



REPUBLIC OF KENYA



KENYA LAW
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**Omar v Mambui & 3 others (Environment and Land Case
E070 of 2024) [2025] KEELC 5853 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE E070 OF 2024**

**LL NAIKUNI, J
JULY 11, 2025**

BETWEEN

MARYAM OMAR MWANAHAMISI OMAR PLAINTIFF

AND

ALI JUMA MAMBRUI 1ST DEFENDANT

NASSIRI HAMISI MWAKASIDI 2ND DEFENDANT

ERICK MURIUKI MBIRIGA 3RD DEFENDANT

THE LAND REGISTRAR, KWALE 4TH DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination is the Notice of Preliminary Objection dated 4th April 2025. It is raised by Ali Juma Mambui, the 1st Defendant/Applicant herein.
2. The objection was at the point when the matter was coming up for Hearing of Plaintiffs'/Applicants' Application dated 13th November 2024.

II. The objection by the 1st Defendant/Applicant

3. The preliminary objection was based on the following grounds:-
 - a. That the instant application and suit dated 13th November 2024, is ex facie incompetent and an abuse of the court process.
 - b. That this Honourable Court lacks Jurisdiction to entertain this matter at the first instance as the same is devoid of merit and mala fides the law, as the pecuniary Jurisdiction of the Suit property Kwale/Ukunda/160 being the mother title and measuring approximately 0.46Ha



and is undeveloped, rightly so falls under the Jurisdiction of Principal Magistrate's Court as the Value of land does not exceed Kenya Shillings Ten Million, and we firmly believe that Court 1, Kwale Law Courts is vested with jurisdiction to hear and determine the suit herein.

- c. That the application is offensive, frivolous, vexatious and or is an abuse of the Honourable Court's process.
- d. That the suit and application herein seek to waste this Honourable Court's judicious time, yet there is a lower Court with competent jurisdiction to hear and determine the matter herein, if indeed there is any valid claim.
- e. That the Suit herein is offensive and is an abuse of the Honourable Court's process.

III. The responses

4. The Plaintiff/Respondent responded to the Preliminary Objection dated 4th April, 2025 through a Replying Affidavit sworn and dated on 7th April, 2025 by Maryam Omar. She deposed that: -
 - a. She was the Plaintiff/Applicant herein with authority from the 2nd Plaintiff hence competent to swear this affidavit.
 - b. She had read and understood the Preliminary Objection.
 - c. She had been advised by her Advocate on record the Law firm of Messrs. Barayan and Associates which advice she verily believe to be true.
 - d. This Honourable Court was properly seized of jurisdiction to hear this matter, by virtue of the provision of Article 162(2)(b) of *the Constitution* of 2010 and Section 13 of the *Environment and Land Court Act* 2011.
 - e. Pursuant thereto, this Honourable Court had the Original and unlimited jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land.
 - f. Further in response, this Honourable Court operated without any monetary constraints.
 - g. The Preliminary Objection be herein dismissed with cost to the Applicants.

IV. Submissions

5. On 7th April 2025 while all parties were present in Court, they were directed to have the preliminary objection disposed of by way of written submissions. The Plaintiff/Respondent herein filed an 8 Paragraphed Replying Affidavit dated 7th April 2025 and later filed submissions dated 13th May 2025. The 1st Defendant/ Applicant submissions are dated 30th April 2025. There were no submissions by the 2nd, 3rd and Defendants herein. The court reserved the 2nd July 2025 for delivery of the ruling.

A. The Written Submissions by the 1st Defendant/Applicant

6. The Learned Counsel for the 1st Defendant through the Law Firm of Messrs. Wanjiku Omari & Co. Advocates filed their written submissions dated 30th April 2025. M/s. Wanjiku Advocate commenced her submissions by stating that she would be relying on three (3) key issues for determination.
7. Firstly, whether the preliminary objection by the 1st Defendant was merited. The Learned Counsel relied on the case of:- "Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited [1969] EA 696, the 1st Defendant asserted that a Preliminary Objection must raise a pure



point of law, assuming the Plaintiffs' facts as correct. The Learned Counsel asserted that the objection was said to protect judicial time and resources, as per the legal reasoning in the case of:- "Independent Electoral & Boundaries Commission – Versus - Jane Cheperenger [2015] eKLR". The Learned Counsel argued that this Court, established under Article 162(2)(b) of *the Constitution*, lacked jurisdiction as the matter fell within the pecuniary jurisdiction of the Magistrates' Court under the provision of Article 169 and Section 7 of the *Magistrates' Courts Act*. He asserted that the suit property being Land reference Numbers Kwale/Ukunda/160, 0.46 Ha, was valued at a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) which was within the pecuniary jurisdiction of a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) of Hon. B. Lewa, a Principal Magistrate at Kwale Law Courts.

