



Wanamboko (Suing in his own capacity as the administrator of the Estate of Florence Wafula - Dcd) v Kiusya & another (Environment and Land Appeal E002 of 2024) [2025] KEELC 1351 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1351 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E002 OF 2024
EC CHERONO, J
MARCH 13, 2025

BETWEEN

ALFRED WAFULA WANAMBOKO (SUING IN HIS OWN CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF FLORENCE WAFULA - DCD) APPELLANT

AND

ANN NANCY KIUSYA 1ST RESPONDENT
MARTIN MAKHANU MACHESO 2ND RESPONDENT

(Being an appeal from the ruling by Hon. C. Maundu (CM) in Bungoma MC ELC No. 80 of 2023 delivered on 19/12/2023)

JUDGMENT

1. This appeal arises from the Ruling/Order of the Chief Magistrate Hon. Cosmas Maundu in Bungoma CM-ELC No.80 of 2023 between Alfred Wafula Wanamboko the Appellant herein who was the plaintiff while Ann Nancy Kiusya and Martin Makhanu Macheso – the Respondents herein as the defendants.
2. The Appellant had commenced the former suit by way of a plaint dated 29/06/2023 seeking the following orders;
 - a. As prayed under paragraph 14,15 & 16 (understood as 13,14 & 15) of this plaint.
 13. The plaintiff's claim against the defendant therefore is for a declaration that the defendant action of storming the suit property amounts to trespass.
 14. The plaintiff also claims for general damages for trespass.



15. The plaintiff further claims for a permanent injunction, restraining the defendants, servants, agents, assignees, employees, workers or any other person claiming through them from further trespassing upon the suit property.
- b. Costs of the suit
 - c. Interests at court rates
 - d. Any other relief that this honourable court may think just and fit to grant.
3. The Appellant's case was that he holds an equitable interest in the entire land parcel No. E.Bukusu/N.Kanduyi/1495, measuring 0.18 hectares (hereinafter referred to as "the suit property"), as both a purchaser and the husband of the late Florence Wafula, through whom he acquired the suit property from Wamakuria Sindani Kilwake under a sale agreement dated 14/02/2014. That he has been in use and occupation of the suit land since then until her demise upon which he filed a succession cause no. 477 of 2014 wherein he was issued with a grant. That the suit property was not included in the estate of his wife because it is registered in the name of Wamakuria Sindani Kilwake who is also deceased. That he later came to learn that the 1st Respondent had purportedly sold the property to the 2nd Respondent who deposited construction materials on the land. It was his contention that the Respondent's actions amounted to trespass.
4. The Respondents filed a joint statement of defence dated 07/08/2023 in which they denied the Appellant's claim and averred that they are entitled to the suit property as their inheritance and that the Appellant had previously stated that the property belonged to one Dickson Wanjala Nakhissah in Bungoma CMELC No. E019 of 2022 and CMELC23 OF 2023.
5. Alongside the said defence, the Respondents filed a notice of preliminary objection of even date on the following grounds;
 - a. The plaintiff lacks capacity and locus standi to agitate this suit.
 - b. The matter is res judicata and sub judice having been brought to court thrice in Bungoma CMELC No. E019 of 2022 and CMELC23 OF 2023.
 - c. The plaintiff in both cases wrote statements that contradict this suit hence he is stooge of the previous plaintiff.
 - d. The entire suit is incompetent for being statute barred and the plaintiff's nationality being doubtful and dubious.
 - e. The honourable court lacks jurisdiction.
6. The trial court in its determination of the preliminary objection found that the Appellant lacked locus standi to present the suit, that the suit was statute barred and that it does not disclose any reasonable cause of action therefore found it meritorious and proceeded to strike out the Appellant's suit with costs.
7. Being dissatisfied with the learned trial magistrate's ruling, the Appellant preferred the current appeal on the following grounds;
 - a. The trial magistrate erred in law and in fact by holding the plaintiff had no locus standi to institute the claim against the weight of the evidence on record thus arrived at a wrong conclusion.



