



**Indiazi & another (Suing as Legal Representatives of the Estate of the Late Jotham Indiazi Mbongo) v Mtange & 2 others (Environment & Land Case 10 of 2023) [2025] KEELC 1443 (KLR) (18 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1443 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 10 OF 2023  
FO NYAGAKA, J  
MARCH 18, 2025**

**BETWEEN**

**FRIDAH SAVAI INDIAZI ..... 1<sup>ST</sup> PLAINTIFF  
GILBERT LUKUZI INDIAZI ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
JOTHAM INDIAZI MBONGO**

**AND**

**SAMUEL UDALI MTANGE ..... 1<sup>ST</sup> DEFENDANT  
JAMES LUVAI CHINGULI (BEING SUED AS THE ADMINISTRATORS OF THE  
ESTATE OF THE LATE STEPHEN MTANGE MBONGO) ..... 2<sup>ND</sup> DEFENDANT  
TOM AMDAVI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiffs instituted the instant suit on 31st August 2023. They were two. They described themselves as the Legal Representatives of the Estate of Jotham Indiazi Mbongo. They sued the Defendants, the first set of them being sued as the Administrators of the Estate of the late Stephen Mutange Mbongo, and the other Defendant being a person whose whereabouts were unknown.
2. It was the Plaintiff's case that in or about the year 1959, the late Jotham Indiazi Mbongo and the late Stephen Mtange Mbongo developed an interest in settling in the then Trans Nzoia District. They heard that there was land available for sale by the "white settlers" who were about to relocate to the United Kingdom. The two approached Herman James Ulyate to buy the land parcel numbers LR. 2050/4 and 2050/2/3, which were comprised in the certificate of title registered as IR. 4090/1 delineated in the Land Survey Plan number 33640 and land reference number 2050/5/5 being the remaining piece



of land comprised in the Grant registered as number IR. 219/1, which was delineated in Survey Plan number 53618.

3. It was the plaintiffs' case that the parcels of land had a leasehold interest of 999 years with effect from 1<sup>st</sup> July 1918 and registered at Nairobi Central Land Registry as IR. No. 219/36 and 4090/8.
4. On 10th March 1964, the late Stephen Mtange and Jotham Indiazi entered into an agreement with Herman Ulyate to purchase the said parcels of land from him at a price of 150,000/=. It was their further claim that to secure loans from the Agricultural Finance Corporation (AFC) it required that a third name be included in the Certificate of Title. The two proposed the name of Tom Amudavi, the 2<sup>nd</sup> Defendant.
5. On 10th March 1964, the late Jotham Indiazi, the late Stephen Mtange and Tom Amdavi were registered as proprietors of this said parcels of land as tenants in common in equal shares, meaning, as Co-owners each registered person had a definite portion they owned. The Certificate of Title totaling to 1060 acres of which each had a share of 353.33 acres was now existed.
6. After the registration, both the late Jotham Indiazi and the late Stephen Mtange moved on to the parcels of land and established matrimonial homes on them in almost equal portions. Further, since the time of the purchase they had never seen, the said Tom Amdavi nor did he contribute to the purchase price of the said land or settle on the same.
7. On 11th September 1964, the 2<sup>nd</sup> Defendant executed a Power of Attorney, donating the following to Stephen Mtange, the 1<sup>st</sup> Defendant.
  1. To sell to any person the aforesaid lands or his share therein
  2. To charge the said lands for any sum at any rate of interest.
  3. To lease the said lands for a term not exceeding 21 years in possession at any rent.
  4. To surrender or obtain or accept the surrender of any such lease for the said second defendant in his name.
  5. To sign all such transfers and other instruments and do all such acts and things as may be necessary or expedient for the carrying out of the powers thereby given.
  6. To recover all sums of money that may be due to Tom Amdavi in respect of the said parcels of land.
  7. To vary any contracts, agreements, or conditions binding upon any leases, tenant or occupier of the said lands, or upon any other person in respect of the same.
  8. To recover and maintain possession of the said parcels of land and to protect the same from waste damage or trespass.
8. It was the plaintiffs' claim that on the 16th August 2015 the late Jotham Indiazi and the late Stephen Mtange and their families met and agreed that the said parcels of land be shared in portions of 560 acres and 500 acres respectively but the public utilities be considered during planning and accommodated within the late Stephen Mtange's portion. The agreement was to necessitate the process of surrender and conversion of the title of the said parcels of land from the Registration of Titles Act to the Registered *Land Act* that was subsequently repealed by the *Land Registration Act*. But the provisions on the process of surrender and conversion in the former still subsists. He summarized the steps followed for conversion of land under the land regime and the process of surrender.



