied on the case of Aviation & Allied Workers Union Kenya versus Kenya Airways Ltd & 3 Others Application No 50 of 2014, [2015] eKLR.

9. The plaintiffs further submitted that the issues raised in the preliminary objection requires production of evidence and a substantive hearing. Further, that this court should note that these claims were made earlier vide grounds of opposition dated June 27, 2021 and which this court has since made a determination on the same. That the preliminary objection should only consist of points of law and in this case, the objection widely falls short of that requirement thus fatally defective. The plaintiffs relied on the cases of Mediamax Network Limited versus William Momanyi & 2 Others [2022] eKLR and Joshua Werunga versus Joyce Namunyak [2013] eKLR.
10. I have carefully analysed and considered the notice of preliminary objection, written submissions and authorities cited by both parties and the issues for determination are as below: -
  - i. Did the preliminary objection raise a pure point of law?
  - ii. Was there need to ascertain any fact?
11. A preliminary objection was described in the *Mukisa Biscuits Manufacturing Co Ltd 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 Nebbold, 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

12. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”
13. I am of the considered view that the notice of preliminary objection raised by the defendant does not raise any pure point of law. By and large the defendant dwelt on issues which ought to be tried through a full trial.



14. Arising from the above, the notice of preliminary objection dated October 28,2022 lacks merit and is dismissed with costs. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL on this 21<sup>st</sup> day of FEBRUARY, 2023.**

**HON MBOGO C G**

**JUDGE**

**21/2/2023.**

**In the presence of:-**

**C/A Timothy Chuma**

