



**Kerubo & Children v Motito & 3 others (Land Case E004 of 2025)
[2025] KEELC 4168 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
LAND CASE E004 OF 2025**

DO OHUNGO, J

MAY 29, 2025

BETWEEN

GLADYS KERUBO AND CHILDREN PLAINTIFF

AND

TIMOTHY NYAKIBA MOTITO 1ST DEFENDANT

SABINA NYANCHAMA MOTITO 2ND DEFENDANT

GEOFREY ARISA NDUBI 3RD DEFENDANT

GIBON ONGERI 4TH DEFENDANT

RULING

1. The Plaintiff moved the Court through Plaintiff dated 3rd February 2025 wherein she averred that the Defendants had entered the parcel of land known as North Mugirango/Ikonge/1XX1 (the suit property) and had tried to erect fences and structures thereon. She further averred that she had been in occupation of the suit property together with her five children. She therefore sought judgment against the Defendants jointly and severally for a permanent injunction to restrain the Defendants together with their servants and agents from remaining on or continuing in occupation of the suit property, eviction of the Defendants, general damages for trespass and an order directing the Defendants to stop entering, occupying, trespassing upon, cultivating or constructing on the suit property. Alongside the Plaintiff, the Plaintiff filed Notice of Motion dated 3rd February 2025, through which she sought an interlocutory injunction against the Defendants.
2. The First to Third Defendants reacted to both the suit and the application by filing Notice of Preliminary Objection dated 17th February 2025. They sought striking out of the suit on the grounds that the Plaintiff lacks locus standi since she is not the personal representative of the estates of Zachariah Ngurue Moturi and Ndubi Onsomu Onsango (both deceased), that the suit offends Order 1 Rule 13 (1) and (2) and Order 4 Rule 1 (3) of the Civil Procedure Rules since the Plaintiff had not filed any



authority to plead from her children and that the suit discloses no reasonable cause of action against the Defendants.

3. The Fourth Defendant also raised an objection on locus standi through his replying affidavit which he filed on 28th February 2025.
4. This ruling is in respect of the preliminary objections. The objections were canvassed through written submissions. The First to Third Defendants filed submissions dated 12th March 2025. They contended that proprietors of the suit property are deceased and that the Plaintiff lacks locus standi since she is not the personal representative of the estates of the deceased persons. They relied on Section 45 of the [Law of Succession Act](#) and the case of *Mwakivonje (On his Behalf and on Behalf of the Estate of Kassim Ali Nzimu, Salim Mwatenga, Jumaa Vwinyu and Mwamoyo Moyo – Deceased) v Mwakaonje* [2024] KEELC 3794 (KLR) in support of that argument.
5. Relying on Order 1 Rule 13 (1) and (2) and Order 4 Rule 1 (3) of the Civil Procedure Rules, the First to Third Defendants went on to argue that the Plaintiff lacks locus standi since what she has presented is a representative suit in respect of the estates of Zachariah Ngurue Moturi and Ndubi Onsomu Onsango (both deceased) but without authority from other beneficiaries. They also contended that the suit discloses no cause of action since the Plaintiff lacks locus standi by virtue of not being personal representative of the estates of the deceased persons. They therefore urged the Court to strike out the suit with costs.
6. The Fourth Defendant did not file any submissions.
7. The Plaintiff filed submissions dated 12th March 2025. Relying on the cases of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR, *Crescent Construction Co. Ltd v Delphis Bank Ltd* [2007] eKLR and *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, she argued that the jurisdiction to strike out a suit should be exercised sparingly. The Plaintiff therefore urged the Court to strike out the objections and to allow her application. I must however reiterate that this ruling is only on the objections. The application will be considered in the future, if the suit survives the objections.
8. I have considered the objections and the submissions. The issues that arise for determination are whether the objections are valid preliminary objections and if so, is whether they should be allowed.
9. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. The objection must be argued purely on the facts pleaded by the party against who it is raised. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in this region, Law JA stated:

So far as I'm aware, 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.
10. Not every objection amounts to a valid preliminary objection. Sir Charles Newbold (P) lamented the widespread practice in his day, and which persists to this day, of raising what really does not amount to a valid preliminary objection in *Mukisa Biscuit Manufacturing Co. Ltd* (supra) as follows:

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 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 had 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 issue. The improper practice should stop.

11. Thus, a litigant cannot be permitted to raise a purported preliminary objection and then bring evidence to prop it up. A preliminary must fail or succeed exclusively through scrutiny of the pleadings and facts supplied by the party against whom it is raised. Ojwang J (as he then was) emphasised the bar against ascertainment of facts in the course of determining a preliminary objection when he stated in *Oraro v Mbaja* [2005] eKLR thus:

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point..”

12. The Defendants’ objection is that the Plaintiff lacks locus standi since she is not the personal representative of the estates of Zachariah Ngurue Moturi and Ndubi Onsomu Onsango (both deceased) and that the Plaintiff discloses no cause of action on that account. In their submissions, the First to Third Defendants lay bare the basis of their objection: they contend that the registered proprietors of the suit property are both deceased and that the Plaintiff is not the personal representative of the estates of the said deceased proprietors. The Fourth Defendant also advanced that line of argument in his replying affidavit.
13. A perusal of the Plaintiff shows that the Plaintiff did not anywhere aver that the registered proprietors of the suit property are deceased. In fact, she did not state who is the registered proprietor. While the Defendants may have some facts as to the proprietorship of the suit property and whether the proprietors are alive, the ensuing legal consequences cannot, in the circumstances of this case, be resolved through a preliminary objection. The same applies to the question of whether the Plaintiff has any authority to plead from her children since that is an issue of joinder or misjoinder. Pursuant to Order 1 Rule 9 of the Civil Procedure Rules, a suit cannot be defeated by reason of the misjoinder or nonjoinder of parties. In other words, the Court has discretion on issues of misjoinder or nonjoinder. A preliminary objection cannot resolve an issue that admits of exercise of judicial discretion. See *Mukisa Biscuit Manufacturing Co. Ltd* (supra).
14. In view of the foregoing discourse, I find that the objections herein are not valid preliminary objections. It follows therefore that they are dismissed. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 29TH DAY OF MAY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

The Plaintiff in person

Mr Mongare holding brief for Mr Nyamwange for the First to Third Defendants



Mr Maswari for the Fourth Defendant

Court Assistant: B Kerubo

