



Okelo (Suing as the Legal Representative of the Estate of the Late Okelo Otieno) v Otieno & another (Environment & Land Case E015 of 2021) [2023] KEELC 16727 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16727 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT & LAND CASE E015 OF 2021

MN KULLOW, J

MARCH 28, 2023

IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF

2012

AND

IN THE MATTER OF LAW OF SUCCESSION ACT CAP 160

LAWS OF KENYA

AND

IN THE MATTER OF CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF APPLICATION FOR RECTIFICATION/
CANCELLATION OF THE TITLE RELATING TO LAND PARCELS
NO. SOUTH SAKWA/KOGELO/375, 1413 AND 1414**

BETWEEN

**SAMWEL ODERA OKELO (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF THE LATE OKELO OTIENO) PLAINTIFF**

AND

MESHACK OCHIENG OTIENO 1ST DEFENDANT

COUNTY LAND REGISTRAR, MIGORI 2ND DEFENDANT



RULING

1. The 1st Defendant filed a Notice of Preliminary Objection dated November 21, 2022 in objection to the Plaintiff's suit based on the following grounds: -
 - a. The Amended Originating Summons herein is misconceived, misdirected and an abuse of the due process of this Honourable Court as it offends the mandatory provisions of Order 37 Rule 1 of the *Civil Procedure Rules, 2010*;
 - b. The Court has no jurisdiction to hear and determine this Originating Summons as the prayers sought are incapable of being granted by this Honourable Court in their current form;
 - c. The Originating Summons herein is therefore defective, frivolous and vexatious and the same ought to be dismissed with costs.
2. The Preliminary Objection was canvassed by way of written submissions. Both parties filed their rival submissions together with authorities which I have read and taken into account in arriving at my ruling as hereunder;
3. The sole issue for determination before me is whether the Notice of Preliminary Objection dated November 21, 2022 is merited;
4. Preliminary Objection was described in *Mukisa Biscuits Manufacturing Co Ltd...Vs...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.....”.

Sir Charles Nebbold, JA went further to state 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”.
5. The law on what amounts to a Preliminary Objection is now well settled; from the Mukhisa Biscuit case (*supra*) it must raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
6. The Applicant has sought the dismissal of the Plaintiff's suit on the basis that suit offends the provisions of Order 37 Rule 1 of the Civil Procedure Rules, 2010 and hence this court is not vested with the requisite jurisdiction to grant the orders sought therein. He has dismissed the Plaintiff's Originating Summons as being defective, frivolous and vexatious and urged the court to strike it out with costs.
7. The Respondent on the other hand submitted that from the suit, it is clear that the 1st Defendant fraudulently without carrying out succession proceedings, caused the suit parcel to be subdivided



into two no 1414 and 1413. He thus maintained that the same is an issue arising directly out of administration of the estate of the deceased as provided in Order 37 Rule 1(g) on the determination of any question arising directly out of the administration of the estate, hence the Preliminary Objection is not merited.

8. Order 37 Rule 1 provides the instances where a suit can be instituted by way of an Originating and in respect of what matters and states as follows :-

“ 1. The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions-

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust; (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

9. In determining whether the Notice of Preliminary Objection filed herein is merited; this court must establish whether the same is valid as envisaged by the law and meets the set criteria of what amounts to a preliminary objection vis- a vis the contents of the Respondent’s Originating Summons and the prayers sought therein. It is trite law that a preliminary objection must be one that raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and cannot be raised if any fact has to be ascertained.

10. I have looked at the notice of Preliminary Objection herein and I note that the grounds upon which the preliminary objection is based are not pure points of law but is instead marred with factual issues. The basis of the P O touches on the process used in filing the suit rather than the issue at the center of the dispute.



11. This court has considered the rival position taken by both parties with regards to the cause of action and whether the suit has properly been instituted by way of an Originating Summons and further, whether the court is vested with the requisite jurisdiction to grant the reliefs sought therein.
12. In order to clearly ascertain the merits of the preliminary objection, this court would be required to critically evaluate the cause of action in determining whether the same was properly instituted by way of an Originating Summons and in accordance with the provisions of Order 37 Rule 1, to look at the reliefs sought and whether this court is vested with the requisite jurisdiction to grant the reliefs sought and the circumstances of the case in totality. This in my opinion does not meet the threshold of what amounts to a pure preliminary objection as the same would require an examination of the facts and the exercise of discretion.
13. In the case of *Oraro vs Mbaja* [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows; -

“...a “Preliminary Objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

14. The upshot of the foregoing analysis is that the 1st Defendant’s Preliminary Objection dated November 21, 2022 is not merited and is hereby dismissed with costs to the Plaintiff/ Respondent. It is so Ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL AT MIGORI ON 28TH DAY OF MARCH, 2023.

MOHAMMED N KULLOW

JUDGE

Ruling delivered in the presence of: -

****Court Assistant - Tom Maurice/Victor**

