



REPUBLIC OF KENYA



**Mwangi v Mbuki & 4 others (Environment & Land Case .  
E009 of 2021) [2023] KEELC 16400 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16400 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE . E009 OF 2021  
LN GACHERU, J  
MARCH 23, 2023**

**BETWEEN**

**JULIUS NJUGUNA MWANGI ..... PLAINTIFF**

**AND**

**KARIUKI KAMAU MBUKI ..... 1<sup>ST</sup> DEFENDANT**

**HANNAH WARIGIA MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**WAMBUI MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**SARAH WAMAITHA ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, MURANGA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant/Objector herein has filed a Notice of Preliminary Objection dated July 28, 2022, in response to the Plaint dated February 17, 2021, on the following points of law:
  1. That the suit is *res judicata* as the Plaintiff had filed a similar suit being Murang'a ELC Case No 425B of 2017 raising similar issues between the same parties;
  2. The issue raised in this suit were found to be time barred in Murang'a ELC Case No 425B of 2017;
  3. The Honourable Court lacks jurisdiction;
    - a. The honourable Court lacks jurisdiction to sit in appeal of its own decision;
    - b. The honourable Court lacks jurisdiction by dint of Section 76 of the [Law of Succession Act](#) of the Laws of Kenya.



2. The Preliminary Objection was canvassed by way of written submissions. The 1<sup>st</sup> Defendant/Objector filed his submissions dated January 18, 2023, through Wilfred & Ngugi Associates Advocates.
3. The 1<sup>st</sup> Defendant raised three issues in the Preliminary Objection. The first issue was whether the suit was *res judicata* as provided for under Section 7 of the [Civil Procedure Act](#). On this issue, the 1<sup>st</sup> Defendant relied on the case of [Invesco Assurance Company Ltd & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Co Advocates & Another \(Interested Parties\)](#) (2020) eKLR, in which it was held that the following must be proved for a finding of *res judicata* to be made:
  1. The suit or issue raised was directly and substantially in issue in the former suit;
  2. That the former suit was between the same parties or parties under who they or any of them claim;
  3. That those parties were litigating under the same title;
  4. That the issue in question was heard and finally determined in the former suit;
  5. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
4. The 1<sup>st</sup> Defendant submitted the Preliminary Objection met the criteria set above to warrant the suit being dismissed on the grounds of *res judicata*.
5. The second issue raised was whether the suit was time barred. The 1<sup>st</sup> Defendant submitted that the claim by the Plaintiff was based on the alleged fraudulent transmission of the suit property on 29<sup>th</sup> August 2011. The 1<sup>st</sup> Defendant submitted that the claim is time barred as per Sections 4(2) and 26 of the [Limitation of Actions Act](#), which provides that a cause of action founded on fraud should have commenced three years from the discovery of the alleged fraud. He further relied on the case of [Jared Iqbal Abdul Rahman & Another v Benard Alfred Wekesa Sambu & Another](#) No 11 of 2001 (unreported) wherein the Court of Appeal held that the period for purposes of limitations in suits founded on fraud begins to run from when the fraud is discovered.
6. The final issue submitted by the 1<sup>st</sup> Defendant was on whether this court has jurisdiction to hear and determine this matter. On this issue, the 1<sup>st</sup> Defendant submitted that this Court lacks jurisdiction in this suit on account that the property was transmitted to the Defendants' name pursuant to the confirmed grant in the succession cause. The 1<sup>st</sup> Defendant relied on the case of [Owners of Motor Vessel Lillian "S" v Caltex Oil Kenya Ltd](#) [1989] 1 KLR. He further relied on Section 10 of the [Law of Succession Act](#), which provides the procedure to follow to revoke a grant of letters of administration on the grounds of fraud. He also relied on the case of [John Oyoo v Japheth Oyoo](#) [2013] eKLR.
7. Lastly, it was submitted that Section 76 of the [Law of Succession Act](#) provides the correct way to challenge the grant instead of cancelling of the title.
8. The Plaintiff through the Law Firm of Tim Kariuki & Co. Advocates filed his written submissions dated January 12, 2023, opposing the Preliminary Objection. The Plaintiff submitted that the Preliminary Objection particularly the 1<sup>st</sup> and 2<sup>nd</sup> grounds do not constitute pure points of law. He further submitted that the question of whether a similar suit raising similar issues between the same parties can only be proved by bringing evidence of that fact through a Notice of Motion Application supported by an Affidavit and not a Preliminary Objection.



