



**Kamanda v Karuga & 2 others (Environment and Land Appeal  
E018 of 2022) [2023] KEELC 20133 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20133 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E018 OF 2022  
LN GACHERU, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**JAMES KAMANDA ..... APPELLANT**

**AND**

**SAMSON MAINA KARUGA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY GOVERNMENT OF MURANGA ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR MURANG'A ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Ruling of the Learned Magistrate Hon. S. Mwangi, Senior Resident Magistrate dated 18/8/2022 in Murang'a C.M. ELC Case No. E 078 of 2021)*

**JUDGMENT**

1. This is an Interim Appeal arising from the Ruling of the trial Court in Murang'a CM ELC No. E078 of 2021, where the Learned Magistrate found that the Preliminary Objection by the Appellant herein lacked merits and proceeded to dismiss it. The Appeal is anchored on the three grounds, set out in the Memorandum of Appeal dated 23<sup>rd</sup> August, 2022 to wit; -
  - a. The Learned trial Magistrate erred in law by her failure to uphold the Appellant's Preliminary Objection that the Appellant had no Locus Standi and/or capacity to be sued on behalf of the Estate of Kamanda Gichira being not the legal representative of the said Estate.
  - b. The Learned trial Magistrate erred in law and fact by her failure to uphold the Appellant's Preliminary Objection that the Court had no jurisdiction to hear and determine a dispute relating and/ or based on partnership property whose value exceed the lower Court's Pecuniary Jurisdiction under Section 2 & 3 of the Partnership Act No. 12 of 2012.



- c. The Learned trial Court erred in law in confusing the Provisions of Section 13(1) of the Environment and Land Act with the provisions of Section 2(1) of the Partnership Act No. 16 of 2012 which defines Court to mean the High Court where gross assets of a partnership exceed Kshs. Three Hundred Thousand thus arose at the wrong interpretation of the law.
2. The facts founding this Appeal are that the 1<sup>st</sup> Respondent filed a suit against the Appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents jointly and severally claiming trust over land registered as Plot No. Loc.12/ Sub-Loc 4/1362/7. The 1<sup>st</sup> Respondent vide the Plaint dated 27<sup>th</sup> September, 2021, averred that his father and three others jointly acquired and owned the suit land, but which land was illegally and fraudulently transferred. He averred that the Defendant's father owned the land in trust for himself and that of the 1<sup>st</sup> Respondent's father.
3. The Appellant filed a Notice of Preliminary Objection in opposing the suit and it was premised on two grounds;
  - a. That the 1<sup>st</sup> Defendant has no capacity and/ or locus standi to be sued on behalf of the Estate of Kamanda Gichira as he is not the Legal Representative of his Estate.
  - b. The cause of action being based on partnership, the Court has no jurisdiction on partnership property whose value exceeds Kshs. 50,000/= as per the provisions of Sections 2 & 3 of the Partnership Act No. 12 of 2012, based on the report of valuation by Upcountry Valuers dated 24/ 3/ 2022.
4. The trial Court in its ruling found that the Partnership Act did not provide for pecuniary jurisdiction and proceeded to determine on whether the trial Court was clothed with jurisdiction to determine the matter. The Court found and expressed itself that the issue for determination in the suit was on ownership of the suit land based on trust. On the issue of locus, the trial Court found that the Appellant herein was estopped from claiming on locus as he had participated in previous proceedings over the suit land.
5. The Appeal was dispensed with by way of written submissions. The Appellant filed his submissions through the Law Firm of Kirubi Mwangi Ben & Co. Advocates, and proceeded to submit on three issues.
6. On the issue of locus, the Appellant maintained that he lacked the capacity to be sued as he was not a personal representative of the estate of his deceased father, and as such, the Court lacked the jurisdiction to entertain the matter. He relied on the case of Juliana Adoyo vs Francis Kiberenge Abano{2015}, where the Court observed that locus standi can be equated to lack of jurisdiction by a Court. He relied on a number of cases to support his claim that a Personal Representative should sue or be sued over the estate of a deceased person.
7. On the second issue of Partnership, the Appellant submitted that the suit revolved around Business Partnership, over the suit property and as such the trial Court lacked jurisdiction, since the Partnership property exceeded kshs. 300,000/= allowable by Section 2 of the Partnership Act. The Appellant brought up the issue of limitation of actions to the extent that the suit is statutory barred within the provisions of Sections 4(3) and 7 of the Limitation of Actions Act.
8. The 1<sup>st</sup> Respondent filed his submissions through the Law Firm of Gori Ombongi & Co. Advocates. He submitted that the Appellant having first filed a suit, cannot now make a turn over and claim not to have locus. On jurisdiction, he submitted that this was a declaratory suit and/ or a suit based on trust and the issue of Partnership cannot stand. He added that if there existed any partnership, the same was dissolved and properties thereafter shared.



