



REPUBLIC OF KENYA



**Hassan v Kitonga & 2 others (Environment & Land Case 218 of 2021)
[2023] KEELC 20998 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 218 OF 2021
NA MATHEKA, J
OCTOBER 24, 2023**

BETWEEN

HASSANAT MWANADZOMBA HASSAN PLAINTIFF

AND

JOSEPH KITHUKU KITONGA 1ST DEFENDANT

LARRY NGALA MWAHENDO 2ND DEFENDANT

JARVIS DONDO MWAHENDO 3RD DEFENDANT

RULING

1. The Defendants raised a preliminary objection dated 13th June 2023 on the following grounds;
 1. That the Plaintiff has no legal capacity to file the suit herein as neither a grant of probate nor letters of administration has been issued to the Plaintiff with respect to the 1st Defendant's parcel of land known as Kilifi /Kadzonzo /Madzimbani/502
 2. That there is no privity of contract between the Plaintiff and the Defendants.
 3. The Court lacks territorial jurisdiction to entertain the entire suit as the Malindi Court has jurisdiction to entertain this suit by virtue of the provisions of section 14 of the Practice Directions issued by the Chief Justice on 25th July 2014 in Gazette Notice No. 5178, Section 12 of the Civil Procedure Act and Article 48 of the Constitution on Access to Justice since:
 - i. All the Defendants reside and work in Mariakani or Kilifi
 - ii. The subject property is situated in Kilifi
 - iii. The cause of action arose in Kilifi.



4. That this suit has been filed contrary to the provisions of the *Law of Contract Act* and the *Law of Succession Act* or any other law relating to Succession of the 1st Defendant's parcel of land known as Kilifi /Kadzonzo /Madzimbani/502.
 5. That the suit as filed is misconceived, frivolous, vexatious, scandalous, and bad in law and an abuse of the court process.
 6. That the Plaintiff's suit is bad in law and discloses no cause of action against the Defendants and ought to be struck out
2. This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
3. The above legal proposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;
- “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 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 has to be ascertained or if what is sought in 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”
4. In the case of *Attorney General & Another vs Andrew Mwaura Githinji & another (2016)* eKLR the court outlined the scope and nature of preliminarily objection as;
- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
5. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I find that the filed preliminary objection by the Defendant herein was properly brought before the court.
6. I have perused the court record and find that this property is situate in Kilifi County and the Defendants also reside and work in Kilifi County. The certificate of title of the suit property is parcel of land known as Kilifi /Kadzonzo /Madzimbani/502. Section 12 of the *Civil Procedure Act* Cap 21 provides for guidelines on choosing territorial jurisdiction. When filing matters it provides thus; -

'Subject to the preliminary or other limitations prescribed by any law,



- a. for the recovery of immovable property; with or without rent or profits;
- b. for the partition of immovable property;
- c. for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;
- d. for the determination of any other right to or interest in immovable property;
- e. for compensation for wrong to immovable property;
- f. for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the Defendant may, where the relief sought be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides or carries on business, or personal works for gain.’

Section 13 provides; -

“Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different courts, the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such court.”

7. In the instant case the suit property is in Kilifi County which is served by Malindi Environment and Land Court in Kilifi County. Given that the suit property is located within Kilifi County Government, subject to Section 12 the correct forum is the Malindi Environment and Land Court. Having found that this court has no jurisdiction in the matter this court cannot determine the other issues in the preliminary objection. Consequently, I transfer this matter to the Environment and Land Court Malindi for hearing and determination. Costs to be in the cause.
8. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