9. The Plaintiff relied on the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 in which Sir Charles Newbold P observed as follows:

The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A mere Preliminary Objection is in the nature of what used to be a demurrer. It raises pure points 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. The improper raising of point by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion confuses issues. This improper practice should stop.”

10. On the issue of whether the suit is *res judicata*, the Plaintiff also submitted that to ascertain whether the present suit was similar to Murang’a ELC Case No 425B of 2017, raising similar issues between the same parties, the Court would have to investigate the two suits which cannot be done through a Preliminary Objection. He relied on the provisions under which *res judicata* is grounded. That is under Section 7 of the [Civil Procedure Act](#) which provides:

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.”

11. Further, the Plaintiff relied on the Court of Appeal case of [Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd](#) [2017] eKLR, wherein it was held as follows:

“The elements of *res judicata* have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed *res judicata* on account of a former suit.

- a. The suit or issue directly and substantially in issue in the former suit
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title
  - d. The issue was heard and finally determined in the former suit;
  - e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue was raised.”
12. The Plaintiff submitted that for the suit to be found to be *res judicata* all the above elements must be proven through which evidence must be raised through an Affidavit.
13. The Court has carefully considered the instant Notice of Preliminary of Objection and the rivals written submissions, authorities cited and the relevant provisions of law and finds that the issue for determination is whether the Preliminary Objection is merited?
14. For this Court to delve into the Preliminary Objection it will outline the undisputed facts from the pleadings and evidence of the parties herein. Through a Plaint dated February 17, 2021, the Plaintiff sought judgement against the Defendants for:



1. A declaration that all the transactions concerning the sale and transfer of land parcel No Loc 20/Mirira/4481(the suit property) and the registration of the 2<sup>nd</sup> and 1<sup>st</sup> Defendants as proprietors of the same were fraudulent;
  2. An order directed to the 5<sup>th</sup> Defendant to cancel the registration of the 1<sup>st</sup> Defendant and the title deed issued to the 1<sup>st</sup> Defendant as proprietor of the land parcel no Loc 20/Mirira/4481;
  3. An orders directing the 5<sup>th</sup> Defendant to restore the status quo prevailing before the fraud and re-register Mwangi Mura as the proprietor of land parcel no Loc 20/Mirira/4481 for purposes of filing succession cause for distribution of his estate to the rightful heirs.
15. The Plaintiff claimed that the Defendants fraudulently transferred the suit property to the 2<sup>nd</sup> Defendant and subsequently to the 1<sup>st</sup> Defendant. No response or Defence has been filed on the matter. However, a Preliminary Objection was raised by the 1<sup>st</sup> Defendant which shall be addressed herein below; -
16. It is the Plaintiff's contention that the Preliminary Objection as raised in not a pure points of law, and that the objections raised would require investigation of certain facts. The Plaintiff prays that the Preliminary Objection be dismissed.
17. The legal position on Preliminary Objection was well established in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where the Court held as follows:

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.

The Court further held:

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.”

18. For a Preliminary Objection to succeed, the same must raise pure points of law that it would not be difficult to ascertain and there must be no proper contests of facts. The Purpose of a Preliminary Objection was well stated by the Supreme Court in Civil Application No 36 of 2014 *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR in which it was held as follows:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



19. Considering the above, this Court is tasked with applying the stated principles to the present case and determine whether the Preliminary Objection herein is merited or not?
20. The first ground in the Preliminary Objection is whether the suit is *res judicata*? The elements of *res judicata* are laid out in Section 7 of the [Civil Procedure Act](#) which provides

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.”

21. The purpose of *res judicata* is essentially to bring litigation to a halt especially where a person who has had his day in a court of competent jurisdiction, where his case was concluded from re-litigating his case afresh. For this court to determine whether a suit is indeed *res judicata* or not, an investigation of the present suit and Murang’a ELC Case No 425B of 2017, needs to be conducted to establish the facts and determine whether they meet the threshold of what constitutes a Preliminary Objection. This Court is persuaded by the finding of the Court in [George Kamau Kimani & 4 Others v County Government of Trans-Nzoia & Another](#) [2014] eKLR where the Court opined:

One cannot raise a ground of *res judicata* by way of preliminary objection. The best way to raise a ground of *res judicata* is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is *res judicata*”.

