



REPUBLIC OF KENYA



KENYA LAW
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**Nyaga & 2 others v Elikana (Environment and Land Appeal
4 of 2020) [2023] KEELC 21496 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 21496 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 4 OF 2020
A KANIARU, J
MAY 24, 2023**

BETWEEN

JULIUS KINYUA NYAGA 1ST APPELLANT

WILSON IRERI ELIKANA 2ND APPELLANT

ELIAS KATHURI ELIKANA 3RD APPELLANT

AND

JOYCE MARIGU ELIKANA RESPONDENT

RULING

1. This is a ruling on a preliminary objection raised *vide* a notice dated 22/4/2022 and filed on 11/7/2022. The objection is premised on five (5) postulates as follows:
 - i. The appeal is fatally defective.
 - ii. I never attended court for the interparte (sic) hearing of the application dated 18/2/2022.
 - iii. The case before you, your honour, is a succession matter and this court does not have jurisdiction to hear and determine (sic) since the best way to dispose this matter is through a revocation of grant.
 - iv. The appellants and respondent are all beneficiaries of succession cause No. 174 of 1995 and therefore the appellants have no claim against the respondent whatsoever.
 - v. The appellants have deliberately conspired that the 1st defendant who was the administrator in the lower court file be removed from the case before



you which can not be allowed in this court since it was his responsibility to distribute the said estate.

2. It is necessary to highlight the salient aspects of this entire matter. The appellants and the respondent are all members of the same family. Their dispute started in the lower court way back on 28/1/2019. It revolved around the distribution of the estate of their late father – Elikana Ngoroi Njakambi. More particularly, the dispute focused on Land parcel No. Ngandori/Kirigi/6350, which was a portion derived from the then larger parcel Ngandori/Kirigi/386.
3. After the succession process, parcel No. 6380 was allocated to the parties late mother – Martha Rwamba Ngoroi. According to the respondent, the mother is said to have orally willed the land to her before she passed on. The appellants however do not share that position and as children of that same mother, their position is that they are entitled to a share of the portion.
4. The lower court heard the matter and found in favour of the respondent. The appellants who were plaintiffs in the lower court, decided to appeal. This is the appeal now before this court. The appeal is yet to be heard. The respondent filed the objection now under consideration in the hope that the appeal will preliminarily be struck out.
5. The objection was canvassed by way of written submissions. The respondents submissions were filed on 22/3/2023. She submitted, *inter alia*, that she is a beneficiary of the estate of her late father and that the proper procedure was followed to ensure that she became the registered owner of the land in dispute. She submitted further that the appellants are working in cahoots with a party – Ephantus Njagi Elikana Ngoroi – who was a defendant in the lower court but has not been made a respondent in this appeal. This apparent collusion was, according to the respondent, one of the reasons why the lower court dismissed the appellant’s suit. The respondent alleges that the collusion continues as is evident in the fact that this appeal is against her alone while the other party has been left out.
6. It was submitted further that this matter is, or should be, a succession matter. The respondent submitted that what the appellants should have done is to apply for revocation of grant.
7. The appellants submissions were filed on 1/3/2023 and dated the same. According to the appellants the preliminary objection filed does not meet the legal threshold required of a proper preliminary objection. To drive home the point, the appellants cited and quoted the cases of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1968] EA 696 and *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR. It was then submitted that grounds 1, 2, 4 and 5 are not points of law. They were said to relate to the merits of appeal.
8. Ground 3 was said to be focused on jurisdiction. The appellants submitted that the appeal before this court is on “a dispute on title to land parcel No. Ngandori/Kirigi/6350”. The case before the lower court was said to be a land matter and the respondent was said not to have raised the issue of jurisdiction before that court. She was therefore said to be “estopped” from raising the issue of jurisdiction here.
9. I have considered the preliminary objection as raised, rival submissions, and the entire court record generally. The appellants have correctly pointed out that a preliminary objection ought to be based on pure points of law. They have cited and quoted the cases of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1968] EA 696 and *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR to make their point. It is true that a preliminary objection raises pure points of law which are based on incontrovertible or uncontested facts.



10. In *Eunice Karimi Kibunja v Mwirigia M' Ringera Kibunja*: C.A. No. 103 of 1996, the court of Appeal sitting at Nyeri observed thus:

“The issue before the court clearly required a full hearing and we reiterate that the practice of raising points, which should be argued in the normal manner, by way of a preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. A preliminary objection can not be raised if any fact has to be ascertained.”

11. As raised, the objection before me is largely based on contested facts. The appellant has not been able to point out any provision of law violated by the appellants regarding the manner they filed the suit in the lower court or this appeal itself. To further illustrate what a preliminary objection is or should be, the case of *Oraro v Mbaja* [2005] KLR 141 is instructive. In the case Ojwang J (as he then was) delivered 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 by factual details liable to be contested, and in any event to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seek 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.”

12. Generally, the submissions filed by the respondent are addressing the merits of the appeal instead of focusing on the objection. The appeal is yet to be heard. It is an appeal that is contested by the respondent. Yet she is raising this objection knowing well that she is not admitting anything.

13. Further, I note that the issue of jurisdiction raised by the respondent, which prima facie seems to be a point of law, is in essence also hinged on a contested fact. According to the respondent, this matter should be a succession matter and this court therefore has no jurisdiction as it does not handle succession matters. But what is before this court is an appeal from a dispute in the lower court which clearly related to land and was handled by that court as such. The respondent, as pointed out by the appellants, never raised the issue of jurisdiction before the lower court. I am unable to agree with the respondent on this issue. It is plain to me that the appellants are claiming land from the respondent. This is the court that handles matter relating to land.

14. My considered view is that the merits of the objection before me have not been demonstrated. In *Peter Ngugi Kabiri v Esther Wangari Gitbinji & another* [2015] eKLR, the court of Appeal emphasized that it is a fundamental right for the parties to be heard on merits. There is need to hear both sides in this appeal. Accordingly, I find the objection before me unmeritorious and I hereby dismiss it. The parties in the appeal seem to be siblings. I therefore make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 24TH DAY OF MAY, 2023.

In the presence of

Njeru Ithiga for appellant.

In the absence of the respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE



24.05.2023