9. The 2<sup>nd</sup> Respondent filed its written submissions through the Law Firm of Kimwere Josphat & Co. Advocates, in support of the Appeal. It is its submissions that this was a Partnership property and which ought to have been determined in the High Court as it exceeded the pecuniary jurisdiction of the trial Court. On the issue of locus, it submitted that the Appellant lacked the locus of being sued and could not therefore be sued.
10. This Court has been moved on appeal and the Appellant wants the Court to interfere with the discretionary powers of the trial Court. The Court, is alive to its role on appeal as laid out in Section 78 of the *Civil Procedure Act*, which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was echoed by the Court in the case of Peter M. Kariuki Vs Attorney General [2014] eKLR, where the Court held:

“We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
11. The Supreme Court in the case of Sonko v County Assembly of Nairobi City & 11 others (Petition 11 (E008) of 2022), had this to say:

“A first appellate court should accord deference to the trial court’s conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions.”
12. Similarly, the case of Mbogo & Another vs Shah,[1968] EA, p.15; has often offered guidance of the power of an appellate Court and on when to disturb the discretionary power of a trial Court. The Court held:

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
13. Having been sufficiently guided, this Court will proceed and determine whether the trial Court erred in dismissing the Preliminary Objection. It is important to first point out what constitutes a Preliminary Objection. The case Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 lends great credence to this Court. The trial Court defined Preliminary Objection to mean: -

“So far as I am 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. 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”.



Further Sir Charles Newbold, JA stated that: -

“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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

14. The Supreme Court in the case of Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others [2015] e KLR expanded the above principle and further gave the rationale for raising a preliminary objection. It delivered itself thus:

- “1. Preliminary objection consisted of a point of law which had been pleaded or which arose by clear implication out of pleadings and which if argued as a preliminary point could dispose off the suit. A preliminary objection was in the nature of what used to be a demurrer. It raised a pure point of law which was argued on the assumption that all the facts pleaded by the other side were correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion. The Court had to be satisfied that there was no proper contest as to the facts. The facts were deemed agreed, as they were prima facie presented in the pleadings on record.
2. Preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts were incompatible with that point of law. ...
3. ....

The Supreme Court in the aforementioned case went on to state that;

“The true preliminary objection served two purposes of merit:

1. it served as a shield for the originator of the objection against profligate deployment of time and other resources. and
2. it served the public cause, of sparing scarce judicial time, so it could be committed only to deserving cases of dispute settlement. It was distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

15. The above being the description of Preliminary Objection, it is evident that a Preliminary Objection, raises a pure point of law, which is premised on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or where the court is called upon to exercise judicial discretion.

16. In determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises pure point of law. See the case of Avtar Singh Bhamra



& Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that: -

“ 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.”

17. In the present case, the Preliminary Objection was premised on two grounds being that the Appellant Lacked Locus standi and that the trial Court lacked pecuniary jurisdiction, based on the Valuation Report. As stated above, the trial Court dismissed the Preliminary Objection and held that it had the requisite jurisdiction.
18. Having gone through the Record of Appeal, and the rival written submissions by parties, the Court finds the issues for determination by this Court are; -
  - i. Whether the Preliminary Objection was merited?
  - ii. Whether the trial Court erred in dismissing the Preliminary Objection?
  - iii. Whether the appeal is merited?
  - iv. Who should pay costs for the Appeal?

