



REPUBLIC OF KENYA



KENYA LAW
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**Mucheke & another v Mucheke & another (Environment & Land Case
E021 of 2021) [2022] KEELC 14806 (KLR) (16 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E021 OF 2021**

CK YANO, J

NOVEMBER 16, 2022

BETWEEN

ANN MARY KAGENDO MUCHEKE 1ST APPLICANT

**LUCY GATWIRI MUTHAIA (SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF FESTUS MUCHEKE NGARUNI) 2ND APPLICANT**

AND

TIMOTHY GATIRI MUCHEKE 1ST RESPONDENT

PAUL MWITI MUCHEKE 2ND RESPONDENT

RULING

1. Before me for consideration is the notice of preliminary objection dated July 22, 2022 by the 1st respondent against the applicants suit on the grounds that this court lacks jurisdiction to try this suit and that the suit is a non-starter and an abuse of the court process.
2. On July 25, 2022, the court directed that the 1st respondent's preliminary objection be canvassed by way of written submissions. The 1st respondent filed his submissions on August 4, 2022 while the applicants filed theirs on September 16, 2022.
3. Regarding the issue of jurisdiction, the 1st respondent's counsel cited the provisions of section 13(2) of the *Environment and Land Court Act* and submitted that it is clear that the applicants in their originating summons dated August 26, 2021 are seeking determination of the succession of the Estate of Festus Mucheke Ngaruni and therefore this court does not have jurisdiction to determine succession issues and revoke the grant issued in 1977.



4. Counsel for the 1st respondent referred to the case of [Isaac Kinyua & 3 others v Hellen Kaigongi \[2018\] eKLR](#) in which the court held that:-

“Succession matters do not fall under the ambit of the jurisdiction of ELC court. If this court was to grant stay orders in respect of the succession cause, it would in essence amount to straying in a field where the court has no jurisdiction”
5. It is the 1st respondent’s submissions that the ownership and distribution issues with regard to the Estate of Festus Ngaruni Mucheke should be determined by the Probate Court, arguing that this court does not have jurisdiction to determine issues on legality of a grant.
6. The 1st respondent’s counsel also relied on the case of [Priscilla Ndubi and Zipporah Mutiga v Gerishon Gatobu](#), Meru Succession cause No 720 of 2013 where it was held;

“The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus where issues on ownership of the property in the estate are raised in a succession cause, they must be resolved before such property is distributed. And that is the very reason why rule 41 (3) of the [Probate and Administration Rules](#) was enacted so that claims which are prima facie valid should be determined before confirmation.”
7. Learned counsel for the 1st respondent also relied on the decision of the Supreme Court in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & other \[2012\] eKLR](#) and urged the court to dismiss the applicant’s suit with costs to the 1st respondent.
8. On their part, learned counsel for the applicants cited the provisions of article 162 (2) (b) of the [Constitution](#), section 13 (2) (d) and 13(7) of the [Environment and Land Court Act](#), section 150 of the [Land Act](#), section 80 (1) and 101 of the [Land Registration Act](#) and submitted that this court is clothed with the jurisdiction to issue the orders sought out in the originating summons filed herein. It is argued that other than just making claims that there was a grant of letters of administration that ostensibly used to transfer the suit property, the 1st respondent has not produced or filed any such grant to prove that there was succession proceedings that led to the transfer of the suit properties into his and the 2nd respondent’s names. It is the applicants’ contention that there was no such succession proceedings filed for the estate of the deceased, adding that there could be no such succession proceedings without the involvement and or consent of all family members.
9. To support their arguments, learned counsel for the applicants cited the case of ELC Appeal No E001 of 2020 (Kericho) [Joseph Kiprotich Bor v Tabutany Chepkoech Chebusit](#) which cited the Court of Appeal in [Munya Maina v Hiram Gathiba Maina \[2013\] eKLR](#), and ELC 51 of 2014 (O.S) [Alice Chemutai Too v Nickson Kipkurui Korir & 2 others \[2015\] eKLR](#).
10. The applicants further submitted that the preliminary objection must be points of law, and the claim that the substantive suit is a non-starter and an abuse of the court process is just but allegations by the respondent and the same does not show which point of law, if any, has been violated by the suit. The applicants urged the court to dismiss the preliminary objection with costs to the applicants.
11. The 2nd respondent also opposed the preliminary objection by the 1st respondent and submitted that the issues for determination in this suit fall under the ambit of this court. Learned counsel for the 2nd respondent cited the case of [Owners of Motor Vessel “Lillian S” v Caltex Oil \(Kenya Ltd 1989\)](#) and article 162 (2) (b) of the [Constitution](#).



