



Hassan & another (as the administrator of the Estate of Mohamed Hassan Gichunge, also known as Mohamed Gichunge Hassan, also known as M. Kishungi H. Kitonga (Deceased)) v Hassan & 2 others (Environment & Land Case E016 of 2021) [2022] KEELC 15554 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15554 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E016 OF 2021**

A KANIARU, J

DECEMBER 6, 2022

BETWEEN

ALLY MOHAMED HASSAN 1ST PLAINTIFF

GICHUNGE HASSAN ABUBAKAR GITONGA 2ND PLAINTIFF

**AS THE ADMINISTRATOR OF THE ESTATE OF MOHAMED HASSAN
GICHUNGE, ALSO KNOWN AS MOHAMED GICHUNGE HASSAN, ALSO
KNOWN AS M. KISHUNGI H. KITONGA (DECEASED)**

AND

ISMAEL MSAMBA HASSAN 1ST DEFENDANT

THE LAND REGISTRAR EMBU COUNTY 2ND DEFENDANT

HON. ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This is a ruling on a preliminary objection dated January 21, 2021. The objection is filed by the plaintiff and it targets the 1st defendant's application dated August 16, 2021. The preliminary objection is premised on two (2) grounds as follows:-
 - i) That the 1st defendant/applicant's application dated August 16, 2021 is incompetent and a nonstarter as the original plaint dated June 10, 2021 being sought to be struck out was amended through an amended plaint dated August 2, 2021 and filed on August 5, 2021 prior to the defendant entering appearance.



- ii) That the 1st defendant/applicant's application dated August 16, 2021 is incompetent and an abuse of court process and should be dismissed in limine with costs.
2. The parties in the suit are Ally Mohamed Hassan and Gichunge Abubakar Gitonga as plaintiffs and respondents. They have filed the suit in their capacity as administrators of the Estate of Mohamed Hassan Gichunge. The defendants are Ismael Msamba Hassan, the Land Registrar Embu County and the Hon Attorney General. The preliminary objection has been filed by the plaintiff/respondents.
 3. In the notice of motion filed by the applicant, he sought orders that the verifying affidavit sworn by Ally Mohammed Hassan dated June 10, 2021 be struck out for falsehood; that the plaint dated June 10, 2021 be struck out; and that the suit dismissed with costs. Lastly, he sought costs of the application. It was deposed that the respondents had sued the applicant in ELC case No E011 of 2021, seeking to revoke the applicant's title document over land parcel Embu/Municipality/1571. It was also said that the court, via a ruling dated May 26, 2021 had struck out both the suit and the interlocutory application.
 4. It was contended that the respondents had filed the present suit, which was a replica of the struck-out suit, but now filed by way of plaint as opposed to an originating summons. It was argued that the respondents had stated that there were no previous proceedings or any suit pending between the two parties over the same subject matter in any court of law save for Embu ELC No E011 of 2021 (OS) which was withdrawn under order 25 rule 1 of the Civil Procedure Rules. The said averments were said to have also been stated in the verifying affidavit and it was argued that the said affidavit was manifestly false and was intended to mislead the court for reason that the said suit and application were struck out and not withdrawn.
 5. The respondents were accused of being in breach of mandatory provisions of the law by deliberately swearing falsehoods in their verifying affidavit. The applicant was of the view that the respondents should be charged with the offence of false swearing under the penal code or making a false declaration under the *Oaths and Statutory Declarations Act*, whichever carries the heaviest penalty. The court was urged to dismiss the suit for failure on the part of the respondents to come to court with clean hands. The plaint was said to be incompetent and fatally defective and one that could not stand on its legs.
 6. The application was opposed to by way of replying affidavit and preliminary objection. In the replying affidavit it was deposed that the respondent had filed an amended plaint on August 2, 2021 together with respective verifying affidavits verifying the correctness of the averments in the amended plaint to the effect and/or confirming that Embu ELC No E011 of 2021 (OS) between the parties herein had struck out. That application was said to have been served upon the applicant who was accused of feigning ignorance of such service. The suit before the court was therefore said to be competent and not defective as alleged by the applicant. The application was therefore said to be just a time-wasting tactic, an abuse of court process and one that ought to be dismissed with costs.
 7. The applicant filed a supplementary affidavit dated January 21, 2022. He submitted that he had produced the verifying affidavit, letters of authority, consent and minutes by the respondents for examination to the directorate of criminal investigations and that the court would be provided with the guidance on veracity of the signature of the 1st respondent in due course.
 8. The application was canvassed by way of written submissions. The respondents filed their submissions on February 10, 2022. They gave a synopsis of the pleadings filed by the respective parties. It was contended that the supplementary affidavit filed by the applicant raised extraneous matters which are not pleaded in the application dated August 16, 2021 and which related to the original verifying



