



**Mattu & another v Ngoma (Appeal E001 of 2021)
[2022] KEELC 15491 (KLR) (21 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
APPEAL E001 OF 2021
CG MBOGO, J
DECEMBER 21, 2022**

BETWEEN

PETER MUTISYA MATTU 1ST APPELLANT

DAVID MWEU MATTU 2ND APPELLANT

AND

STEPHEN NZIOKA NGOMA RESPONDENT

*(Being an appeal from the ruling and order of Hon J N Mwaniki,
Senior Principal Magistrate, delivered on 2nd December, 2020 in the
Principal Magistrates Court at Makueni, ELC Case No 17 of 2020)*

JUDGMENT

1. Being dissatisfied with the ruling of Hon J N Mwaniki, Senior Principal Magistrate delivered on December 2, 2020 the appellants aggrieved with the whole ruling and order have appealed against the same on the following grounds: -
 1. The learned magistrate misdirected himself in failing to appreciate what constitutes a proper preliminary objection.
 2. The learned magistrates erred in law and fact in holding and finding that the grounds raised in the notice of preliminary objection dated August 31, 2020 did not fit the description of a preliminary objection.
 3. The learned magistrate erred in law and fact in failing to find and hold that the respondent's purported cause of actions, as per the respondent's pleadings anchored on illegal contracts that were entered into in clear contravention of the law particularly sections 45 and 82 of the *Law of Succession Act*, cap 160 Laws of Kenya.



4. The learned magistrate erred in finding and holding that from pleadings and application dated August 26, 2020 the respondent appeared to have proprietary rights and interest in the land(s) in question.
 5. The learned magistrate erred in failing to analyse and consider the merits of the notice of motion application dated August 26, 2020 and to hold and find that the respondent had not established a case for the grant of an interlocutory injunction.
2. The appellants pray for orders that: -
- a. The ruling and order delivered and dated December 2, 2020 be and is hereby set aside.
 - b. The appellants' preliminary objection dated August 31, 2020 be upheld with costs to the appellants.
 - c. The notice of motion dated August 26, 2020 and the plaint dated August 26, 2020 or the entire suit be struck out with costs to the appellants.
 - d. The appellants be awarded the costs of this appeal.
3. Both parties filed their respective submissions to canvass the appeal. The appellants filed written submissions dated July 4, 2021. On grounds 1,2 and 3, the appellants submitted that the finding of the trial court contradicts itself which is a clear indication that the court did not appreciate what constitutes a preliminary objection. The counsel for the appellants relied on the cases of *Beatrice Wambui Kiarie & 2 Others v & Tabitha Wanjiku & 9 Others [2018] eKLR*, *Mukisa Biscuits Manufacturing Limited v West End Distributors (1969) EA 696* and *John Musakali v Speaker of Bungoma & 4 Others [2015] eKLR*. The counsel submitted that two issues were raised in the preliminary objection i.e. whether the lack of capacity or locus standi on the part of the 1st appellant to enter into the contracts upon which the suit is anchored and the legality or lack thereof of any such purported agreements. The counsel submitted that based on the pleadings in paragraph 6,7,8,9,10 and 12 (d) and (e) of the plaint dated August 26, 2020, these are undisputed facts arising from pleadings and which constitutes a preliminary objection. Counsel further submitted that had the trial court properly addressed its mind to the merits of the first ground of objection it would have come to the inescapable conclusion that without letters of administration duly confirmed by a court of competent jurisdiction, in exercise of jurisdiction conferred upon it under the *Law of Succession Act*, in favour of the 1st appellant, the contracts entered into between the 1st appellant and the respondent in respect of the suit land was entered into by someone without the requisite capacity or *locus standi* and thereof illegal by dint of sections 45 and 82 of the *Law of Succession Act*. The counsel relied on the case of *Virginia Mwari Thurania v Purity Nkirote Thurania [2017] eKLR*.
4. The counsel further submitted that the court having acknowledged that the jurisdiction of the court was challenged, the court was enjoined to consider that issue and make a determination on the same before even considering the respondent's notice of motion. The appellants relied on the case of *Phoenix of EA Assurance Company Limited v S M Thiga t/a Newspapers Service [2019] eKLR* and *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR*.
5. The counsel further submitted that it is not disputed that duly gazetted subordinate courts have jurisdiction to handle environment and land disputes but this jurisdiction must be invoked only in appropriate matters as defined under section 26 (4) (b) of the *Environment and Land Court Act*. He further submitted that it is apparent from the pleadings filed in the lower court that the suit land at all material times formed part of the estate of a deceased person and that it is also apparent that the respondent's claim is that he was entitled to transmission of the suit land to him by the eventual



