



**Kisaka v Muyia & 3 others (Environment & Land Case  
E009 of 2022) [2023] KEELC 18345 (KLR) (22 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18345 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE E009 OF 2022**

**EM WASHE, J**

**JUNE 22, 2023**

**BETWEEN**

**FRANCIS OLOISHAI KISAKA ..... PLAINTIFF**

**AND**

**EVALINE ARAMI MUYIA ..... 1<sup>ST</sup> DEFENDANT**

**SOYUA SAKANA MUYIA ..... 2<sup>ND</sup> DEFENDANT**

**LAND ADJUDICATION & SETTLEMENT OFFICER TRANSMARA EAST,  
WEST & SOUTH ..... 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> defendants (hereinafter referred to as “the applicants”) filed a preliminary objection dated October 4, 2022 (hereinafter referred to as “the present P.O”) seeking for the Plaint dated July 26, 2022 to be struck out for the following grounds; -
  - a. That this honourable court do down the tools for lack of jurisdiction over this matter as the matter is *res judicata* having been heard and determined by a competent quasi-judicial institution.
  - b. That the suit offends the provisions of section 29 and 30 of the *Land Adjudication Act*, cap 284 which provides that the decision of the Minister shall be final.
  - c. That the Plaintiff should only challenge the decision of the Minister in this Court by way of Judicial Review to quash the decision and not by way of Plaint therefore, it is an abuse of the due process of the law.
  - d. That the suit be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.



2. The present P.O was duly served on the Plaintiff (hereinafter referred to “the Respondent”).
3. The honourable court then directed the present P.O to be canvassed by way of written submissions.
4. The Applicants filed their submissions on the March 20, 2023 while the Respondent filed his submissions on the 10<sup>th</sup> of April 2023.
5. The main issue for determination before the Honourable Court is whether the facts placed before it are sufficient to determine the respondent’s suit by way of the present P.O.
6. The applicants submission is that the present suit before this honourable court is *res-judicata* and offends the provisions of Section 29 and 30 of the *Land Adjudication Act*, cap 287 Laws of Kenya.
7. Consequently therefore, this honourable court lacks jurisdiction to entertain and/or determine the present suit before it.
8. In the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989), the court observed as follows; -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
9. On the other hand, the principles guiding the consideration of a preliminary objection were generally settled in the case of *Mukhisa Mukhisa Biscuits Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696 as follows; -

“A Preliminary Objection 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.”
10. In another case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, KSM HCCC NO. 53 of 2004, the honourable court made the following finding;-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
11. In other words, to enable a court decide a preliminary objection, the facts emanating from the pleadings must have been ascertained to facilitate a decision only on a pure point of law to be made.
12. In this suit filed by the respondent herein, the applicants have not filed any Defence in answer to the Plaint dated July 26, 2022.
13. In essence therefore, the pleadings and facts before the honourable court cannot be said to be ascertainable to enable the court decide of the point of law raised by the applicants herein.



14. In the case of *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* (2020) eKLR, the court observed as follows; -

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1<sup>st</sup> – 4<sup>th</sup> defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.”

15. In another of *George Waweru Njuguna v Pauline Chesang Gitau Kamuyu* (2017) eKLR, the Learned Judge was of a similar view by holding as follows; -

“I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff’s claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant’s preliminary objection has no basis”

16. In essence therefore, any Preliminary Objection raised before the filing of a Defence and/or closure of the pleadings under the *Civil Procedure Rules*, 2010 is premature and without proper facts for a court of law to decide on a point of law.
17. In conclusion therefore, the present P.O having been filed before a Defence or substantive response is filed, the same is pre-mature and therefore dismissed forthwith with costs.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 22<sup>ND</sup> OF JUNE 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

**IN THE PRESENCE OF:**

COURT ASSISTANT: MR. NGENO

ADVOCATE FOR APPLICANT: N/A

ADVOCATE FOR RESPONDENT: N/A