- affidavit that was said to have been overtaken by events. It was argued that, there were two (2) verifying affidavits sworn by the two administrators and yet the applicant had only raised issue on one verifying affidavit only. They further argued that the attack on the verifying affidavit was misplaced since it was not challenging the averments in the verifying affidavit brought with the amended pleadings.
9. They relied on East African Court of Appeal case in *Dhanji Ramji v Malde Timber Company* (1970) EA 422 where it was stated that “..where an original pleading contained an admission which was deleted in the amended pleading, that admission can no longer be relied on. But that does not mean that the original pleading has entirely ceased to exist. It remains on record and it is a rule of practice that the amendment must be so effected that what was originally written remains legible. It seems that it is proper to refer to an original pleading for certain limited purposes, one of course which is, to show inconsistency”.
 10. It was contended that the applicant, in its supplementary affidavit, had indicated to annex an expert report, which was yet to be prepared. This was said to be an unprocedural way of annexing documents. The respondent reiterated that the amended pleadings superseded the original filed pleadings and the applicant’s application was therefore said to have been misplaced.
 11. The respondents, in discussing the preliminary objection filed, further submitted that the provisions of order 2 rule 14 of the *Civil Procedure Rules* provides that no technical objection may be raised to any pleading on the ground of any want of form. Further reliance was made on the provisions of order 2 rule 15 of the *Civil Procedure Rules* which set out the grounds upon which pleadings can be struck out. The respondents relied on the case of *Teclab J. Tuwei (Administrators of the Estate of late Malakwen Arap Cheruiyot v Kimaiyo Chirchir* [2021]eKLR where the court cited with approval the case of Jephtha Muchai Mwai v Peter Wangio Thuku (2015) eKLR. In the case, the court held that in the spirit of article 159 of the *Constitution* courts should try as much as possible to sustain causes rather than striking out suits for reasons that are merely technical and curable by a simple step that does not prejudice the other party. It was held that where a party inadvertently leaves out a verifying affidavit or any other document like statement, he/she could be given a chance to file one and the matter can proceed for determination on merit.
 12. Further reliance was made on the case of *Microsoft Corporation v Mistumi Computer Garage* (2001) where it was stated that the purpose for verifying the contents of the pleadings may be attained by rejecting a defective affidavit and ordering that a fresh and complying one be made and filed on record. To support their case the respondent also relied on the case of *Peerai General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited* (2016) where the court stated that a defect in a verifying affidavit cannot warrant the striking out of the suit. On the contrary, it was argued that the application purporting to have the pleadings struck out fell on all four grounds within the ambit of order 2 rule 15 of the *Civil Procedure Rules* and ought to be dismissed with costs.
 13. The respondents relied on a number of cases on this issue of preliminary objection, among them the supreme court case of *Kalpana Rawal & 2 others v Judicial Service Commission & 6 others* [2016] eKLR, where the court stated that where a preliminary objection raised a “fundamental issue” (per Mutunga CJ) then as a matter of good order, it was appropriate to have the issue settled first even if there were apparent factual conflicts. The court was urged to adopt this more liberal approach taken by the supreme court and also in view of article 163(7) of the *Constitution*. The respondents reiterated that the pleadings ought to be struck out as it had already been overtaken by events and was akin to dismissing an application that had already been determined. In that regard the application was said to be incompetent and an abuse of the court process and therefore ought to be dismissed with costs.



