



**Mbarire v Ireri & another (Environment & Land Case E009 of 2022)
[2023] KEELC 20151 (KLR) (26 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20151 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E009 OF 2022
A KANIARU, J
SEPTEMBER 26, 2023**

BETWEEN

ALBERT IRERI MBARIRE PLAINTIFF

AND

NICHOLAS IRERI 1ST DEFENDANT

JOHN NJIRU MBARIRE 2ND DEFENDANT

RULING

1. What is before me for determination is a Preliminary Objection dated 17.03.2022 and filed on 16.02.2023. It was brought by Nicholas Ireri who is 1st Defendant in the suit. It is against the Respondent – Albert Ireri Mbarire – who is the Plaintiff. The objection is as follows:
 - i. Take Notice that at the hearing of the Originating Summons dated 7th March 2022, the first respondent will raise a Preliminary Objection based on a point of law, namely jurisdiction.
2. It was agreed that the preliminary objection be disposed of by way of written submissions. The 1st Defendant filed his submissions on 30.03.2023 and the Plaintiff filed his submissions on 04.05.2023. The 2nd Defendant filed his submissions on 18.04.2023.
3. The 1st defendant submitted that he is one of the administrators of the estate of the late Jacob Njiru Mbarire and a confirmed grant to that effect was issued by Embu High Court in Succession cause no. 120 of 2009 on 11th May 2016. That the Plaintiff had filed in the said succession cause an application for revocation of grant on grounds that he was a beneficiary and also an adverse possessor. He was claiming to have lived on the land together with his siblings for over 50 years without interruption. The court is said to have dismissed the plaintiff's application on 16.02.2022.
4. The 1st defendant seems to be of the view that this matter is a succession matter. He is of the opinion that the Plaintiff is asking the court to sit on appeal in a succession matter. He is therefore asking



- the court to dismiss the same. He cites the provisions of *Environment and Land Court Act*, section 13(1&2) and the *Land Act* 2012 at section 150, which gives this court jurisdiction to hear Land and Environment matters.
5. The plaintiff on the other hand associates himself with the 2nd Defendants submissions. He is of the view that this matter is not a succession matter and urges the court to dismiss the Preliminary objection.
 6. The 2nd Defendant submitted that the Preliminary Objection does not meet the legal threshold required for a proper preliminary objection as, according to him, it was a mixture of law and fact. He submitted that the plaintiff's suit is not one of succession but one in which the plaintiff seeks declarations that he has acquired property rights under Article 40 of *the Constitution* and by adverse possession. He submits further that jurisdiction of this Honourable court is granted under Article 162 (2) (b) of *the Constitution* and section 13 of the *Environment and Land Court*. Further, he submitted that it has not been in dispute that the Plaintiff has been in occupation and has been using the suit land for over 50 years. And that it is on the basis of the foregoing circumstances that the Plaintiff has filed the instant suit seeking to be registered as the legal owner of the suit land. He urges that this court has the exclusive jurisdiction to deal with this suit and prays that the preliminary objection be dismissed with costs. To reinforce his position, he has cited the cases of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA and *Hassan Nyanje Charo vs Khatib Mwasbetani & 3 others* Civil Application No. 14 of 2014 eKLR.
 7. I have considered the application and the rival submissions. The issue for determination is whether the Preliminary Objection has merit. The 1st defendant has raised his preliminary objection on the ground that this court lacks jurisdiction to hear this suit.
 8. This suit was brought vide an Originating Summons dated 07.03.2022 filed on the same day. The Plaintiff made the following prayers;
 - a. That the Honourable Court declares that the plaintiff herein Albert Ileri Mbarire has become entitled to ownership of land parcel number Kagaari/gikuuri/T.246 on the ground that since 1973, the plaintiff and his family have openly, peacefully and of right been in occupation of the said parcel of land, that is to say, for a period exceeding 12 years preceding the presentation of this summons.
 - b. That in the alternative there be a declaration that the Defendants/Respondents hold title to land parcel number Kagaari/gikuuru/T.246 in trust for the Plaintiff/Applicant herein and the said trust must be dissolved and the Defendants do transfer land parcel number Kagaari/gikuuri/T.246 to the plaintiff.
 - c. That the Honourable Deputy Registrar of this court be ordered to execute the necessary transfer documents on behalf of the Defendants in favour of the Applicant herein.
 - d. That costs be provided for.
 9. The Environment and Land Court is a legal entity created by *the Constitution* of Kenya 2010 under the provision of Article 162(2)(b) of the said *Constitution* and by *Environment and Land Court Act*. The court is vested with original and unlimited jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.



10. From the preamble of the *Environment and Land Court Act*, the jurisdiction of the court is captured as follows:

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

Under Sections 4 and 13 (1) of the *Environment Land court Act* the court has the legal mandate to hear any matter related to environment and land. This would include the one filed by the Plaintiff herein.

11. In the case of “*Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited* (1989) eKLR it was held:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence.

A court of law downs its tools in respect of the matter before it the moment it holds the opinion 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”.

12. In the instant suit, the Plaintiff pursues a declaration that he has become entitled by way of adverse possession to the suit land or, in the alternative, the court declares that the defendants are holding in trust the suit land for him. He further prays that the Deputy Registrar be ordered to execute the necessary transfer documents in favour of him. In my view, the issue before court is one of ownership of land, which in this case is Kagaari/Gikuuri/T.246. This places the cause of action squarely in domain of the *Environment and Land Court Act* and consequently the Environment and Land Court.
13. In addition to the above, the circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, as follows:

“ 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. A preliminary objection can only be raised on a pure point of law and must not be blurred with factual details that can be subjected to contest through evidence. For the same to succeed, the facts should not be disputed. The 1st defendant has submitted that this suit is a succession cause and that this court lacks the jurisdiction to hear it. The plaintiff and 2nd defendant submit that the same is a suit on adverse possession. This goes to show that these are facts in dispute and the court ought to examine and test the facts through evidence. Once the court has to consider factual evidence or where its called to exercise its discretion in making it’s decision as in this case, then the preliminary Objection ceases to be on uncontentious facts and cannot be sustained.
15. From the foregoing, I proceed to find that the Notice of Preliminary Objection dated 17.03.2022 has no merit and I therefore dismiss it with costs to the plaintiff.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF SEPTEMBER, 2023.



In the presence of the plaintiff in person and 1st defendants/respondents and in the absence of the 2nd defendant/respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE

26.09.2023

