



Mungai (Suing as the Administrator of the Estate of Joseph Karanu Mugo - Deceased) v Mugo & 2 others (Sued as the Administrators of the Estate of Cosmas Mugo Kamau - Deceased) (Environment and Land Case E002 of 2024) [2025] KEELC 5258 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE E002 OF 2024**

**JM ONYANGO, J
JULY 10, 2025**

BETWEEN

**LUCY WANJIRU MUNGAI PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSEPH KARANU
MUGO - DECEASED**

AND

**ESTHER NGINA MUGO 1ST DEFENDANT
HOSEA GITAU MUGO 2ND DEFENDANT
MOSES GATHEGU MUGO 3RD DEFENDANT
SUED AS THE ADMINISTRATORS OF THE ESTATE OF COSMAS MUGO
KAMAU - DECEASED**

RULING

1. The Plaintiff/applicant filed Originating Summons seeking the following orders:
 - a. That L.R No. Karai/Renguti/74 be declared registered as a tenancy in common between Joseph Karanu Mugo registered against 1.25 acres and Cosmas Mugo Kamau registered as against 3.75 acres.
 - b. That an order do issue directing rectification of the Confirmed Grant in the High Court at Nairobi Succession Cause No. 324 of 2003 Estate of Cosmas Mygo Kamau (Deceased) to indicate the shared portions of the estate in L.R No. Karai/Renguti/74 as 3.75 acres.
 - c. That the District Surveyor Kiambu be ordered to restore the original boundary of the 1.25 acres of the late Joseph Karanu Mugo out of L.R No. Karai/Renguti/74.



- d. That upon issuance of orders (a), (b) and (c) above, permanent order of injunction do issue restraining the Respondents herein, their servants, agents and/or personal representatives from interfering with and/or trespassing on the 1.25 acres out of L.R No. Karai/Renguti/74 registered under Joseph Karanu Mugo.
 - e. That the share of the estate of Joseph Karanu Mugo alias Karanu Mugo in the estate of the late Cosmas Mugo Kamau be registered in the names of Peter Kariuki Karanu as per the Certificate of Confirmation of Grant issued on the 23rd September 2023 in Kikuyu Senior Principal Magistrate's Court Succession Cause No. E379 of 2021-In the Estate of Joseph Karanu Mugo (Deceased).
 - f. Any other orders that the court may deem fit to grant.
2. Together with the Originating Summons, the Applicant filed a Notice of Motion seeking a stay of the sub-division and registration of the mutation of land parcel number L.R No. Karai/Renguti/74 by the Respondents pending the hearing and determination of the application and thereafter the main suit.
 3. She also sought an order of temporary injunction restraining the Respondents from interfering with the original boundaries of land parcel number L.R No. Karai/Renguti/74 separating the 1.25 acres belonging to the estate of Joseph Karanu Mugo and 3.75 acres belonging to the estate of Cosmas Kamau Mugo and registration of the mutations of the proposed sub-divisions thereof pending the hearing and determination of the application and thereafter the main suit herein.
 4. The grounds upon which the application and the Originating Summons is premised are that the Respondents are the children of the late Cosmas Mugo Kamau and administrators of his estate. Prior to his demise, the late Cosmas Mugo Kamau had sold a portion of his land parcel no. L.R No. Karai/Renguti/74 measuring 1.25 acres to his son Joseph Karanu Mugo now deceased. As a result of the said sale, parcel number L.R No. Karai/Renguti/74 was registered in the names of Cosmas Kamau Mugo and Joseph Karanu Mugo as tenants in common in the ratio of 3.75 :1.25 acres respectively.
 5. During the lifetime of Cosmas and Joseph, the boundaries separating the two parcels of land were clearly demarcated. However, following the death of Cosmas, the Respondents who are his beneficiaries in total disregard of Joseph's share in the suit property caused the probate court to distribute the suit property in Nairobi HC Succession Cause No. 324 of 2003 *Estate of Cosmas Mugo Kamau*. Subsequently in 2018, the Respondent, moved the boundaries and allocated the beneficiaries of Joseph a portion full of graves of family members who are not closely related to them.
 6. In response to the application, the Respondents filed a Replying Affidavit sworn by Hosea Gitau Mugo, one of the administrators of the estate of Cosmas Mugo Kamau. He deposed that the applicant is his late brother's daughter. That the suit property belonged to his late father and formed part of his estate. He added that in the succession matter relating to the estate of Cosmas Mugo Kamau the Applicant was one of the beneficiaries through her deceased father but she never filed any objection to the mode of distribution of the estate nor did she file an appeal.
 7. He averred that this court lacks jurisdiction to hear and determine this matter or issue the orders sought.
 8. In addition to the Replying Affidavit, the Respondents filed a Notice of Preliminary Objection in which they raised the grounds that the application is incompetent, defective and bad in law as this court lacks the jurisdiction to determine questions arising from the deceased's estate. Secondly they stated that the application offends the provisions of the *Civil Procedure Rules* and the *Law of Succession Act*.



