



Koilel (Suing as the Legal Representative of the Estate of Parmeres Ole Koilel) v Moshoro Group Ranch & 12 others (Environment & Land Case 589 of 2017) [2023] KEELC 18758 (KLR) (18 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18758 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 589 OF 2017**

**CG MBOGO, J
JULY 18, 2023**

BETWEEN

**SEKETO ENE KOILEL PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PARMERES
OLE KOILEL**

AND

MOSHORO GROUP RANCH & 12 OTHERS DEFENDANT

RULING

1. Before this court for determination is the notice of preliminary objection filed by the defendants and is dated April 3, 2023 challenging the suit on the following grounds: -
 1. That the suit as filed violates section 47 of the Community Land Act and to that extent is invalid.
 2. That the suit violates section 8 of the Land Group Ranch Representative Act Chapter 287 (repealed) of the Laws of Kenya for it clearly states it is suing the 2nd-9th defendants in their capacity as officials of the group ranch.
 3. That the 10th -13th defendants are bonafide allottees of the group ranch parcel and could only be sued by filing complaints to the Minister whose decision would have been brought before this court if the same is challenged. This is provided in section 29 of the Land Adjudication Act chapter 284 of the laws of Kenya. Hence there is no valid suit against them before you.
 4. That the 1st defendant was registered group ranch pursuant group ranch pursuant to chapter 287 of the Laws of Kenya, which was repealed by the Community Land Act No 27 of 2016 on September 21, 2016 and as there was no compliance with section 47 of the said Act by the former 1st defendant. The suit against it if any abated.



5. That the plaintiff failed to file a suit against the Minister for Land Adjudication within stipulated time hence no suit.
 6. That this court lacks jurisdiction to entertain and determine allegation against the 10th-13th defendants.
 7. The 3rd-13th defendants prays that the court finds for them, dismisses the plaintiff alleged complain herein with costs and interests.
2. The defendants pray for the following orders: -
1. That the suit filed by the plaintiff in its entirety be and is hereby struck out/dismissed.
 2. That the costs of this application and substantive suit be to the 3rd-13th defendants.
3. On June 6, 2023, this court directed that the preliminary objection be canvassed by way of written submissions. On the June 13, 2023 the plaintiff filed written submissions dated May 25, 2023. The plaintiff submitted that the preliminary objection only serves to cloud issues. That article 63 of the Constitution provides that a community land shall vest in communities identified on the basis of ethnicity, culture or similar community interests.
 4. The plaintiff further submitted that section 46 of the Community Land Act gives this court jurisdiction to deal with cases under the Land (Group Representatives) Act (repealed).
 5. On the issue of request for particulars, the plaintiffs submitted that the defendants do refer to their list of documents as they are aware that the Land (Group Representatives) Act is repealed. Further that the law allows the court to determine if title is acquired illegally or unprocedurally and that this court will determine how the 10th to 13th defendants acquired the title deeds.
 6. The 3rd to 13th defendants filed their written submissions dated June 28, 2023. The 3rd to 13th defendants submitted that this court lacks jurisdiction to determine this matter for the reason that such jurisdiction rests with the Magistrate's Court pursuant to section 10 (2) of the Land (Group Representatives) Act (repealed).
 7. The 3rd to 13th defendants further submitted that they are the bonafide allottees of the group ranch and could only be sued upon filing a complaint to the Minister whose decision would have been brought before this court if the same was challenged. They relied on section 26, 27 and 29 of the Land Adjudication Act.
 8. The 3rd to 13th defendants further submitted that suing them in their individual capacity was an error and the plaintiff ought to have sued the Attorney General. Also, that the 2nd defendant died long before the amendment was done which is also a great error.
 9. I have considered the notice of preliminary objection and the written submissions filed by the parties herein and the issue for determination is whether the notice of preliminary objection is merited.
 10. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors ltd* (1969) EA 696, the court stated as follows: -

Per Law, JA



“So far as I’m aware, 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.”