8. It was the contention of the Learned Counsel that the Plaintiffs had bypassed the Magistrates' Court, engaging in forum shopping. This risked denying the parties their right to appeal from lower courts to this Court. In saying so, the Counsel cited the provision of Order 2, Rule 15 of the Civil Procedure Rules, 2010. The Counsel argued that the suit was frivolous, vexatious, and an abuse of court process, warranting dismissal in limine.
9. In conclusion, the 1st Defendant sought for costs, asserting the Court's discretion to award them for defending a misguided suit.

B. The Written Submissions by the Plaintiff/Respondent

10. While opposing the objection, the Law firm of Messrs. Barayan & Associates filed submissions dated 13th May 2025 on behalf of the Plaintiffs/Respondents in opposition to the 1st Defendant's/ Respondent Preliminary Objection dated 4th April 2025. The Plaintiffs/Respondents submit that the key issues for determination was whether the objection was merited.
11. The Learned Counsel asserted that this Honourable Court has original jurisdiction under the provision of Article 162(2)(b) of *the Constitution* of 2010 and Section 13 of the *Environment and Land Court Act*, No. 19 of 2011, to hear all land disputes, including those concerning title and tenure (See Boniface Waweru Mbiu v- Versus . Mary Njeri & Another [2005] KEHC). They argued that the Preliminary Objection failed as it relied on disputed facts, such as the property's value and existence allegedly non-existent per official searches. The said case of Mukisa Biscuit (Supra) required objections to be on pure points of law, not facts requiring ascertainment. Further, the Learned Counsel cited "Mutege Mugwetwa – Versus - Chief Officer Lands & 4 Others [2019] KEELC", they contended that pecuniary jurisdiction was not a bar when other issues like title disputes was raised, which required full hearing. The objection was misconceived and should be dismissed with costs.

V. Analysis and Determination

12. I have keenly considered the objection raised through the Notice of Preliminary Objection dated 7th April 2025 by the Defendant herein, the rival written submissions, the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
13. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) issues for its determination. These are: -
 - a. Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 7th April 2025 meets the threshold founded in Law and precedents.
 - b. Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 7th April 2025



- c. Who will bear the Costs of the Objection?

Issue No. a) Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 7th April 2025 meets the threshold founded in Law and precedents.

14. Under this sub – title, the Honourable Court would start by setting out what a proper preliminary objection is. According to the Black Law Dictionary a preliminary objection is defined as:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

15. In the case of “Nitin Properties Limited – Versus - Singh Kalsi & Another [1995] eKLR” the court stated thus; -

‘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.’

16. Additionally, the Tanzanian Court of Appeal sitting in Dar es Salaam, in the case of:- “Karata Ernest & others – Versus - Attorney General (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), expounded the issue of preliminary objections in a more exhaustive manner as follows: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.’

17. I reiterate that the court in ‘the Classicus locus’ case of:- “Mukisa Biscuits Manufacturing Co Limited (Supra)” described a preliminary objection as hereunder:-

‘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.’

Sir Charles Newbold, JA in the same case 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.'

18. Further, the Supreme Court addressed its mind on this issue in the case of “Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Limited & 3 Others [2015] eKLR” and stated:-

“Thus, a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

19. Arising from the above, it is clear that a preliminary objection should raise pure points of law and which are argued on the assumption that all facts are correct. However, a preliminary objection cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

20. The instant preliminary objection herein questions this court’s jurisdiction to handle this matter. It is well settled that jurisdiction is the backdrop against with the court is mandated to engage in determination of any matter brought before it, without it the court has no business proceeding with the matter. The Court of Appeal stated in the now well celebrated cases of “Owners of Lillian Vessel “S” – Versus – Caltex oil (Kenya) Limited” (1989) eKLR and “Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others – Versus - Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another – Versus - Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 expressed itself on the doctrine of jurisdiction in general as follows:

“Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows: By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

21. Critically speaking, the objection on jurisdiction is largely based on the provisions of Section 7 of the Magistrates’ Court Act as well as Section 13 of the *Environment and Land Court Act*, No. 19 of 2011. Guided by the dictum of the Court Appeal above, it is clear that the allegation that this court lacks jurisdiction is indeed a pure point of law. Jurisdiction is central in every litigation before court; without jurisdiction the court of law cannot take any step in making a finding of a matter before it. It is this court’s finding that the preliminary objection on this point is properly raised.



Issue No. b). Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 7th April 2025

22. Having satisfied myself that the preliminary objection on the point of jurisdiction is properly raised, I will embark on the merits of the said preliminary objection. The Environment & Land Court is constitutional creature. The Article 162(2)(b) of *the Constitution* of Kenya 2010 grant this Court original jurisdiction over land disputes, including title and tenure, irrespective of pecuniary value.

