



**Ndaba v Olkejuado County Council & 2 others (Environment and Land Case Civil Suit 182 of 2010) [2022] KEELC 13314 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13314 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 182 OF 2010  
JA MOGENI, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**SCHOLASTICA RUGURU NDABA ..... PLAINTIFF**

**AND**

**OLKEJUADO COUNTY COUNCIL ..... 1<sup>ST</sup> DEFENDANT**

**MOSES KITURA ..... 2<sup>ND</sup> DEFENDANT**

**SABUNI PARKINE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction:**

1. This ruling is in relation to the 1<sup>st</sup> defendant's notice of preliminary objection dated May 31, 2022 which is based on the following grounds:-

**a) That this Honourable Court lacks jurisdiction.**

2. In response to the preliminary objection, the plaintiffs' advocate deposed that the said preliminary objection was vague, malicious and a non-starter since it did not disclose issues of law. Further, that the 1<sup>st</sup> defendant had not disclosed which law had been infringed upon by the plaintiff.

3. The preliminary objection was canvassed by way of written submissions which were filed by both the 1<sup>st</sup> defendant and plaintiff, the 3<sup>rd</sup> defendant stated that he will align themselves with the response of the plaintiff and would not therefore file any responses nor submissions.



## Analysis and Determination

4. Upon consideration of the notice of preliminary objection, reply to the said objection as well as rivalling submissions, the only issue for determination is whether the court has jurisdiction to deal with the instant suit.
5. The 1<sup>st</sup> defendant in his submissions contended that this court did not have jurisdiction to deal with this matter. He contended that the suit property is situated in the Ongata Rongai in the locality of Kajiado and therefore the suit should have not have been instituted at Milimani but in Kajiado County. He urged the court to uphold the preliminary objection and dismiss the plaintiff's suit herein.
6. In response, the plaintiff submitted that the 1<sup>st</sup> defendant failed to comply with the rules of a preliminary objection as it was meant to be based on issues of law. Further, that the preliminary objection was defective and should be dismissed. To support her arguments, she relied on the following decisions: *Wambua v Kimondiu & 3 others* (Miscellaneous Civil Application 087 of 2022) and *Hangzhou Agrochemical Industries Ltd v Panda Flowers Ltd* 2012 eKLR.
7. The plaintiff contends that the Environment and Land Court was not in existence in 2010 when this matter was filed further that judge Komingoi directed that all part-heard matters were to be concluded in the court stations where they were filed and not transferred to the new court stations.
8. Further that the plaintiff stated that the application had not satisfied the conditions provided for in law for a preliminary application. That prior to this application the instant suit had been heard and the court had ordered that the Land Registrar of Kajiado County was to appear in court to provide information the record showing who was the allottee for the suit property since both plaintiff and the 3<sup>rd</sup> defendant had testified and closed their cases.

## Analysis and Determination

9. The application was prosecuted by way of written submissions and I have examined both the plaintiff's and the 1<sup>st</sup> defendant's submissions dated September 20, 2022 and September 1, 2022 respectively.
10. On the part of the 1<sup>st</sup> defendant the application is purely based on territorial jurisdiction where he seeks to have the court downs its tool alleging that the court lacks jurisdiction.
11. On the part of the plaintiff it is submitted that the application is clearly misguided and an abuse of the due process, brought in bad faith with no law to back it since Justice Komingoi had earlier directed that all part heard matters were to be heard and determined in the courts where they were filed before the Environment and Land Courts were set up in 2012. This being a 2010 matter it was already part-heard and both the plaintiff and 3<sup>rd</sup> defendant had testified and closed their cases. Further that the court ought to unmask the motive behind the preliminary objection seeking to have the matter transferred to Kajiado since it is not made in good faith.
12. The law on jurisdiction as was stated by Nyarangi JA in the case of *Mukbisa Biscuit Manufacturing Co Ltd v West End Distributors Company Limited* (1969) EA 696; the court held that;-

“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. The improper raising of points by way of preliminary objection does



nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”.