This was followed up by the judgment of Sir Charles Newbold, P in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

11. In the case of *Lemitei Ole Koros & another v Attorney General & 3 others* (2016) eKLR, Munyao, J stated as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”

12. Having looked at the definition and what constitutes a preliminary objection, I am satisfied that it merits consideration to the extent that it raises the issue of jurisdiction from two angles i. e. under section 47 of the *Community Land Act* and section 29 of the *Land Adjudication Act*.

13. Jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of *The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* (1989) KLR 1 where Nyarangi J.A. held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

14. The defendants in this case are challenging the jurisdiction of this court on the ground that the suit violates section 47 of the *Community Land Act* and section 29 of the *Land Adjudication Act*.

15. A perusal of the pleadings shows that the plaintiff filed a further amended plaint dated March 8, 2023. In the further amended plaint, the plaintiff stated that the 1st defendant is a group ranch formed for the acquisition of land for its members and registered under the *Land (Group Representatives) Act*.

16. Section 47 of the *Community Land Act* provides as follows: -

1. “In relation to land held under the *Land (Group Representatives) Act* (cap 287), the respective group representatives together with the communities they represent shall be registered as a community in accordance with the provisions of this Act.
2. Upon registration, the respective group representatives shall cease to hold office.



3. Land held by group representatives referred to under subsection (1) shall not be sold, leased or converted to private land before it has been registered under this Act.
 4. Title documents issued to group representatives under the *Land (Group Representatives) Act* (cap 287) shall continue to be in force until new titles are issued in the names of the respective communities or other institutions in accordance with this Act.
 5. The transitional provisions set out in the schedule shall apply upon commencement of this Act.
 6. The Cabinet Secretary may prescribe regulations for giving effect to this section.”
17. Section 46 (1) of the *Community Land Act* further provides that: -
- “Unless the contrary is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall be deemed to have been acquired under this Act.”
18. The plaintiff commenced this suit in the year 1998 at the time when the *Community Land Act* was not in force. Section 46 (1) of the Act is very clear and express that any right or interest to land that existed prior to the commencement of the Act shall be deemed to have been acquired under the Act. I do not understand how the plaintiff was required to have complied with the provisions of section 47 at a time when they did not anticipate as such. Even the drafters of the said Act foresaw the scenario and provided transitional clauses to that effect. On this ground, the notice of preliminary objection fails.
 19. On the issue of jurisdiction as raised by the defendants under section 29 of the *Land Adjudication Act*, let me say that this court will be confined to look at the pleadings only and not comb through the evidence as doing so would defeat the purpose of a preliminary objection. Again, the plaintiff in her further amended plaint pleaded in paragraph 2 that the 1st defendant is registered under the *Land (Group Representatives) Act* (repealed).
 20. The prayers sought in the further amended plaint are for permanent injunction and trespass against the defendants. Again, flowing from the further amended plaint, the plaintiff pleaded the standing of the 1st defendant who was registered under the *Land (Group Representatives) Act* (repealed). Going by this pleading alone, the *Land Adjudication Act* has no role to play in this suit as stated by the defendants.
 21. The way I have understood the defendants is that they are indirectly admitting to their fault in failing to comply with section 47 of the *Community Land Act* as can be seen in ground 4 of the objection. It is their reasoning that in absence of their non-compliance with the laws, the resultant effect is that they are not capable of being sued and if sued, then the suit is said to abate. It is also disturbing for the 3rd to 13th defendants to refer to the *Land Adjudication Act* as an Act of parliament that is repealed. I do not know where the said defendants obtained this information since the *Land Adjudication Act* is still in force.
 22. Let me say that a litigant chooses whom to file a case against and more so where a tangible and reasonable cause of action exists.
 23. From the foregoing, I am of the view that the notice of preliminary objection dated April 3, 2023 fails completely and it is hereby dismissed. This court has jurisdiction to hear and determine the dispute. I make no orders as to costs. The hearing of the substantive suit to proceed as earlier diarised on July 3, 2023. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 18TH DAY OF JULY, 2023.



HON. MBOGO C.G.

JUDGE

18/7/2023.

In the presence of: -

CA:Chuma

Mr. Eric Musyoka for the plaintiff

Mr Agina for the defendants