9. Soon after the meeting, the two families engaged the officers in the Ministry of Land offices in Kitale to start the process, but soon thereafter, on the 22nd August 2015 the late Stephen Mtange passed away. Four years later, on 13th October 2019, the late Jotham Indiazi Mbongo also passed away without the ascertainment of the respective boundaries and the said conversion and issuance of the respective title deeds. By the time of death the Certificates of Title were in with the Ministry of Lands officials.
10. In the year 2020, the plaintiffs communicated with their officials and informed them of the death of the landowners. They were informed that since the certificates of title had already been surrendered, the demise of the land-owners could not affect the process of conversion, but the resultant titles would be registered in the names of the land-owners unless a duly executed Area List was submitted by the land-owners.
11. Then a dispute arose among the beneficiaries of the Estate of the late Jotham Indiazi Mbongo out of a misunderstanding of the aforesaid process of surrender and conversion of the titles. It led to a report of fraud being made to the police and the process halted. In the year 2021, Kitale Succession Cause No. 35 of 2021 was filed with respect of the Estate of the late Jotham Indiazi Mbongo and Eldoret Cause No. 38 of 2021 filed in respect of the Estate of the late Stephen Mtange Mbongo where the said parcels of land featured as part of the Estates in both Succession Causes.
12. The plaintiffs, vide a report dated 31<sup>st</sup> January 2023 prepared by Landscan Associates Company Limited, established the Estate of the late Jotham Indiazi Mbongo occupying 511.90 acres of the entire portion. He gave the details of the Report and the farming activities on the land. They averred that a Valuation Report dated 13th March 2021 by Chrisca Real Estates Limited submitted in the Succession Cause No. 38 of 2021 established that the 560 acres which formed part of the land reference LR. Nos. 2050/4 (IR No. 4090/1 and 2025/10)/ IR No. 219/1 was valued at Kshs. 2510,000,000/-.
13. The plaintiffs claimed further that arising from the fact that LR. No. 205/4 and 2050/10 were still separately held and the Certificates of Leave were still registered in the names of the late Stephen Mtange Mbongo (deceased), Jotham Indiazi Mbongo (deceased) and Tom Amdavi it would be prudent for the Court to amalgamate the two parcels of land, prepare a subdivision scheme and carry out an accurate survey for registration of the parcels of land in the names of Jotham Indiazi Mbongo and Stephen Mtange Mbongo after the surrender of the leases and conversion of the land into freehold interest. They pleaded further that the determined respective portions of the late Jotham Indiazii Mbongo and Stephen Mtange Mbongo be subjected to the respective Succession Causes for final distribution and subdivision as per the certificates of Confirmation of Grant.
14. He added that besides the two Succession Causes, there was no other suit pending between the parties.
15. In summary, they prayed for the following reliefs:-
  1. Rectification of the certificates of title in respect of the parcels of land in issue.
  2. Amalgamation of the land Reference Nos. 2050/4 (Original Number 2025/2/3 being comprised in the title registered as I.R. 4050/1, and Land Reference No. 2050/5/5 being the remaining piece of land comprised in a Grant registered as Number I.R. 219/7 and delineated on the Survey Plan No. 53618 and an amalgamated title does issue in the names of Jotham Indiazi Mbongo and Stephen Mtange Mbongo
  3. The Amalgamated lease be surrendered back to government for conversion into freehold interest planning and subsequent subdivision into two portions to be registered in the names of the late Jotham Indiazi Mbongo and Stephen Mtange Mbongo



