



REPUBLIC OF KENYA



KENYA LAW
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**Makau & another v Nzioka (Environment & Land Case E002 of 2022)
[2022] KEELC 4856 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E002 OF 2022
CA OCHIENG, J
SEPTEMBER 21, 2022**

BETWEEN

JANET MBOLI MAKAU 1ST PLAINTIFF

NZEMBI MAKAU 2ND PLAINTIFF

AND

JUDITH N'THENYA NZIOKA DEFENDANT

RULING

1. What is before court for determination is the defendant's notices of preliminary objection dated the February 21, 2022 and April 25, 2022 respectively.

In the notice of preliminary objection dated the February 21, 2022, it is premised on the following grounds:

1. That in so far as the claim is premised on the alleged encroachment of the plaintiff's property, this court lacks jurisdiction to hear and determine this matter by virtue of the express provisions of section 18(2) of the *Land Registration Act* and the entire suit is misconceived in law and amounts to an abuse of the court process.

Reasons wherefore, the defendant prays that the plaintiff's plaint and application dated January 13, 2022 be struck off forthwith.

In the notice of preliminary objection dated the April 25, 2022, the defendant seeks the following orders:

- a. That the court lacks jurisdiction to determine this matter as it is the domain of the National Environment Management Authority which under part XII of the *Environmental Management and Coordination Act, 1999* No 8 of 1999 and



amended by the [Environmental Management and Coordination \(Amendment Act\) 2015](#) established the National Environment Tribunal to handle the disputes herein.

2. Reasons wherefore the respondents pray that the plaintiffs' amended plaint dated April 18, 2022 be set aside forthwith.

The 1st plaintiff filed two replying affidavits in response to the two notices of preliminary objection where she deposes that the same are misconceived, an abuse of the court process and merely meant to delay this matter. Further, that the defendant has already commenced unlawful construction of a mortuary on their land and it will be had to recover their land if the dispute is determined in their favour. She avers that the boundary of LR No Machakos/Nguluni/2949 are fixed and the provisions of section 18(2) of the [Land Registration Act](#) does not apply. She explains that the dispute herein concerns the unlawful sale by one administrator of the estate of the late Peter Makau Ndonge without consent of the other administrator. Further, it concerns erection of a mortuary as well as determination of whether there was a valid sale as the 1st respondent's consent was never sought prior to execution of the agreement between the defendant and Nzembi Makau.

3. The preliminary objections were canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the two notices of preliminary objection including the replying affidavits and rivalling submissions, the only issue for determination is whether this court has jurisdiction to determine this suit.
5. The defendant in her submissions contends that this court does not have jurisdiction to determine this matter as it is a boundary dispute which should first be determined by the land registrar in accordance with the provisions of section 18(1) of the [Land Registration Act](#). She contends that the issue raised in the amended plaint fall under the jurisdiction of the National Environmental Tribunal under [Environmental Management and Coordination Act](#) (EMCA). Further, that she obtained the requisite permit before constructing the mortuary. She relied on section 129 of EMCA to support these arguments. To buttress her averments, she has relied on following decisions: [George Kamau Macharia v Dexka Limited](#) (2019) eKLR; [Willis Ochola v Mary Ndege](#) (2016) eKLR; [United Millers Limited v Kenya Bureau of Standards & 5 others](#) (2021) eKLR and [Shiloah Investments Limited vs National Environment Tribunal & 7 others](#) (2018) eKLR.
6. The 1st plaintiff in her submissions insists the preliminary objections are defective as the defendant has misconstrued facts. Further, that the amended plaint at paragraphs 5 and 7 strongly address the unlawful acquisition of land parcel number Machakos/Nguluni/2949 by the defendant. She contends that the allegation that the subject suit is premised on environment management is not alluded to, in the plaint. She reiterates that the court has jurisdiction to deal with the matter. To support her arguments, she has relied on section 13 of the [Environment and Land Court Act](#) as well as the following decisions: [West Kenya Co Limited v Busia Sugar Industries Limited & 2 others](#) (2017) eKLR; [Lydia Kaguna Japheth & 2 others v Mbesa Investment Limited & 2 others](#) (2021) eKLR; [Taib Investments Limited v Fahim Salim Said & 5 others](#) (2016) eKLR and [Paolo Di Maria & 5 others v Alice M Kuria & 5 others](#) (2021) eKLR.
7. I have had a chance to peruse the amended plaint and note the plaintiffs' claim revolves around unlawful acquisition of land as well as illegal erection of a mortuary contrary to permissible land use laws. In the plaint, the plaintiffs have sought for the following orders:



- a. A very urgent injunction do issue to restrain the defendants from proceeding with the construction of the mortuary in residential area.
 - b. A very urgent injunction do issue to restrain the defendant from proceeding with mortuary process and activities on the said parcel of land.
 - c. This court to ventilate and the parcel of land that has been illegally acquired to be returned back to the really administrators.
 - d. The value of the said piece of land to be reconsidered, revised as per the current sale market (value market)
 - e. The defendant to return the extra piece of land she acquired unlawfully.
 - f. Costs of suit.
 - g. Any other relief that this honourable court may deem fit to grant.
8. The defendant in her defence denied the averments in the plaint and insists this court does not have jurisdiction to deal with this matter.

In the case of *Mukhisa 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.”

9. While in the case of *Taib Investments Limited v Fabim Salim Said & 5 others* (2016) eKLR, it was held that:

Where we have environmental and developmental issues in a suit that are supposed to be dealt with by numerous tribunals or bodies, and where those issues cannot be dealt with separately, it is only this court, pursuant to the provisions of article 162(2)(b) of the *Constitution*, that can deal with all those issues.”

10. In associating myself with the two decisions while applying them to the circumstances at hand, I note the plaintiff’s suit has raised different issues which can only be determined once *viva voce* evidence is adduced. Insofar as the issue of building of the mortuary touches on obtaining license from NEMA, it is my considered view that these issues cannot be dealt with separately. To my mind, I find that the issues raised in the two notices of preliminary objection require facts to be ascertained and are not on pure points of law as claimed by the defendant. In relying on article 162(2) (b) of the *Constitution*, I find that this court has jurisdiction to deal with all the issues in this suit.
11. In the circumstances, I find the two notices of preliminary objection premature and will disallow them.
Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2022

CHRISTINE OCHIENG



JUDGE