22. The upshot of the above is that this Court finds and holds that the instant ground of Preliminary Objection must fail for want of facts.
23. The second grounds stated in the Preliminary Objection is whether the suit, which the 1<sup>st</sup> Defendant alleges is based on fraudulent transmission of the suit property, is time barred?
24. The 1<sup>st</sup> Defendant submitted that the suit offends Sections 4(2) and Section 26 of the Limitations of Actions Act, which stipulates that a cause of action founded on fraud should commence 3 years from the time of the alleged fraud was discovered in compliance. For this court to establish whether there was indeed fraud in the transmission of the suit property, it would have to involve itself with fact finding on the issues of fraud which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. In fraud cases, time only begins to run once fraud has been discovered as envisioned under Section 26 of Limitations of Action Act. This Court is persuaded by its ruling in the case of Murang’a ELC No 18 OF 2021 [Isaac Njoroge Kariuki, David Maina Ngure, Priscah Wangui Waweru \(as trustees of Kibinganda Self Help Group\) and Jones Gachie G Ngure v Kakuzi Limited & 3 Others](#) where this Court held that the onus is on the party alleging fraud to lead Court to its occurrence which can only be done at the hearing of the suit.
25. Having been so guided, this Court holds that it cannot find that the suit is Statutory barred by dint of Section 4(2) and 26 of the Limitations of Action Act without the suit proceeding to formal hearing, by calling of evidence, thus ascertaining of facts.
26. The penultimate issue for determination in the Preliminary Objection is whether this court lacks jurisdiction?
27. An issue of jurisdiction can be raised through a Preliminary Objection and this is because this Court need not investigate facts as to established whether is clothed with jurisdiction or not. The 1<sup>st</sup> Defendant alleges in the Preliminary Objection that this Court lacks jurisdiction to sit in an appeal of



its own decisions. This Court finds that this ground closely related to the issue of *res judicata* succinctly as it touches on issues of a determined case and subsequent rehearing of the matter in the same Court. For that reason, this ground similarly fails.

28. The final issue for determination is whether this court lacks jurisdiction by dint of Section 76 of the [Law of Succession Act](#), which provides for revocation or annulment of grant. The 1<sup>st</sup> Defendant submitted that this court lacks jurisdiction since the suit property had been transmitted pursuant to a confirmed grant of letters of administration in Murang'a Succession Cause no. 44 of 2007.
29. Jurisdiction is the power conferred on a Court to hear and determine issues and give orders. It is the cornerstone of determination of any suit without which a Court cannot entertain any matter before it. It is trite that issues of jurisdiction should be determined at the first instance. The Court of Appeal in Nairobi Civil Appeal No 244 of 2010 [Phoenix of E A Assurance Company Limited v S M Thiga t/a Newspaper Service](#) [2019] eKLR, extensively determined the issue of jurisdiction the Court held:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.
30. In the Plaint dated February 17, 2021, the Plaintiff alleges that the suit property was fraudulent transferred to the 1<sup>st</sup> to 4<sup>th</sup> Defendants despite the registered owner being deceased, and while the Plaintiff had possession of the title documents. The Plaintiff stated that no Succession proceedings were filed and therefore questioned the means the 1<sup>st</sup> to 4<sup>th</sup> Defendants acquired the property.
31. The jurisdiction of the Environment and Land Court is provided for under Article 162(2) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#). Section 13(2)(e) of the [Environment and Land Court Act](#) in particular states as follows:

In exercise of its jurisdiction under Article 162(2)(b) of [the Constitution](#), the Court shall have power to hear and determine disputes— (e) any other dispute relating to environment and land.”
32. As stated above, this court has jurisdiction to determine any dispute relating to land. This Court is of the considered view that to determine whether the 1<sup>st</sup> to 4<sup>th</sup> Defendants fraudulently acquired the suit property as claimed by the Plaintiff, is within the realm of this Court's jurisdiction as the main suit seeks to determine ownership of the suit property. This however would not be possible without a probe into the evidence in order to ascertain facts and determine how the ownership of the suit property came to be in the name of the 1<sup>st</sup> Defendant. This would not be possible solely through a Preliminary Objection.
33. Therefore, this Court finds that the 1<sup>st</sup> Defendant's Preliminary Objection does not consist of a pure point of law which have been pleaded thus the Preliminary Objection is not merited.
34. Having carefully considered the instant Notice of Preliminary Objection dated July 28, 2022, the Court finds it not merited and the same is dismissed entirely with costs to the Plaintiff.
35. Let the suit proceed for full hearing and be determined on merit.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**L GACHERU**

**JUDGE**

**Delivered online in the presence of;**

**Lily Mwende - Court Assistant**

**Plaintiff – Absent**

**Mr Wachira for the 1<sup>st</sup> Defendant/Objector**

**2<sup>nd</sup> Defendant**

**3<sup>rd</sup> Defendant Absent**

**4<sup>th</sup> Defendant**

**5<sup>th</sup> Defendant**

**L GACHERU**

**JUDGE**

**23/3/2023**