4. The costs of rectification, amalgamation, conversion, planning and subdivision be borne by the estates of Jotham Indiazi Mbongo and Stephen Mtange Mbongo in equal portions.
  5. Costs of the suit.
16. Following the institution of the suit, the 1<sup>st</sup> Defendant raised a preliminary objection dated 9th December 2024. It was based on five grounds. These were that:
1. The suit was time-barred by virtue of Section 7 of the *Limitation of Actions Act*.
  2. The Court lacked jurisdiction by virtue of Order 37 Rule 1(f) of the Civil Procedure Rules, 2010.
  3. The suit was incompetent and fatally defective for failure to include the Land Registry as a party and the orders sought could not be granted
  4. The Court lacked jurisdiction to entertain the application dated 29th September 2024 Eldoret High Court Succession Cause No. 38 of 2021 and Kitale High Court No 35 of 2021 were separate and distinct wherein orders had already been issued and if this Court were to issue any orders the same would likely review orders of a court of concurrent jurisdiction.
  5. The suit and the application dated 29th September 2023 contravened the provisions of Order 2 Rule 15 of the Civil Procedure Rules 2010 and therefore the suit was frivolous, vexatious and did not disclose any reasonable cause of action.
17. The objection was disposed of by way of written submissions. This Court has considered the same.

### **Issue, Analysis And Determination**

18. Having considered the preliminary objection, the law, the pleadings and the submissions by the counsel for the rival parties, this court is of the view that the only two issues that commend themselves for determination are whether the preliminary objection is merited and who to bear the costs of the same. This court starts with determining the first issue.
19. For a court to determine the merits of a Preliminary Objection only the parties' pleadings are analyzed as pointers to the merits or otherwise of the Objection. This is because objections are based on points of law. Such do not call for considerations of fact otherwise that would mean the Court would be looking into the merits of the matter itself. This, the law is used as the searching magnifying lens or torchlight on whether the pleadings meet the requirements thereof to sustain a cause of action or defence for that matter. In arriving at such view this Court is guided by three decisions, among a myriad of others, that have spoken to the issue.
20. The first one is the seminal case of *Mukisa Biscuits Manufacturing Ltd. vs West End Distributors Ltd* [1969] E. A. 696. In it the Court defined a preliminary objection as:-
- “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... 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.”



21. The second one is *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, in which the same Court held that,
- “We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”
22. The third one is *Susan Wairimu Ndiangui V Pauline W. Thuo & Another* [2005] eKLR, wherein Musinga J. as he then was held as follows:-
- “A preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”
23. With that legal position being clearly understood that a preliminary objection arises only on a point of law, this Court now considers the Objections raised herein, on whether they are on points of law and if so, whether they are merited.
24. The first point was that the suit was time-barred by virtue of Section 7 of the *Limitation of Actions Act*. The second one is that the Court lacks jurisdiction by virtue of Order 37 Rule 1(f) of the Civil Procedure Rules, 2010, while the third one is that the suit is incompetent and fatally defective for failure to include the Land Registry as a party and hence the orders sought could not be granted. These three raise points of law only because they flow from pleadings.
25. Regarding the next two, which are that the Court lacked jurisdiction to entertain the application dated 29th September 2024 and the suit because the Eldoret High Court Succession Cause No. 38 of 2021 and Kitale High Court No 35 of 2021 were separate and distinct wherein orders had already been issued and if this Court were to issue any orders the same would likely review orders of a court of concurrent jurisdiction, and the next one that the suit and the application dated 29th September 2023 contravene the provisions of Order 2 Rule 15 of the Civil Procedure Rules 2010 hence the suit was frivolous, vexatious and did not disclose any reasonable cause of action, require the Court to analyze the content of the two Succession matters and receive factual information how the Plaintiff has vexed the Court or is vexing it in the circumstances and how the suit is frivolous. Only one of the limbs in Order 2 Rule 12 of the Civil Procedure Rules does not call for factual information through an Affidavit. It is sub-rule 1 which provides that “At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that (a) it discloses no reasonable cause of action or defence in law.” As is clear from the last term applied at the phrase in the provision, whether the cause of action or defence is reasonable or not is measured against the law. Thus, the said pleadings are weighed against the law in such an application.
26. Thus, now the Court turns to the points raised and weighs them against the law. On the first point, this Court now turns to the two remaining points of law. The first one is on jurisdiction. It is not in dispute that this, just like any other court, is a creature of statute. Following the plebiscite in 2010 for *the Constitution*, this Country established the present Court under Article 162 (2) (b). Consequently, it enacted the *Environment and Land Court Act* whose preamble reads, “to give effect to Article 162(2)



