



REPUBLIC OF KENYA



**Karuguri v Mwangi (Environment and Land Appeal E028 of 2022)
[2023] KEELC 18676 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E028 OF 2022**

JO OLOLA, J

JULY 14, 2023

BETWEEN

MUHURI KARUGURI APPLICANT

AND

SYLVESTER GACHERU MWANGI RESPONDENT

RULING

1. By the Notice of Motion dated November 10, 2022, Muhuri Karuguri (the Applicant) prays for a raft of orders as follows:
 3. That the Honourable Court be pleased to enlarge time and grant the Applicant leave to file an Appeal out of time against the Judgment/Decree dated February 6, 2018 in Mukurweini PMCC No 19 of 2015; Sylvester Gacheru Mwangi -vs- District Land Registrar Nyeri County & Another;
 4. That there be a stay of execution of the aforesaid Judgment/Decree pending the hearing and determination of such Appeal as may be preferred against the said Judgment/Decree upon leave being granted by this Honourable Court;
 5. That this Honourable Court be pleased to order/direct that the status quo of the illegally acquired subject suit land Gikondi/Gikondi/1862 be maintained;
 6. ...
 7. That this Honourable Court outrightly issues an order to the Respondent halting/estopping (sic) the transfer (of) the subject suit land;
 8. That in the alternative and without prejudice to paragraph 5 above, the Honourable Court be pleased to order/direct the Respondent to surrender



in Court the illegally acquired Title Deed to the subject suit land upon such terms as are just;

9. That the Officer Commanding Karaba Police Station do enforce compliance of the orders above; and
 10. That the costs of this application be provided for.
2. That application is supported by an Affidavit sworn by the Applicant and is premised inter alia on the grounds that:
- (a) By the Judgment delivered on February 6, 2028, the Court noted that the Defendants had entered appearance through the Attorney General but omitted to participate in the proceedings;
 - (b) The Applicant was unaware of the existence of the Mukurweini case and was thus adjudged and condemned unheard contrary to Article 50 of the Constitution;
 - (c) Had the Applicant been enjoined in the suit, he would have had a chance to challenge the issuance of the Respondent's Title Deed on the basis of fraud and illegality;
 - (d) The Applicant was enjoined as an Interested Party in the said case on January 22, 2019 some eleven (11) months after Judgment was delivered;
 - (e) The Judgment delivered on February 6, 2018 offends Article 40, 47 and 50 of the Constitution hence a grievous miscarriage of justice;
 - (f) The Applicant's meritorious application for setting aside the Judgment has been dismissed leaving the Applicant exposed; and
 - (g) That the Applicant is apprehensive that unless the Respondent is restrained by the orders sought herein, the Respondent will proceed and totally disinherit the Applicant in execution of the said Judgment.
3. In response to the application, Sylvester Gacheru Mwangi (the Respondent) has taken out a Notice of Preliminary Objection dated November 28, 2022 wherein he objects to the application on the grounds:
1. That the Memorandum of Appeal dated November 10, 2022 in this matter was filed over four (4) years since delivery of the Lower Court's Judgment on August 6, 2018;
 2. No order has been issued granting the Interested Party/Applicant leave to appeal out of time;
 3. All the Applicants pleadings subsequent to the Memorandum of Appeal i.e the application dated November 10, 2022 and filed on November 15, 2022 have no legs to stand on.
 4. Without leave having been issued to enlarge time, to file appeal out of time this entire suit is a non-starter and has no basis or grounds for prosecution;
 5. From the Applicants application dated November 10, 2022 and filed on November 15, 2022 there is no draft Memorandum of Appeal but an



annexture marked as “MK4” which is the Memorandum of Appeal filed without leave of the Court as is also evidenced by paragraph 28 of the Supporting Affidavit of the Applicant;

6. That the Interested Party/Applicant is not an administrator of the estate of the late Karuguri Kabachia and has no locus standi to plead his father’s cause as averred in paragraphs 3, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18 and 20 of the said dubious and unlawful Memorandum of Appeal;
 7. The Lower Court’s suit dealt with boundary issues substantively but the illegal Memorandum of Appeal raises proprietorship issues substantively; and
 8. The Memorandum of Appeal and application all filed on November 15, 2022 and dated November 10, 2022 are an abuse of the process of this Honourable Court and should be dismissed with costs.
4. Following directions issued herein on December 6, 2022, it was agreed that the Preliminary Objection be disposed of first by way of Written Submissions. I have accordingly perused and considered the Notice of Preliminary Objection as well as the submissions and authorities placed before me by the Learned Advocates representing the Parties.
 5. The Respondent herein objects to the matter herein on several grounds. It is his case that the Applicant has filed a Memorandum of Appeal without the leave of the Court some four (4) years after the delivery of the Judgment in the Lower Court. Accordingly he asserts that all the pleadings filed by the Applicant subsequent to that Memorandum of Appeal have no legs to stand on.
 6. The Respondent further objects to the matter herein on the ground that the Applicant is not an administrator of the estate of one Karuguri Kabachia and that he had no locus standi to institute these proceedings. He further states that the Lower Court had dealt substantively with boundary issues which the Applicant wants to raise again in these proceedings.
 7. From the outset, it was clear to me that the so-called Preliminary Objection was filed in grave error by the Respondent. While the reference to this matter may give the impression that what is before this Court is an Appeal, my perusal of the matter herein reveals that no Memorandum of Appeal has so far been lodged before this Court. What the Respondent refers to as a Memorandum of Appeal is actually an annexure marked “MK4” in the Supporting Affidavit the Applicant has sworn in support of his application dated November 10, 2022 seeking enlargement of time to enable him lodge the Memorandum of Appeal out of time.
 8. That being the case, the grounds objecting to the matter on the basis that the Memorandum of Appeal has been lodged without leave some 4 years late are misconceived and without any basis.
 9. Again, and as was long stated in *Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors Limited* (1969) EA 696:

“ ... a Preliminary Objection consists of a pure 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.”
 10. In the matter herein, the Respondent has not filed any Replying Affidavit to the Applicant’s application aforesaid. His first response was by the Notice of Preliminary Objection. That being the



case, it is difficult to see how the Respondent expects the Court to conclude from his bare assertion that the Applicant is not an administrator of the estate of Karuguri Kabachia and/or that the Lower Court had dealt extensively with the boundary issues and that hence the same should not be litigated anymore herein.

11. Those are clearly matters of fact that require to be ascertained from elsewhere and they do not appear to me to be capable of disposing of the suit. As Sir Charles Newbold P stated in the Mukisa Biscuits case aforesaid:

“ A Preliminary Objection is in the nature of what used to be a demurer. 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 Objections does nothing but unnecessarily increase costs, and on occasions, confuse the issue. The improper practice should stop.”

12. Decades after that famous injunction was issued, many such as the Respondent are yet to heed to that call. It bears repeating, that any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks 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. Where a Court needs to investigate facts, a matter cannot be raised as a Preliminary Point.

13. In the premises, I do find that the Preliminary Objection before me is misconceived and baseless. The same is struck out with costs to the Applicant.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 14TH DAY OF JULY 2023.**

In the presence of:

Mr. Maingi for the Appellants

No appearance for the Respondents

Court assistant – Kendi

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J. O. OLOLA

JUDGE