12. On the 1st respondent's contention that the issues raised by the applicants are mainly of distribution of the estate of the deceased which ought to be dealt with at the Probate and Administration court, counsel for the 2nd respondent submitted that this is not the proper position. That the applicants are contesting the transfer of title from the deceased to the 1st and 2nd respondents, the same having been done without procurement of letters of administration which makes the transfer illegal. That the applicants are further asking the court to revoke titles and direct the Land Registrar to cancel the titles and revert the registration of the title to the original owner. It is submitted that these prayers fall squarely under what is contemplated under section 13 (2) of the *Environment and Land Court Act*. The 2nd respondent relied on the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* (supra).
13. On the issue whether the matter is a non-starter and an abuse of court process, learned Counsel for the 2nd Respondent cited the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR* and *Mukisa Biscuits case*, and invited the court to find that this court has the requisite jurisdiction to hear and determine this matter and dismiss the preliminary objection with costs.
14. I have considered the notice of preliminary objection by the 1st respondent, the submissions in support and against. The issue for determination is whether the issues raised in the notice of preliminary objection are merited or not.
15. The law on preliminary objection is firmly stated on the principles that were set by the Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd [1969] EA 696* where Law JA and Newbold P (both with whom Duffus VP agreed) respectively at page 700, held as follows:

Law, JA

“so far as I am aware, a preliminary objection consist of a pure 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 on 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 matter to arbitration”

Newbold P

“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 increases costs and, on occasion, confuse the issues. This improper practice should stop”
16. The 1st respondent has submitted that the applicants are seeking determination of the succession of the Estate of Festus Mucheke Ngaruni and that this court does not have jurisdiction to determine succession issues and revoke the grant issued in 1977. The applicants on the other hand have submitted that other than just making claims that there was a grant of letters of administration that ostensibly used to transfer the suit property, the 1st respondent has not produced or filed any such grant. It is the applicants' contention that there was no succession proceedings filed for the estate of the deceased.
17. From the submissions, it is apparent that the parties are not in agreement on the issues herein. In my view, the issues raised herein cannot be resolved through the preliminary objection raised. This is because it raises some issues of fact which have to be ascertained. Indeed the 1st respondent has raised some issues of fact through submissions. As already stated a preliminary objection should raise a pure point of law which is argued on the presumption that all facts pleaded by the other side are correct and



it cannot be raised if any fact has to be ascertained. In my view, raising issues of fact through submissions amounts to giving evidence from the bar which in my opinion is not proper as there is a clear procedure on how facts or evidence ought to be laid before a court of law. One of such mechanisms is the filing of application. Indeed the authorities relied on by the 1st respondent in support of his submissions related to decisions made pursuant to applications and not through a preliminary objection.

18. For the foregoing reasons, I am inclined to dismiss the preliminary objection dated July 22, 2022 and decline to dismiss the applicants' suit as requested. I find that the preliminary objection has no merit and the same is hereby dismissed with costs to the applicants and the 2nd respondent.

19. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF NOVEMBER, 2022

In the presence of

CA Mwenda

No appearance for applicants

No appearance for respondents

CK YANO

ELC JUDGE