- (b) of *the Constitution*; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers”.
27. In the Act, the legislature then enacted Section 13, which gives the jurisdiction of the Court. It is therefore imperative that the present dispute must fall within the ambit and jurisdiction of this court espoused of the Act, if it has to survive the onslaught against it by way of the preliminary objection.
28. First, it is important to note that jurisdiction is everything. Without it a court should down its tools immediately and that this Court is prepared to do if the point succeeds. I need not reinvent the wisdom enunciated in the Court of Appeal decision of the Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR. It is clear.
29. The crux of the Preliminary Objection herein is that this Court has no jurisdiction. The reason, as given in the second point, is that the lacks jurisdiction by virtue of Order 37 Rule 1(f) of the Civil Procedure Rules, 2010. It provides that,
- “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- (f) the approval of a sale, purchase, compromise or other transaction;”
30. I have carefully examined the provision sought to be relied on regarding this point of law. Unless the 1st Defendant wholly misunderstood this provision, this Court sees no point of the law herein that ousts its jurisdiction. If anything, the sub-rule, when read with Section 13 of the ELC Act firmly grounds the instant claim in the jurisdiction of the Court. It is this Court that is empowered by law to determine any sale, purchase or compromise of land rights or ownership thereof of a deceased person. Determination of title to land squarely lies within the jurisdiction of this Court.
31. Regarding the second point that the suit is incompetent and fatally defective for failure to include the Land Registrar as a party the 1<sup>st</sup> Defendant is convinced that the land registrar should be enjoined as a party in this matter. First, he has not established a basis for that in order to satisfy the Court that the said party is a necessary party as envisaged under the law. Secondly, it is trite that a cause of action is not defeated merely for misjoinder or non-joinder of parties. Order 1 Rule 9 provides:
- “No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
32. In any event if the land registrar is a necessary party to the instant suit he/she can be joined as a party under Order 1 Rule 10 of the Civil Procedure Rules which seeks to give wisdom immediately after Order 1 Rule 9 about how necessary parties left out or unnecessary ones joined should be dealt with in proceedings. Thus, I find the contention by the Defendant not holding any water. I dismiss it.



33. About the last point, the 1<sup>st</sup> Defendant argues that the suit is time-barred by virtue of Section 7 of the Limitation of Actions Act. Section of the Act provides that,

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

34. When the above provision is applied to the facts pleaded in the Plaintiff, this Court finds no claim for recovery of land. The provision refers to a situation where an owner of a parcel of land left it without permission in the possession of another for a period of over twelve years and raises a claim for its recovery from that other. His action would be time barred. It is not the case herein. Amalgamation of title, rectification and surrender of the same is not recovery. In any event the Defendants have not been sued as having possession of any of the Plaintiff's land. This Court thus dismisses the point too.