13. Further in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* Civil Application No 36 of 2014, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows; -

“A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion”.

14. While in the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, the court held that:-

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

15. In the instant case, the defendants filed their defence on May 11, 2022 and there is no averments on the issue of jurisdiction of the court. It is interesting to note that the issue of jurisdiction only came up when the case was already concluded and the next step was to summon the Land Registrar to provide evidence on who was the registered owner of the suit property. It is trite law that a preliminary objection can be brought at any time but at least before the final conclusion of the case.

16. 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. Based on the facts as presented while associating myself with the cited decisions, it is my considered view that the preliminary objection as filed does not raise pure points of law because the issues of where the land is situated have to be ascertained through evidence. On the issue that this court does not have jurisdiction to deal with the instant case. I wish to refer to section 13 of the *Environment and Land Court Act* which confers jurisdiction to this court and provides that:

- (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.

Section 13 (2) (c) & (d) further stipulates that 'in exercise of its jurisdiction under article 162 (2) (b) of the *Constitution*, the court shall have power to hear and determine disputes - (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land'

17. The above provisions are distinct in terms of the jurisdiction of the Environment and Land Court. In the circumstance, I beg to disagree with the 1<sup>st</sup> defendant that this court is devoid of jurisdiction to determine this case. I opine that the 1<sup>st</sup> defendant simply seeks to rely on technicalities to defeat the plaintiff's claim before the matter is determined. Further, Pursuant to article 159 (2) (d) of the *Constitution*, I find that the 1<sup>st</sup> defendant's action of filing a preliminary objection while the hearing had been concluded by both the plaintiff and the 3<sup>rd</sup> defendants is indeed a defeated avenue.

18. Ibrahim, JSC in Supreme Court of Kenya Civil Application No 11 of 2016 *Hon (Lady) Justice Kalpana H Rawal v Judicial Service Commission & Others* in demystifying the issue of jurisdiction cited the decision in Supreme Court of Nigeria Supreme Case No 11 of 2012 *Ocheja Emmanuel Dangana v*



*Hon Atai Aidoko Aliusman & 4 Others where Walter Samuel Nkanu Onnoghen*, JSC expressed himself as follows:-

“...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

19. Further, in the Court of Appeal case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* (2013) eKLR on the centrality of the issue of jurisdiction stated that: -

“So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain”.

20. Now efficient disposal of the business of the court and efficient use of available judicial and administrative resources would necessarily demand that as much as possible cases be filed within the jurisdiction of the subject matter so as not to clog other registries while others remain unutilized. As for the timely disposal of the proceedings, again it would be prudent that the cases which have been instituted and are already being processed should not be unduly interrupted. The need to have the cases disposed of at a cost affordable to the respective parties on the other hand would call for the court to examine the costs implications involved in carrying out the trial at one place and not another. It is clear therefore that it is a matter of balancing the interests of the parties with the ultimate aim of doing justice.

21. Therefore, upon gleaning, the pleadings filed herein as well as the evidence presented during trial, to my mind, I find that the 1<sup>st</sup> defendant’s action of raising the preliminary objection after the hearing had commenced and concluded is actually mischievous. I note he has not particularized the main points of law he is raising and as it reads, I opine that the same is ambiguous. It is my considered view that upholding the said preliminary objection at this stage would be draconian.

22. The upshot of this is that in the circumstances, while associating myself with the decisions cited above,

- a. I find the notice of preliminary objection dated May 30, 2022 is unmerited and will proceed to dismiss it.
- b. Summons have to be extracted and issued to the Land Registrar for Kajiado to appear in court to shade light on the ownership of the suit property and produce the registration documents at the next hearing.
- c. The costs will be borne by the 1<sup>st</sup> defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2022.**

.....

**MOGENI J**



**JUDGE**

**In the Presence of**

Mr Gichamba for Plaintiff

Mr Nyangito for 1<sup>st</sup> Defendant

Mr Mbaabu for 3<sup>rd</sup> Defendant

Court Assistant: Mr Vincent Owuor

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**MOGENI J**

**JUDGE**

