



Kahumburu v Wanjoga (Suing in her Capacity as the Administrator of the Estate of the Late Eliud Wanjoga) (Environment & Land Case E059 of 2022) [2023] KEELC 16900 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16900 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E059 OF 2022**

**JG KEMEL, J
APRIL 20, 2023**

BETWEEN

DORCAS WAMBUI KAHUMBURU PLAINTIFF

AND

**PHYLIS WANJIKU WANJOGA (SUING IN HER CAPACITY AS
THE ADMINISTRATOR OF THE ESTATE OF THE LATE ELIUD
WANJOGA) DEFENDANT**

RULING

1. Before Court is the Defendant's Notice of Preliminary Objection dated September 30, 2022 and filed on November 24, 2022 on grounds that;
 - a. The Application contravenes Order 4 Rule 4 of the *Civil Procedure Rules 2010* Since the Respondent lacks the legal capacity to be sued on behalf of the estate of the late Eliud Wanjoga Mucheru as the letters of administration for the said estate are yet to be issued.
 - b. The Honorable Court has no jurisdiction to hear and determine the Application as it raises no legal issues against the Respondent.
 - c. The Application is inherently bad in law, defective and untenable before this Honorable Court.
2. To place the Preliminary Objection in context a brief background of the facts of this case is necessary. Vide a Plaint dated June 2, 2021 the Plaintiff through her Counsel M/s Mugo Mugo & Associates sued the Defendant for orders inter alia that a declaration that the transmissions of property Title No Ndarugu/Gakoe/578 to one Eliud Wanjoga is illegal and the title thereto be revoked and an order for delisting of the suit property as forming part of the estate of Eliud Wanjoga Mucheru. At para 2 of the Plaint the Defendant is described as the administrator of the estate of Eliud Wanjoga Mucheru.



Contemporaneous to filing the Plaintiff, the Plaintiff filed an Application of even date seeking in the main temporary injunction against the Defendant from interfering with the suit land.

3. Despite service upon the Defendant as evidenced by Certificate (sic) of service sworn on July 28, 2022 by the Plaintiff's Counsel, Samuel Mugo Kamau neither the Plaintiff nor the said Application is opposed. Be that as it may the Plaintiff proceeded to file an undated and unsigned Notice of Withdrawal of suit drawn under Order 25 Rule 1 Civil Procedure Rules filed on November 15, 2022.
4. The matter was listed for mention on November 16, 2022 to confirm withdrawal of suit when the Defendant's Counsel objected to the withdrawal on grounds that the Notice was improperly drawn pursuant to Order 25 rule 1 Civil Procedure Rules instead of Order 25 rule 2 Civil Procedure Rules and that the parties had not agreed on the issue of costs. The Defendant's Counsel urged the Court to determine the instant Preliminary Objection, the subject of this Ruling.
5. On February 14, 2023 directions were taken for parties to canvass the Preliminary Objection by way of written submissions. By the time of writing this Ruling, none of the parties had complied with the said directions.
6. The germane issue for determination is whether the Preliminary Objection is merited.
7. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696 At page 700* Law JA stated:

' 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.'

8. At page 701 Sir Charles Newbold, P added:

' A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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.'

9. The Preliminary Objection impugns the Defendants capacity to be sued in the manner outlined in the Plaintiff which according to her does not raise any legal issues against her hence the Court's lack of jurisdiction to entertain the suit. For this Court to determine whether or not the Defendant is properly sued, it needs to call for evidence to prove her capacity as an administrator of the estate of Eliud Wanjoga Mucheru or otherwise. See Order 24 rule 5 Civil Procedure Rules which states;

' Determination of question as to legal representative [Order 24, rule 5.]

Where a question arises as to whether any person is or is not the legal representative of a deceased Plaintiff, or a deceased Defendant, such question shall be determined by the Court.'



10. The same case applies if the Court were to decide whether or not the Plaintiff discloses legal issues against the Defendant.
11. Whilst the Defendant's Counsel assailed the provisions of the Civil Procedure Rules relied on in the Notice of Withdrawal, he has not filed any memorandum of appearance to grant him audience before the Court on behalf of the Defendant. He further argued that the parties are yet to agree on the issue of costs and he did not have any instructions on recording a consent. Further the Defendant as already stated above, has not filed any objection against the suit or the Application for temporary injunction to warrant a prayer for costs.
12. The Court takes cognizance of Order 51 rule 10 (2) Civil Procedure Rules that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. The Plaintiff wishes to withdraw her suit and such move need not be hampered for failure to cite the correct Civil Procedure Rules and in any event that failure finds cure under Article 159 (2) Constitution of Kenya.
13. The totality of the foregoing is that while the withdrawal of suit would bring the matter to an end at the earliest opportunity, the Defendant opted to pursue a Preliminary Objection despite not being properly on record.

Final orders for disposal

14. In as far as the Preliminary Objection calls for evaluation of evidence, it is ousted from being a pure point of law and thus fails. The Court is empowered under Sections, 1B and 3A Civil Procedure Act to ensure timely disposal of suits and ensure ends of justice without abusing the Court process.
15. In the end the final orders are as follows:-
 - a. The Preliminary Objection be and is hereby dismissed.
 - b. The Plaintiff be and is hereby directed to file a fresh and proper Notice of Withdrawal of the suit within 7 days hereof if desired.
 - c. Each party to bear its own costs.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Mugo Kamau for Applicant Plaintiff/Applicant

Respondent - Absent

Court Assistants – Kevin/Lilian