#### **I. Whether the Preliminary Objection was merited**

19. As already established hereinabove Preliminary Objection must be based on pure point of law. Where it requires verification of facts, the same ceases to be a Preliminary Objection and must be dismissed forthwith. This was well captured in In the case of Oraro...Vs...Mbaja(2005) 1KLR 141, where it was held that:-

“ Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

20. The Appellant maintained that he was not a Personal Representative of the Estate of the registered proprietor. Section 83(a) of the *Law of Succession Act* provides:

“ Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative”

21. Similarly, Section 79 of the *Law of Succession Act* makes provision that the property of a deceased person shall vest on the Personal Representatives. It can be deduced from the pleadings that the Appellant was not the registered proprietor of the suit property. As a result, any suit against the Estate of Kamanda Gichira ought to have been against any personal representative. That was not the case herein.

22. On the second issue of pecuniary jurisdiction, it should be noted that there was no document attached to the pleadings that showed existence of partnership. Under the Partnership Act, Section 2 contemplates that Partnership is between persons carrying on business in common, with a view for profit. While the Appellant claimed this was a Partnership property, the 1<sup>st</sup> Respondent’s claim was on trust. To ascertain whether it was a trust or a Partnership property, it required the investigation of facts.



23. The 1<sup>st</sup> Respondent in his Complaint gave a detailed chronology of his account of how the property was acquired and when it changed hands. It is imperative to appreciate that the jointly acquired property was thereafter sub-divided. What is not clear is whether after the sub-division, the property continued to be property held by an individual or by all the parties listed in paragraph 6 of the Complaint.
24. In Order to determine whether the trial Court had jurisdiction by dint of Section 2 of the Partnership Act, the trial Court was to first establish whether the suit property was property held in Partnership or not. This Court finds that the trial Court rightfully invoked the application of the relevant provisions of the Environment and Land Court Act to reinforce its jurisdiction in determining land matter. Undoubtedly, this was a land matter and the trial Court in setting out the provisions that gave it power to act was in no way a confusion as alluded to by the Appellant.
25. Resultantly, this ground would not qualify to be a pure point of law, within the holdings in the Mukisa Biscuits Case, supra. Therefore, it follows that the trial Court did not err in dismissing the Preliminary Objection on this account.

## **II. Whether the trial Court erred in dismissing the Preliminary Objection?**

26. The plausible ground for determination on the Preliminary Objection was the issue of locus standi. The trial Court in determining the issue took cognizant of the Appellant's previous conduct which included the filing of a Miscellaneous Suit against the 1<sup>st</sup> Respondent. The trial Court in concluding that the Appellant was estopped from crying foul on the issue of locus, relied on the provisions of Section 120 of the Evidence Act as well as the case of Serah Njeri Mwaobi vs John Kimani Njoroge{2013}, where the Court expressed itself on the doctrine of estoppel.
27. This Court takes note of the scanty information and notices that the 1<sup>st</sup> Respondent had moved the trial Court on account of the orders issued in the Miscellaneous suit that had been filed by the Appellant herein. It appears to this Court that the Appellant had been sued as a beneficiary of the Estate of Kamanda Gichira. The Miscellaneous suit alluded to was filed by the Appellant herein, wherein he moved the trial Court seeking the Court to enforce the orders of the Tribunal. The Appellant is no doubt a beneficiary of the registered proprietor and not the owner of the suit property.
28. This Court is alive to the pronouncement in the case of Juliana Adoyo vs Francis Kiberenge Abano, supra as quoted by the Appellant. Entertaining the suit against the Appellant who lacked locus may be a triviality. The Court of Appeal in the case of Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR faulted the trial Court for proceeding to dismiss a Preliminary Objection raised on the ground of locus. The Court found that the Respondent therein had no locus and further found as such the proceedings at the trial Court were a nullity and that the Petition ought to have been dismissed. The Court held:

“Applying the above test to this case, we have come to the conclusion that the order consolidating the two petitions was illegal as the respondent's petition having been filed without locus standi was a nullity ab initio and the refusal by Nzioka, J. to strike out the respondent's petition on the basis that they had been consolidated cannot stand.”

29. Therefore, it follows that the Appellant cannot be sued as he is not the registered owner. Beneficial to this suit is the fact that the matter is at its preliminary stages and it would be fair to breathe life to the law by allowing parties to sue the right people and bringing sanctity to Court's proceedings.
30. Even so, this Court has taken account of the grounds sustained by the trial Court in finding that the Appellant had the locus standi of being sued. This Court has perused the Complaint and notes in



paragraphs 15 and 16 of the same that the Appellant and the 1<sup>st</sup> Respondent had litigated against each other. Interestingly, the Tribunal in Murang'a Land Disputes Tribunal Case No. 25 of 2018, between the Appellant and the 1<sup>st</sup> Respondent, found that the 1<sup>st</sup> Respondent herein had not established any material facts against the Appellant herein. This Court is not alive to the facts founding the filing of the suit at the Tribunal and it cannot dwell on it.