- b. The trial magistrate erred in law and in fact by holding that the suit herein was time barred against the facts on the record thus arrived at a wrong conclusion.
8. The appellant sought for the following prayers in the appeal;
- a. That the appeal be allowed.
- b. That the honourable court do set aside the lower courts ruling and arrive at its own conclusion as it deems fit.
- c. That costs of the lower court and this appeal be awarded to the appellant.
9. When this appeal came for directions, the parties agreed to canvass the same by way of written submissions. The Appellant filed his submissions dated 21st day of November, 2024 while the Respondents filed theirs submissions dated 28/11/2024.
10. The Respondents submitted that the Appellant produced evidence to the effect that he was issued with a certificate of grant for the estate of Florence Wafula on 29/04/2015 in Bungoma HC Succession Cause No. 477 of 2014. That the Florence Wafula in the said grant is said to have died on 02/12/2002 while the agreement of sale of the suit property was executed on 14/02/2014. He concurred with the trial courts finding on the Appellant that he lacked locus standi to institute the suit. Reliance was placed in the case of Law Society of Kenya vs. Commissioner of Lands and Others Nakuru High Court Civil Case No. 464 of 2000. They argued that the suit was res judicata since there were previous suits touching on the same subject matter i.e. Bungoma CMELC No. E019 of 2022 and CMELC23 OF 2023.
11. This being a first appeal, the court is alive to its role on appeal as laid out in Section 78 of the [Civil Procedure Act](#), which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was echoed by the Court in the case of Peter M. Kariuki Vs Attorney General [2014] eKLR, where the Court held:
- “We have also, as we are duty bound to do as a first appellate court, reconsidered the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
12. Having been sufficiently guided, this Court will proceed and determine whether the trial Court erred in allowing the Preliminary Objection. It is important to first point out what constitutes a Preliminary Objection. The case Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 lends great credence to this Court. The trial Court defined Preliminary Objection 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 Newbold, 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

13. The above being the definition of Preliminary Objection, it is evident that a Preliminary Objection raises a pure point of law which is premised 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 where the court is called upon to exercise judicial discretion.
14. In determining a Preliminary Objection, the Court will take into account that a Preliminary Objection must stem from the pleadings and that it raises a pure point of law. See the case of Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held as follows: -

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
15. In the case of Quick Enterprises Ltd..Vs..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.”
16. Having reviewed the pleadings, the record of appeal and the argument before the Lower Court and having further considered the submissions made by the parties, it is clear the appeal turns on two grounds as follows:-
 - a. Whether the Appellants’ suit was statute barred as the Learned Trial Magistrate held.
 - b. Whether the Appellants had locus standi to institute the suit.
17. On the first issue, the trial court found that the Appellant had stated that he purchased the suit properties through his wife vide agreements dated 18/3/1978 while the primary suit was filed in the year 2023. That the period exceeded the 12 year period within which suits in respect of land transactions may be brought and as such, he concluded that the suit was statute barred.
18. It is trite that an action for the recovery of land under the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya has to be instituted within a period of 12 years from the date the cause of action accrued. Section 7 of the Act provides as follows:-
 7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
19. From the pleadings, it is not clear when the alleged actions of trespass complained of by the Appellant occurred. However, the Appellant in his submissions stated that the said trespass occurred in the year 2023. Therefore, and guided by the foregoing principles wherein a preliminary objection stems from the pleadings. I find that it was pre-emptive of the trial court to assume that the cause of action arose 12 years prior to the institution of this suit in the absence of pleaded facts to that end. Therefore, at this point this ground of the preliminary objection would require the court to investigate the evidence thus it is not a pure point of law.



20. The second issue for determination is whether the Appellant had locus standi to institute this suit. In the Case of Julian Adoyo Ongunga & Another —Vs- Francis Kiberenge Bondeva Migori Civil Appeal No. 119 of 2015 (2016) eKLR Mrima J stated that

'...Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain the suit even where a valid cause of action exists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is worth noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties...'

21. The Respondents contend that the suit property is registered under the name of Wamakuria Sindani Kilwake and is part of his estate. The Appellant is neither the legal representative nor the administrator of this estate, as his interests are instead linked to the estate of Florence Wafula. This clearly indicates that he lacks the legal standing to sue under Section 83(a) of the Law of Succession Act, 2008. Furthermore, given that the Appellant has acknowledged the inclusion of the suit property in Wamakuria Sindani Kilwake's estate through a succession process, both this court and the trial court lack jurisdiction to adjudicate the present matter. The issue has already been determined by another court (the succession court) which is clothed with the proper jurisdiction.

22. Having carefully considered the instant Appeal, I find it lacking merit. The Appellant herein had no capacity to institute the former suit as held by the trial court. Consequently, the judgment of the trial court is partially upheld. The result however remains the same considering that the preliminary objection on the ground of locus standi succeeds

23. Each party to bear their own costs of the Appeal.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF MARCH, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Sichangi for the Respondent.
2. Appellant-present.
3. Bett C/A.

