



**Attari (Suing for himself, and on behalf of the Estate of Hatim Mohamedali
Jevanjee - Deceased) v Oduori & another (Environment & Land Case
E077 of 2022) [2022] KEELC 15181 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E077 OF 2022**

**NA MATHEKA, J
DECEMBER 6, 2022**

BETWEEN

**ZAHIDHUSSEIN E ATTARI (SUING FOR HIMSELF, AND ON
BEHALF OF THE ESTATE OF HATIM MOHAMEDALI JEVANJEE -
DECEASED) APPLICANT**

AND

**JABES ODUORI 1ST RESPONDENT
MOMBASA COUNTY LAND REGISTRAR 2ND RESPONDENT**

RULING

1. The 1st defendant has raised a preliminary objection dated August 18, 2022 that the plaintiff has no locus to institute this suit because he is not the registered owner of the suit property. The plaintiff opposed the same stating that the preliminary objection is not a preliminary objection because it is not based on a pure point of law. Instead it is based on disputed matters of fact namely, The identity of the plaintiff/respondent and the ownership of the suit property by the plaintiff/respondent. That the issues of the identity and ownership of suit property are matters of fact to be resolved by evidence. That the plaintiff has already filed/ an affidavit on October 12, 2022 explaining the apparent discrepancies in his name as captured in his identify card and the indenture of the suit property. The purported preliminary objection disputing the *locus standi* of the plaintiff/respondent to institute the present suit on the alleged ground that the plaintiff is not the registered proprietor of the suit property by the 1st defendant/applicant is dishonest and frivolous because the 1st defendant/applicant has filed a purported suit for adverse possession over the same suit property in CMC No 93 of 2022 Jabess Mdhai Oduor vs Zaid Hussein Ibrahim and 2 others in which he has named the plaintiff as the 1st defendant. The 1st defendant/applicant has filed an affidavit of service alleging that he served the plaintiff with the originating summons on June 14, 2022.



2. The law on preliminary objection is now settled, it must be confined to pure points of law and not blurred by factual details, which may be disputed by the other party. In *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696, where it was held that:

“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.”

Sir Charles Newbold, P added,

“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.”

3. In the case of *Oraro vs Mbaja* (2005) I KLR 141, the court held that;

“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.” This legal principle is beyond dispute, as there are divers’ weighty authorities carrying the message.”

4. This court has perused the pleadings filed by the plaintiff and the 1st defendant is challenging the identity of the plaintiff/respondent and the ownership of the suit property by the plaintiff/respondent. I find that issues of the identity and ownership of suit property are matters of fact to be resolved by evidence. The 1st defendant has also not come with clean hands as he filed a suit for adverse possession over the same suit property in CMC No 93 of 2022 *Jabess Mdhai Oduor vs Zaid Hussein Ibrahim and 2 others* in which he has named the plaintiff as the 1st defendant. That based on the foregoing, the 1st defendant’s preliminary objection dated August 18, 2022 lacks merit and the same is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6TH DAY OF DECEMBER 2022.

N.A. MATHEKA

JUDGE