14. The applicant filed submissions on October 17, 2022. He set out the grounds of objection as raised by the respondents. The applicant relied on the definition of preliminary objection as set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd.* (1969) EA 696. The applicant further relied on the Court of Appeal case of *Nitin Properties Lid v Singh Kalsi & another* [1995] eKLR where it was stated as follows: “..A preliminary objection 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...”.
15. He identified two issues for determination by the court. The first was whether the preliminary objection was premised on a point of law. The applicant relied on the *Mukisa Bisquit Manufacturing Co Ltd* (supra) case and gave examples of preliminary objection which were on points of law. It was submitted that the issues raised by the respondents in their preliminary objection were not capable of being considered as pure points of law. The issues were said to be issues of fact that needed to be proved by adducing evidence before the court. It was said that the court would require to scrutinize the purported amended plaint and proof that service of the amended plaint was effected on the 1st defendant to enter appearance. The second issue was equally said to be a question of fact that required evidence to show that the applicant intends to waste the court’s time by challenging the integrity of the appended signature on the verifying affidavit.
16. The preliminary objection was said not to raise any pure point of law and ought to fail for being incompetent. Further reliance was made on the case of *Independent Electoral & Boundaries Commission v Jane Cheprenger & 2 others* (2015) eKLR where it was stated that the purpose of a preliminary objection was first to serve as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, to serve the public cause, of sparing scarce judicial time, so that it may be committed only to deserving cases of dispute settlement. It was said to be improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits. On the issue of costs, the applicant submitted that costs ought to be awarded to it.
17. I have considered the objection as raised, the submissions by the parties and the court record. The parties have correctly traced the law on preliminary objection to the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where it was held as follows: “So far as I am aware, a preliminary objection consists 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.....“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.
18. Further the court in the case of *Brownstone Agencies Ltd & another v County Government of Bomet & another* [2022] eKLR cited with approval the case of *Oraro v Mbaja* (2005) eKLR, where Ojwang J (as he was then) held:

“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”.



19. Equally in the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK petition No 10 of 2013 [2014] eKLR the Supreme Court stated 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”
20. The character and nature of a preliminary objection is one that should only raise a point of law which is argued on the assumption that the facts raised are undisputed. The objection raised should not be one that calls for proof or seeks to adduce evidence for its authentication. The objection once argued should be capable of disposing of the suit.
21. I have looked at the two grounds of objection raised by the respondents. The first ground raised is that the application by the applicant is incompetent and a non-starter for reasons that the original plaint sought to be struck out has already been amended through an amended plaint. It is evident that the objection raised does not raise a pure point of law. The same is marred with contended issues of facts that would require the court to scrutinize and confirm whether indeed there is an amended plaint filed herein and if it addresses the issues contested by the parties. For instance the respondents in his submissions stated that the court would need to confirm whether he was indeed served with the said amended plaint and to do this, the court might need to confirm proof of such service.
22. The second ground raised is that the application is incompetent and an abuse of the court process and therefore should be dismissed with costs. This ground too does not meet the threshold for a preliminary objection in accordance with the *Mukhisa case* (supra). The court will first have a duty to look at the application on merit to confirm whether it is incompetent and have parties table evidence and submit on it in order to make a determination. I am of the view that the issues raised therein cannot be raised through a preliminary objection as they are disputed and do not raise points of law.
23. The respondents have however argued that the scope of what encompasses a preliminary objection has been widened. They urged the court to consider the more liberal approach taken by the Supreme Court in the case of *Kalpana Rawal & 2 others v Judicial Service Commission & 6 others* [2016] eKLR. The court in the case of *David Nyekorach Matsanga & another v Philip Waki & 3 others* [2017] eKLR cited with approval the said case of *Kalpana Rawal & 2 others v Judicial Service Commission & 6 others* [2016] eKLR where it was stated that “..the examples of jurisdiction and limitation given by law J.A in the Mukisa Biscuits’ case were but only examples of two grounds worthy of preliminary hearing and that a checklist approach to the test as to whether a matter merited and fell under the *Mukisa Biscuits case* was not in consonant with the spirit and letter of the *Constitution*.” The court then proceeded to state that where the preliminary objection raised a “fundamental issue” (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts.
24. Can the issues raised herein be said to be fundamental in nature? The issues raised are that the application is incompetent, a non-starter and an abuse of the court process for reason that there is already an amended plaint on the court record. There is nothing fundamental about the grounds raised by the respondent. Those issues are common or ordinary in nature and can well be argued in an application. In my view they do not raise such fundamental issues that can be said to have been in the contemplation of the Supreme Court when it expanded the said scope.
25. Simply put, those issues cannot be raised by way of preliminary objection. They could be best raised in an application that would allow the parties to argue them on merit. In the circumstances I find that the objection raised lacks merit and is dismissed with costs to the applicant.



RULING DATED, SIGNED and DELIVERED in open court at EMBU this 6TH day of DECEMBER, 2022.

Waititu for Ali for plaintiff; Feissal Hussein for 1st defendant; Kiongo (AG's office) for 2nd & 3rd respondents.

Court assistant: Leadys

A.K. KANIARU

JUDGE

06.12.2022