- administrator of the said estate. The counsel submitted that the grievances of the respondent ought to have been agitated before the court seized of the succession cause be it the subordinate court or the high court pursuant to the jurisdiction conferred by section 47 of the *Law of Succession Act*. The counsel relied on the case of *Edward Obino Kenyariri v Makori Samarere & 4 Others (interested parties) [2021] eKLR* and submitted that the court ought to have found and held that there the preliminary objection was proper on account of jurisdiction and proceed to uphold the same.
6. On grounds 4 and 5, the counsel submitted that the trial court did not consider the merits of the notice of motion application dated August 26, 2020 as it behoved the court to consider the merits of the application in line with the hallowed threshold enunciated in the case of *Giella v Cassman Brown*. The counsel submitted that the respondent was prohibited by law from taking possession or otherwise intermeddling with the suit land which constituted part of the estate of the deceased and that the respondent's suit, being based on illegal contracts ought not to be considered.
 7. The respondent filed written submissions dated June 30, 2021. On grounds 1 and 2, the counsel for the respondent submitted that the issues raised by the appellants in the preliminary objection require production of evidence and cross examination of rival parties and that reliance on sections 45 and 82 of the *Law of Succession Act* the sale agreements anchored on illegal contracts thereto would occasion injustice upon the respondent. The counsel submitted that the information of letters of administration issued in the year 2009 was material non-disclosure as the contracts of sale of the suit land came into effect in the year 2012 and the respondent had no knowledge of the same and was not in a position to appeal before the court seized of the succession cause. The counsel submitted that the preliminary objection raised is blurred and marred with factual details and therefore is not competent. The counsel relied on the cases of *Mukisa Biscuits Manufacturing Co Limited v West End Distributors [1969] EA 696*, *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others [2014] eKLR* and *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR*.
 8. On grounds 3 and 4, the counsel submitted that the transactions between the respondent and the 1st appellant were made anchored on constructive trust which trust are imposed by parties to prevent a party who has committed an unconscionable conduct to go scot free and that the 1st appellant having entered into sale agreements of the suit land and having received full payment of the purchase price created an implied or constructive trust in favour of the respondent pending institution of a succession cause and transmission of the same to the respondent. The counsel relied on the cases of *Willy Kimutai Kitilit v Michael Kibet [2018] eKLR* and *Steadman v Steadman (1976) AC 536, 540*.
 9. On ground 5, the counsel submitted that there is no doubt that the suit land is in danger of being alienated as the 2nd appellant has already subdivided the same into thirteen portions and mutation forms have been processed awaiting registration and issuance of title deeds and as such the notice of motion application dated August 26, 2020 did establish a *prima facie* case with a probability of success. The counsel relied on the cases of *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Limited & 2 Others [2016] eKLR* and *Giella v Cassman Brown & Company Limited (1973) EA 358*.
 10. This being the first appellate court, I take guidance on the role of this court from the case of *Sumaria & Another v Allied Industries Limited (2007) KLR* where the Court of Appeal expressed itself as follows: -

“ Being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that a court of appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence



or that the Judge was shown demonstrably to have acted on a wrong principle in reaching the finding he did”.

11. This appeal turns entirely on the nature of a preliminary objection and as such the following questions commend themselves to this court for determination: -

- (i) Did the preliminary objections raise a pure point of law?
- (ii) Was there need to ascertain any fact?

12. A preliminary objection was described in the *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696* to mean: -

“So far as I am 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”.

Further Sir Charles Nebbold, JA stated 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 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”.

13. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No 22 of 1999*, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

14. I have perused the record of appeal and the appellants in this case filed a notice of preliminary objection dated August 31, 2020 challenging both the notice of motion application and plaint dated August 26, 2020 on the following grounds: -

1. That the suit is incompetent and bad in law as the plaintiff’s purported cause of action is anchored on illegal contracts that were entered into in violation of section 45 of the [Law of Succession Act](#) as the same amounts to intermeddling with an estate of a deceased person.
2. That the suit herein is misplaced and wrongly before this court as the plaintiff ought to have ventilated his case before the court seized of the succession cause regarding the estate of Jasper Nzangi Mattu (deceased) and not in a fresh suit like the instant one.
3. That the suit land was lawfully transmitted to the 2nd defendant pursuant to orders issued in the succession cause in respect of the estate of Jasper Nzangi Mattu (deceased) hence the suit



herein and the notice of motion thereunder are misconceived as they seek orders that effectively contradict or seek to overturn the aforesaid orders in the succession cause.

15. The notice of preliminary objection was precipitated by the notice of motion application dated August 26, 2020 filed by the respondent and which application was seeking injunctive orders of the parcel of land being plot No Makueni/Unoa 6348-6360 being subdivisions of Makueni/Unoa/3769 being a subdivision of what was formerly Makueni/Unoa/36. The grounds of the application were that the respondent purchased the suit land from the 1st appellant vide various sale agreement and which the 1st appellant was obligated to initiate a succession cause in respect of his late father and transmit the parcel to the respondent.
16. The notice of preliminary objection was disposed off by way of written submissions and a ruling was delivered on December 2, 2020. A further perusal of the appellants' statement of defence reveals that the preliminary objection raised was multi-faceted with claims of an illegal contract on the one part and lack of the trial court jurisdiction to hear and determine the matter on ground that a court seized with jurisdiction to hear succession matters ought to hear this case.
17. I am of the considered view that the notice of preliminary objection raised by the appellants did not raise any pure point of law. By and large the appellants dwelt on the illegality of a contract with the concern of the respondent being that the same ought to be tried through a full trial. I believe that the veracity of the respondent's pleadings in this regard cannot be vouched for in the absence of a trial.
18. In my view, the trial court was in order to determine so in its ruling and I have no reason whatsoever to interfere with the said ruling.
19. Arising from the above, the memorandum of appeal dated December 17, 2020 is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 21ST DAY OF DECEMBER, 2022.

Hon MBOGO CG

JUDGE

December 21, 2022

In the presence of: -

CA:Chuma