9. They further contended the issues relating to the distribution of the estate of Cosmas Mugo Kamau had conclusively been determined vide HC Succession Cause No. 324 of 2003 and a Certificate of Confirmation of Grant issued setting out the mode of distribution of his property including the suit property herein, and no application for review or appeal had been filed by the Applicant. That the Applicant was seeking to reopen litigation that has been put to rest through the back door contrary to the Grant issued by the High Court.
10. The court directed that the Preliminary Objection be dealt with first and that the same be canvassed through written submissions.

Plaintiff's Submissions

11. In his submissions dated 15th April 2025 learned counsel for the Plaintiff relied on the definition of a Preliminary Objection the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 cited in the case of *Rebecca Chumo v Christiana Cheptoo Chumo* (2021) eKLR where the court 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, will dispose of the suit. Examples are an objection to jurisdiction of the court, 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.

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 Preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.”

12. He thus submitted that the preliminary objection was incompetent as the issues raised in the Preliminary Objection would require evidence to be led. It was his contention that the Plaintiff had in her capacity as the administrator of the estate of her late father Joseph Karanu Mugo, filed suit to protect the interest of her late father ‘s estate and that this court had the requisite jurisdiction to deal with the matter as it concerns the issue of interference with boundaries. He submitted that the Probate court had in its ruling delivered on 14th October 2022 alluded to to the fact that right court to deal with the dispute at hand was the Environment and Land Court.
13. Counsel was of the view that since the court would need to confirm this position from the said ruling, the Preliminary Objection was improper as it did not raise a pure point of law. He added that the gist of the Originating Summons was the separation of the Estate of Cosmas Mugo Kamau and Joseph Karanu Mugo Deceased in relation to the suit property and apart from prayer (b), all the prayers were matters that were within the jurisdiction of this court.
14. To buttress his position, counsel relied on the case of *Mbutbia v Njuguna* (Environment and Land Case E018 of 2020 [2024] KEELC 5854 (KLR) August 2024 (Judgment) where the court held that

“Section 61 of the *Land Registration Act* provides for the procedure for dealing with a tenancy in common where the proprietor dies . It provides that the personal representative is entitled



to be registered by transmission as proprietor in place of the deceased and further that such registration relates back to and takes effect from the time of death of the proprietor.”

Defendants’ Submissions

15. On his part, learned counsel for the Defendant submitted that the prayer for the suit property to be registered as a tenancy in common between Joseph Karanu Mugo and Cosmas Mugo Kamau was a negative order which could not be enforced. He relied on the case of *Macfoy v United Africa Co. Ltd* (1961) 3 All E.R 1169 for the proposition that if an act is void then it is a nullity in law.
16. Secondly, counsel submitted that the prayer for rectification of Grant could only be granted by a court of competent jurisdiction under section 74 of the *Law of Succession Act* and the changes proposed by the Applicant did not fall under the scope of section 74. He submitted that this court lacks the jurisdiction to hear and determine this suit as it lies within the succession court. He relied on the case of the *Owners of Motor Vessel Lillian S v Caltex Oil Kenya Ltd* 1989 KLR 1.
17. It was counsel’s submission that this court could not entertain a matter that had already been determined by the Succession court. He referred to the ruling of Justice Maureen Odero in HC Succession Cause No. 324 of 2003.

Analysis and Determination

18. The singular issue for determination is whether the Preliminary Objection is merited. I will start by examining the Preliminary objection to see whether it falls within the definition of a P.O as laid out in the case of *Mukisa Biscuit (supra)*.
19. In the said case the court defined as P.O as follows

“...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, will dispose of the suit. Examples are an objection to jurisdiction of the court, 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.

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 Preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.

In *George Oraro v Barack Eston Mbaja* Nbi HCCC No. 85 of 1992 J.B Ojwang (as he then was) held as follows:

“A Preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through evidence”.

He further observed that:

“...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”



20. Looking at the various grounds set out in the Preliminary Objection put forth by the Defendants it is clear that they are a mixture of both points of law and points of fact which will require to be authenticated by evidence.
21. In order to determine the P.O, the court will have to peruse the Certificate of Confirmation of Grant in HC Succession Cause No. 324 of 2003, the application filed by the Plaintiff in the said suit and the ruling of Justice Maureen Odero delivered on 14th October 2022 in order to determine whether this court has jurisdiction to hear and determine this matter. On that ground alone, I find and hold that the P.O does not meet the criteria set out in the *Mukisa Biscuits case*.
22. Additionally, the prayers sought in the Originating Summons will require the parties to adduce evidence to prove their case before making a determination as to whether or not to grant the orders sought. In the circumstances, I am constrained to agree with counsel for the Plaintiff that the Preliminary Objection is incompetent and I hereby dismiss it with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 10TH DAY OF JULY 2025.

.....

J. M. ONYANGO

JUDGE

In the Presence of:

1. Miss Adhiambo for the Defendant/Applicant

2. Mr Ngigi for the Plaintiff/Respondent

Court Assistant: Hinga