35. As I dismiss it, the million-dollar question the parties herein ought to answer, as they go on either with this suit or, indeed, the two Succession cases or any other that may arise in the future is, how parties or individuals who are not owners of a property can on their own decide to subdivide another's property and own it to the exclusion and consent of or transfer by or conveyance of the same by that other (the owner). This question arises from the Plaintiffs' pleadings which were verified by the Affidavit he swore in terms of Order 3 Rule 5 of the Civil Procedure Rules on the correctness of the facts and claim as follows:

1. That on 10th March 1964, one Jotham Indiazzi Mbongo (now deceased), Stephen Mtange Mbongo (now deceased) and Tom Amdavi were registered as proprietors of these said parcels of land as tenants in common in equal shares
2. Each of the co-owners had a definite portion that he owned
3. The land size on the Certificate of Title totaled 1060 acres
4. Each owner had a share of 353.33 acres.
5. Since the time of purchase the other owners had never seen, the said Tom Amdavi
6. Tom Amdavi did not contribute to the purchase of the land or settle on the same.
7. On 11th September 1964, the 2<sup>nd</sup> Defendant (Tom Amdavi) executed a Power of Attorney, donating authority to Stephen Mtange, the 1<sup>st</sup> Defendant to do a number of things (listed in the Plaintiff)
8. On 16th August 2015 the late Jotham Indiazzi and late Stephen Mtange and their families met and agreed that the said parcels of land be shared in portions of 560 acres and 500 acres, respectively, but public utilities be considered and accommodated within Stephen Mtange's portion.

36. All the above was done to the exclusion of the owner of the 353.53 acres, Mr. Tom Amdavi, yet the Power of Attorney did not provide for that. In any event the Power of Attorney was not registered in accordance with the law hence it is doubtful whether it was a power of attorney properly so called.

37. The question that arises from the Plaintiffs' own pleadings is that one Tom Amdavi was not an imaginary person, as claimed by them. Otherwise, how could an imaginary or non-existent person sign or donate a Power of Attorney over anything? The truth of the matter is that the said Tom Amdavi was a human being who participated in the purchase of the land, and was registered as such. Having not



been seen since the time of purchase or at least from 11th September 1964 after the passage of seven (7) years, the presumption of death as provided for under Section 118A of the *Evidence Act* kicked in. It means that it would be taken that the said Tom Amdavi died as by that provision. Since he was registered as a co-owner and not a joint owner of the land, his share was distinct and would only form part of his Estate (whether he died testate or intestate. It also means that if he died, then the purported power of attorney ceased to exist and have legal meaning upon that death hence anything done on it after the death was unlawful. Additionally, if he died without a will, the under Section 39(1) and (2) of the *Law of Succession Act* apply automatically. It provides that,

“Where an intestate has left no surviving spouse or children, the net intestate estate shall devolve upon the kindred of the intestate in the following order of priority -

- (a) father; or if dead
  - (b) mother; or if dead
  - (c) brothers and sisters, and any child or children of deceased brothers and sisters, in equal shares; or if none,
  - (d) half-brothers and half-sisters and any child or children of deceased half-brothers and half-sisters, in equal shares; or if none
  - (e) the relatives who are in the nearest degree of consanguinity up to and including the sixth degree, in equal shares.
- (2) Failing survival by any of the persons mentioned in paragraphs (a) to (e) of subsection (1), the net intestate estate shall devolve upon the State and be paid into the Consolidated Fund.”

38. Thus, if the Plaintiffs’ and even the Defendants’ claim is that Tom Amdavi has never been seen and may be taken to have died, and none of his relatives to the 6<sup>th</sup> degree of consanguinity can be traced, the property is not up for grabs between the Estates of the late Stephen Mtange and Jotham Indiazi. Far from it. His share would automatically be state property to be realized and paid into the Consolidated Fund.

39. For the above reasons, the costs to of the Preliminary Objection shall be to the Plaintiffs.

40. The matter shall be mentioned on 2<sup>nd</sup> April 2025 before the Judge in Kitale for further directions as to compliance.

41. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM  
THIS 18<sup>TH</sup> DAY OF MARCH 2025.**

**HON. DR. IUR. F. NYAGAKA**

**JUDGE**