31. The 1<sup>st</sup> Respondent in paragraph 12 averred that the Appellant had assumed his father's role. The only plausible way of assuming these responsibilities was through a Grant. It is not clear how this was made possible. This Court appreciates the pronouncement of the Court in the case of *In re Estate of Benson Maingi Mulwa (Deceased)* [2021] eKLR, where the Court held:

“In my view since intermeddling can be committed even by administrators, any person interested in the state of a deceased person as a beneficiary or otherwise is properly entitled to move the court and seek orders intended to preserve the estate. It is therefore not mandatory that such an application be made by the administrators or with consent or authority of the other beneficiaries since a beneficiary is property entitled to protect his or her interest in the estate.” (emphasis)

32. Had the 1<sup>st</sup> Respondent clearly established in his pleadings that the Appellant was misusing or utilizing the suit property exclusively or that the suit as filed by the 1<sup>st</sup> Respondent was to preserve the suit property, it would not be difficult to take the path taken by the trial Court.
33. The 1<sup>st</sup> Respondent had a duty to first establish the appropriate party to sue. As rightly stated by the Court in the case of *Mohamed Abushiri Mkullu v Suleiman Abdala Hassan* [2012] eKLR, where the Court held:

“It is my considered opinion that it is the duty of any party instituting a suit to find out which party they are filing a claim against.”

34. It is no doubt that the 1<sup>st</sup> Respondent has a cause of action which cannot be wished away, but sadly, he has a legal duty to institute the suit against the right party. This Court has taken into account the several correspondences attached to the Record of Appeal and notes the existing feuds surrounding the suit property. It appears to this Court that no letter has ever been addressed to the Appellant concerning the suit property. There is nothing in the pleadings that portrays the Appellant as the beneficial owner of the suit property. Therefore, it is clear that he lacks the requisite locus standi to defend the suit.
35. This Court appreciates the doctrine of estoppel as adopted by the trial Court. However, the same could not hold, and therefore to this end, this Court finds and holds that the trial Court erred in dismissing the Preliminary Objection on the ground of the Appellant's locus standi.

### III. Whether the appeal is merited?

36. Having found as above, it follows that this Appeal is merited on account that the Appellant lacked the locus standi of being sued. The available recourse will be to strike out the suit. This Court is alive to the pronouncement of the Supreme Court in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR. The superior Court when determining an issue of locus though on public interest matters expressed itself that the provisions of Article 159(2)(d) can be applied on case by case basis. While this Court empathizes with the 1<sup>st</sup> Respondent, there is no plausible reason that the 1<sup>st</sup> Respondent has given this Court to invoke the provisions of Article 159(2)(d) of *the Constitution* as allowable in the *Mumo Matemu Case*, supra.



37. The suit was filed against the three parties and the issue of locus standi was raised on the part of the Appellant. Therefore, the available recourse would be to strike out the suit against the Appellant herein. The 1<sup>st</sup> Respondent should move the trial Court appropriately, and amend the pleadings as the suit against the Appellant has been struck out.

#### **IV. Who should pay costs for the appeal?**

38. Matters costs is a discretion of the Court and it is trite law that costs shall follow the event. The appeal partially succeeds and it would mean that the Appellant is entitled to costs. However, this Court appreciates that the Appellant and the 1<sup>st</sup> Respondent are related. As such this Court directs that each party shall bear their own costs.

39. Having carefully considered the instant Appeal, the Court finds it merited, since as per ground (a) of the Preliminary Objection dated 17<sup>th</sup> June 2022, the Appellant herein has no capacity to be sued on behalf of the estate of Kamanda Gachira. Consequently, the suit as against the Appellant herein is struck out for want of locus standi.

40. Each of the party herein to bear its own costs of the Appeal.

41. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of: -

Mr Kirubi for the Appellant

Mr Makura for the 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent Absent

3<sup>rd</sup> Respondent

Joel Njonjo - Court Assistant.

