



**Ngai & another v Mwende & another (Sued in Their Capacity as Administrators  
of the Estate of Mbogo Nyaga Gatema & 15 others) (Environment & Land  
Case 24 of 2015) [2025] KEELC 3330 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3330 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 24 OF 2015**

**AK BOR, J  
APRIL 8, 2025**

**BETWEEN**

**MUNYI NGAI ..... 1<sup>ST</sup> PLAINTIFF**

**ANTHONY NGARI IRERI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**PENINA MWENDE ..... 1<sup>ST</sup> DEFENDANT**

**CERINA MBATHI ..... 2<sup>ND</sup> DEFENDANT**

**SUED IN THEIR CAPACITY AS ADMINISTRATORS OF THE ESTATE OF  
MBOGO NYAGA GATEMA & 15 OTHERS**

**RULING**

1. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 14<sup>th</sup> Defendants, raised a preliminary objection on the grounds that the further amended plaint dated 31/7/2020 did not meet the mandatory requirements of Order 8 Rule 3 of the *Civil Procedure Rules, 2010* for having been filed without leave of court. Further, that the further amended plaint as drawn and filed was fatally defective as against the 7<sup>th</sup> to 16<sup>th</sup> Defendants who have not been procedurally impleaded in line with Order 1 Rule 10 of the *Civil Procedure Rules 2010*. The other grounds were that the suit was incompetent as against the purported 7<sup>th</sup> and 13<sup>th</sup> Defendants who were dead and could not be sustained by law and that the suit was incompetent as against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 12<sup>th</sup> Defendants who are sued in their capacity as legal representatives without their being appointed as such. Additionally, that the suit had abated against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants who died several years ago and that those Defendants had not been substituted in line with Order 24 Rule 4 of the *Civil Procedure Rules 2010*. The other points taken were that the suits against the 7<sup>th</sup> and 13<sup>th</sup> Defendants were void for having been filed after their demise and that the Defendants were not served with the amended plaint contrary to Order 5 Rule 1& 3 of the *Civil Procedure Rules*. They urged that



- the suit in its entirety was fatally defective, a non-starter and bad in law and that it ought to be struck out with costs.
2. The court directed parties to file and exchange written submissions which it has considered. The Defendants submitted that when the Plaintiffs amended the plaint they failed to serve them which meant that they were unable to file their amended defence. They contended that the Plaintiffs' actions violated Order 5 Rule 1 & 3 of the [Civil Procedure Rules](#) and was meant to defeat the course of justice.
  3. They submitted that the Plaintiffs filed the further amended plaint on 2/9/2020 without leave of the court and after the close of pleadings thereby violating Order 8 rule 3 of the [Civil Procedure Rules](#). They contended that the further amended plaint was defective to the extent that the 7<sup>th</sup> to 16<sup>th</sup> Defendants were not procedurally added as Defendants as required by Order 1 rule 10 of the [Civil Procedure Rules](#) before the further amendments were made to the plaint adding them as Defendants. Further, that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 12<sup>th</sup> Defendants had no locus to be sued as the legal representatives of the deceased since they had not been appointed as such.
  4. They urged that the suit abated against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants who passed away several years ago and had not been substituted in accordance with Order 24 Rule 4 of the [Civil Procedure Rules](#). They stated that the 7<sup>th</sup> and 13<sup>th</sup> Defendants were dead and the Plaintiffs filed the further amended plaint after their demise. They argued that the Plaintiffs had subjected them to vexatious litigation over the years filing suits and appeals in different courts which have always been dismissed in favour of the Defendants. Several decisions were cited in support of the submissions.
  5. The 6<sup>th</sup> Defendant, the Land Registrar Mbeere District also filed submissions basically supporting the Defendant's submissions.
  6. The Plaintiffs on the other hand in their submissions pointed out that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed their defences on 16/1/2014 whereas the 6<sup>th</sup> Defendant filed theirs on 15/1/2021. They urged that the 7<sup>th</sup> to 16<sup>th</sup> Defendants had never filed their defence and therefore pleadings in the case had never been closed. That at the time of amending their plaint, pleadings were not closed and they did not require leave. They urged that the issue of the 7<sup>th</sup> to 16<sup>th</sup> Defendants not being procedurally impleaded was not weighty enough to strike out their pleadings.
  7. It was their submission that the issue of some parties being dead was an issue that required evidence by way of death certificates and none was attached in the preliminary objection. They argued that a preliminary objection raised points of law which do not require evidence and this objection should be raised during the hearing of the suit. They argued that grounds 4, 5 and 6 of the preliminary objection could only be proved through documentary evidence and were not appropriate to constitute a basis for the objection. They contended that grounds 7, 8, 9 and 10 did not constitute points of law that can have the suit struck out. On the issue of service, they contended that the Defendants responded to the suit and the question of service did not arise.
  8. The issue for determination is whether the preliminary objection has merit. As was held in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, a preliminary objection 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.
  9. The Defendants argue that the further amended plaint dated 31/7/2020 contravenes Order 8 Rule 3 of the [Civil Procedure Rules](#) for being filed without leave of the court. The Plaintiffs contended that pleadings had not closed since the 7<sup>th</sup> to 16<sup>th</sup> Defendants had never filed a defence. The court finds that the closure of pleadings is a factual issue that must be ascertained through evidence, particularly by



examining whether all parties had filed their pleadings. Since this is a contested fact, it is not a pure point of law and not appropriate to be taken as a preliminary objection.

10. The Defendants challenge the joinder of the 7<sup>th</sup> to 16<sup>th</sup> Defendants under Order 1 Rule 10, but since joinder of parties involves judicial discretion, it does not constitute a pure point of law. The Defendants argued that the suit against the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 7<sup>th</sup>, and 13<sup>th</sup> Defendants is incompetent because they are dead and had not been substituted in accordance with Order 24 Rule 4. Proof of death requires factual evidence in the form of death certificates or some other evidence and therefore this ground does not amount to a pure point of law.
11. The Defendants' claim that the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 12<sup>th</sup> Defendants have been sued as legal representatives without being appointed as such also requires documentary proof. The Defendants contended that they were not served with the amended plaint as required by Order 5 Rule 1 and 3 while the Plaintiffs asserted that they had actively participated in the suit, making service a non-issue. Whether or not service was effected is a question of fact that requires evidence, rendering it unsuitable for a preliminary objection
12. The upshot of this is that none of the objections raised by the Defendants qualify as pure points of law for they require the ascertainment of facts, examination of evidence and the exercise of judicial discretion. They do not meet the threshold of a preliminary objection.

The preliminary objection is dismissed.

**DELIVERED VIRTUALLY AT EMBU THIS 8<sup>TH</sup> DAY OF APRIL 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

No appearance for the parties

Diana Kemboi- Court Assistant

