



Kithini & 2 others v Kyenze (Administrator of the Estate of the Late Ivulu Kithini) (Environment & Land Case E011 of 2022) [2023] KEELC 20024 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E011 OF 2022
TW MURIGI, J
SEPTEMBER 20, 2023**

BETWEEN

**DAVID NDOLO KITHINI 1ST PLAINTIFF
MUINDI NDOLO 2ND PLAINTIFF
WILLIAM T. NDOLO ALIAS JULIUS MUNYAO IVULU (DECEASED
SURVIVED AND REPRESENTED BY HIS WIFE AGNES
MUKONYO) 3RD PLAINTIFF**

AND

**LOISE MUTIO KYENZE (ADMINISTRATOR OF THE ESTATE OF THE LATE
IVULU KITHINI) DEFENDANT**

RULING

1. This ruling is in respect to the Defendant’s Notice of Preliminary Objection dated on 30th August, 2022 on the grounds that: -
 - 1) The suit herein is a claim on inheritance and the key issue for determination will be whether the Plaintiffs are heirs (either as beneficiaries or dependants) of the Estate of the Late Ivulu Kithini. Therefore, the Honourable Court lacks jurisdiction to hear and determine the suit herein since the succession courts are the appropriate forum for hearing and determining matters related to inheritance.
 - 2) In view of the foregoing the present suit is bad in law and ought to be struck out with costs.
2. The parties were directed to canvass the Preliminary Objection by way of written submissions.

The Defendant’s Submissions

3. The Defendant filed two sets of submissions dated 7th February, 2023 and 2nd March, 2023 respectively.



4. Counsel for the Defendant submitted that the only issue for determination is whether this Court has jurisdiction to hear and determine this suit. Citing paragraphs 3,4,5,6,12,16 and 21 of the Plaintiff, Counsel submitted that the suit herein is made up of allegations that raise issues of inheritance. Counsel further submitted that the issues of who are the rightful heirs of the Estate of Ivulu Kithini and the mode of distribution of the Estate can only be determined by a succession court.
5. Counsel submitted that in addition to filing Succession Cause No. 29 of 2019 before the SPM Court Makueni, the parties herein had equally filed Succession Appeal No. E001 of 2021 before the High Court in Makueni. Counsel maintains that the present suit is an attempt to review the ruling delivered in Succession Cause No. 27 of 2019 where the court held that neither the Petitioners nor the Objectors were entitled to the estate better than the other.
6. Lastly, it was submitted that the Plaintiffs want the Court to review the orders issued by the Succession Court and declare them as owners of the suit property. Counsel submitted that the preliminary objection herein is merited and urged the Court to uphold it.
7. To buttress his submissions, Counsel relied on the bundle of authorities filed on 02/03/2023.

The Plaintiffs Submissions

8. The Plaintiffs submissions were filed on 24th April, 2023.
9. On their behalf, Counsel submitted that the instant suit was filed in order to ascertain whether Parcel No. Makueni/Muvau/193 constituted an ordinary piece of land wherein the protestors have acquired ownership through long possession. That there was evidence to show that the Plaintiffs had shared the piece of land and treated the land as their property.
10. Counsel contended that it was up to the Environment and Land Court to ascertain whether or not the parcel of land was estate property since the probate court had failed to do so. To buttress his submissions, Counsel relied on the case of *Isaac Kinyua & 3 Others Vs Hellen Kaigongi* [2018] eKLR.

Analysis And Determination

11. Having considered the pleadings, the Preliminary Objection and the rival submissions, the only issue that arises for determination is whether this court has jurisdiction to hear and determine this suit.
12. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
13. The principles as to what constitutes a Preliminary Objection were laid down by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, where Law JA stated as follows:-

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
14. Further on Sir Charles Newbold JA stated:-

“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 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.”

15. In *Oraro Vs Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

16. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.

17. The Defendant’s Preliminary Objection is based on the grounds that this Court has no jurisdiction to hear and determine this suit as the Plaintiffs claim is based on inheritance and the mode of distribution of the Estate of Ivulu Kithini. Counsel contended that the Plaintiffs claim falls within the jurisdiction of a Succession court.

18. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is satisfied that the Defendant’s Preliminary Objection is based on a point of law.

19. This court is called upon to determine whether it has jurisdiction to hear and determine this suit.

20. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of *Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited* (1989) eKLR the Court held as follows:-

“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...”

21. Similarly, the Supreme Court in the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR pronounced itself thus:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

22. The Plaintiffs commenced this suit vide a Plaint dated 5th May, 2022 seeking the following orders:-

- i. A permanent injunction against the Defendants jointly and severally restraining them from trespassing onto land parcel No. Makueni/Muvau/193 or claiming interest in the land. An



order by the court directing a Surveyor to excise a portion occupied by each family and mark their boundaries.

- ii. A declaration that the Plaintiffs have become the absolute owners jointly and severally in undivided shares having been given the land by their father Ivulu Kathini and having remained in the land adversely for a period of over 50 years with the knowledge of the Defendant.
 - iii. Any other relief that the court deems fit and just to grant.
 - iv. Cost of the suit.
23. The Defendant filed a Memorandum of Appearance dated 4th August, 2022 through the firm of Byron & Partners Advocates.
24. It is trite that a court derives its jurisdiction from the Constitution or legislation or both. Jurisdiction of this court is derived from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.
25. Article 162(2) (b) of the Constitution provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land.
26. To give effect to Article 162 (2) (b) of the Constitution, Parliament enacted the Environment & Land Court Act. Section 13(1) and (2) of the said Act provides as follows:-

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

27. The Plaintiffs are seeking a declaration that they are the absolute owners of the undivided share of the suit property on the grounds that they were given the land by their late father Ivulu kithini and have remained thereon for the last 50 years amongst other orders.



28. On whether the Court can determine a dispute over entitlement to shares of the property, so long as the dispute is over the use, occupation or title to land, this Court has jurisdiction to determine it. In so finding, I am persuaded by the holding in the case of *Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) Vs Caroline Wangui Kiguru*, ELC (2013) eKLR where it was held;

“In matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of *the Constitution* and the High Court as the Succession Court under Section 47 of the *Law of Succession Act* would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”

29. The prayers as sought by the Plaintiffs in their Plaint dated 5th May, 2022 are based on occupation, use and ownership of land. It is crystal clear that this Court has jurisdiction to hear and determine the dispute before it.

30. The issues raised in the preliminary objection are contentious issues of fact as opposed to pure points of law.

31. The upshot of the foregoing is that the Preliminary Objection dated 30th August, 2022 is not merited and the same is dismissed with Costs to the Plaintiffs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF SEPTEMBER, 2023.

HON. T. MURIGI

JUDGE

