



Ali & 22 others v Said & another (Environment and Land Case E92 of 2022) [2023] KEELC 22313 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE E92 OF 2022
NA MATHEKA, J
DECEMBER 14, 2023**

BETWEEN

- SALIM ALI 1ST PLAINTIFF**
- SALIM MOHAMED 2ND PLAINTIFF**
- AKRIM TWAHIR 3RD PLAINTIFF**
- ASAD TWAHIR 4TH PLAINTIFF**
- ASAD TWAHIR 5TH PLAINTIFF**
- HAMIDA TWAHIR 6TH PLAINTIFF**
- HAMIS TWAHIR 7TH PLAINTIFF**
- MOHAMED TWAHIR 8TH PLAINTIFF**
- MOHAMED TWAHIR 9TH PLAINTIFF**
- SEIF AHMED SAID 10TH PLAINTIFF**
- SHEIKHA KHAMIS SALIMU 11TH PLAINTIFF**
- HASSAN ABDALLA SAID 12TH PLAINTIFF**
- NAFISA ALI TWAHIR 13TH PLAINTIFF**
- AMINA ABDALLA SAID 14TH PLAINTIFF**
- AHMED ALI TWAHIR 15TH PLAINTIFF**
- SWALEH ABDALLA MBARAK 16TH PLAINTIFF**
- SALIM ALI TWAHIR 17TH PLAINTIFF**
- SAID AHMED SAID 18TH PLAINTIFF**
- AISHA A TWAHIR 19TH PLAINTIFF**



ABDULLATIF A TWAHIR 20TH PLAINTIFF
ESHA ALI RASHIDNASRA AHMED 21ST PLAINTIFF
SAID ABDALLA BADARUBU 22ND PLAINTIFF
AWADH MOHAMED 23RD PLAINTIFF

AND

AHMED ALI SAID 1ST DEFENDANT
SALWA ALI SAID 2ND DEFENDANT

RULING

1. The defendants raised a preliminary objection against the suit on the following grounds;
 - a. The matter be struck out with costs for being lodged before the wrong forum contrary to Sections 29 and 13 of the *Wakf Act* 2022.
 - b. The suit herein is bad in law and untenable and an abuse of the due process of this Honourable Court as the plaintiffs have no locus standi to institute the present suit and by reason thereof, it should be struck out with costs.
 - c. This Honourable Court lacks jurisdiction over this matter as it is purely a succession dispute thus it ought to be filed before the family division.
2. The Court of Appeal in *Attorney General & another vs Andrew Maina Gitinji & another* (2016) eKLR, laid out the principles to be considered when determining the merits of a Preliminary Objection. The court held that;

in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696. At page 700 Pr. D-F Law JA as he then was had this to say:-

“....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.”

Sir Charles Newbold, P.; on the other hand at pg.701 paragraph B-C added the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

3. The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”



4. The court has applied the principles set out by the appellate court to determine whether the defendant's preliminary objection has upheld the threshold for a preliminary objection, which must stem from the pleadings and should be based on pure points of law with no facts to be ascertained. In this case, the defendant has averred that the jurisdiction to determine the dispute was with the Kadhi's court within the meaning of Section 29 of the Waqf Act 2022 and that the issue at hand was a succession case and not rightfully before this court. The issue of whether or not this court has jurisdiction to determine this suit is a pure point of law that can be determined without ascertaining facts from elsewhere.
5. In their Originating Summons dated 4th August 2022, the plaintiffs averred they are the beneficiaries of the Waqf of Abdulrahman Bin El Mombasiyi the registered owner of Plot No. 244/II/MN, Plot No. 221/II/MN, Plot No. 343/VI/MN and Plot No. 236/II/MN (referred herein as the suit properties). They claimed that the defendants are the registered proprietors of the suit properties in their capacity as Trustees of Waqf of Abdulrahman Bin El
6. Mombasiyi. The plaintiffs sought inter alia orders for the cancellation of the defendants as the trustees of the Waqf to pave the way for the appointment of new trustees in accordance with the Waqf. Further, the defendants sought the immediate release of the suit properties into their possession.
7. The plaintiffs have sought for the removal of the defendants as trustees of the Waqf, and Section 13 (1) of the Act states,
 - A trustee shall be removed from office only by a court on grounds of—
 - (a) misappropriation of a waaqif's property;
 - (b) allowing the waqf property to fall into disrepair when the trustee has funds to maintain the property;
 - (c) knowingly or intentionally causing damage or loss to waqf property;
 - (d) breach of trust in relation to the waqf property; or
 - (e) any other sufficient reason permitted by Islamic law.
8. From Section 29 of the Waqf Act, the court of first instance in a dispute relating to a Waqf shall be a Kadhi's court. It states that;
9. Any matter or dispute relating to a waqf shall in the first instance be referred to a Kadhis' court.
10. Therefore, this court lacks jurisdiction to deal with the instant suit as the suit is premised on a dispute relating to the administration of a Waqf property where the plaintiffs are beneficiaries and defendants are the trustees. The plaintiffs have bypassed the court of first instance, which is the Kadhi's court and it is the view of this court that avenue has to be exhausted. The dispute as outlined in the pleadings, is largely on the misappropriation of the Waqf properties and the breach of trust of the trustees who are said to have unlawfully transferred the Waqf properties into their names. These issues are well within the jurisdiction of the Kadhi's court within the meaning of Section 13 of the Waqf Act.
11. It is the findings of this court that the Notice of Preliminary Objection as raised by the defendants raises pure points of law and has been determined without ascertaining facts from elsewhere. This court therefore holds that the preliminary objection dated 30th June 2023 is proper as stipulated in *Mukisa Biscuit case* (supra) and is hereby found to be merited. This court lacks jurisdiction as the first court



in this dispute is the Kadhi's court and downs its tools. Consequently, the suit herein as filed by the Originating Summons dated 4th August 2022 is struck out in its entirety with costs to the defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 14TH DAY OF DECEMBER 2023.

N.A. MATHEKA

JUDGE