162. System of courts

1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to, land.
3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
4. The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.

23. To give effect to Article 162 (2) (b) and (3) enacted the *Environment and Land Court Act*, No. 19 of 2011 which under Section 13 of said Act provides for the Jurisdiction the court as:

13. Jurisdiction of the Court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.



4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
 5. In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
 - a. interim or permanent preservation orders including injunctions;
 - b. prerogative orders;
 - c. award of damages;
 - d. compensation;
 - e. specific performance;
 - f. restitution;
 - g. declaration; or
 - h. costs.
24. While the provision of Section 7 of the *Magistrates' Courts Act*, Cap. 10 outlines the jurisdiction of Magistrate Court in terms of Civil. The Magistrates' Court Act provides that:-
7. Civil jurisdiction of a magistrate's court
 1. A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
 - (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate.
 2. The Chief Justice may from time to time, by notice in the Gazette, revise the pecuniary limits of jurisdiction set out in subsection (1), taking into account inflation and change in prevailing economic conditions.
 3. A magistrate's court shall have jurisdiction in proceedings of a civil nature concerning any of the following matters under African customary law—
 - a. land held under customary tenure;
 - b. marriage, divorce, maintenance or dowry;
 - c. seduction or pregnancy of an unmarried woman or girl;
 - d. enticement of, or adultery with a married person;



- e. matters affecting status, and in particular the status of widows and children including guardianship, custody, adoption and legitimacy; and
 - f. intestate succession and administration of intestate estates, so far as they are not governed by any written law.
25. The provision of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 provides:
- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
 - (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
 - a. Disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - b. Matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.
26. It is common knowledge that the former Chief Justice had by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 to have the magistrates court handle cases involving occupation and title to land. The gazette notices include Gazette Notice No 1472 dated March 1, 2016, Gazette Notice No 1475 dated March 14, 2016, Gazette Notice No 11930 dated December 5, 2017 and Gazette Notice No 2575 dated February 28, 2019. Thus, there exist within the magistrates' courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land.
27. Therefore, the question that arises is whether the various gazzetments oust the jurisdiction of the ELC Court in this matter? I would say no by dint of the original jurisdiction of this court to determine issues of ownership and occupation of land. However, it is proper for cases to be filed in the lowest court taking into account pecuniary jurisdiction. In the event that a suit finds its way before this court and it is proved by evidence that the value of the property is way below the pecuniary jurisdiction of this court, then the court will always in the interest of justice transfer a suit in this regard to the lower court but not dismiss the suit as prayed on this basis.
28. Additionally and as pointed out by the Plaintiffs, the value of the suit property has not been pleaded and established as such the court cannot make assumption that the value of the suit property is below its pecuniary jurisdiction. Moreover, this aspect can only be ascertained through such evidence as would indicate the value of the suit property.
29. Now back to the main issue herein and which is on the merit of the preliminary objection. Clearly, there is need to consider factual evidence and the court will exercise its judicial discretion on the same by hearing both parties in order to establish the value of the suit property. Rightly as highlighted in Mutegi Mugwetwa [2019] objections on pecuniary jurisdiction may be addressed at trial when intertwined with substantive issues. The Plaintiffs' claim involves a disputed title (Kwale/Ukunda/160's existence), which falls within this Court's mandate. The 1st Defendant's claim that the suit property is valued at a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) is contested by the Plaintiffs, who assert the property's non-existence and lack of valuation evidence. This introduces a factual dispute, undermining the objection's basis as a pure point of law. The Preliminary objection, automatically



ceases to be a point of law and cannot be sustained. Clearly, that means adducing of evidence which can only be achieved through full trial.

30. While Section 7 of the *Magistrates' Courts Act* assigns pecuniary limits of sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) for a Principal Magistrate, the Environment and Land Court's jurisdiction is not strictly limited by value when constitutional or statutory land issues arise. The Plaintiffs' averment of a title dispute justifies this Court's jurisdiction. The Defendants' reliance on the case of:- "Kagenyi – Versus - Musiramo" is misplaced, as it applies to suits filed in courts wholly lacking jurisdiction. Here, this Court has statutory jurisdiction, and the objection hinges on a disputed factual premise property value.
31. The objection fails due to its reliance on contested facts and the Court's clear jurisdiction over land disputes. Dismissing the suit at this stage would prematurely deny the Plaintiffs a hearing on substantive issues. Accordingly, the Preliminary Objection lacks merit and is hereby dismissed. The matter shall proceed to full hearing for substantive determination.

Issue No. c). Who will bear the Costs of the Objection?

32. It is now well established that the issue of Costs is the discretion of Courts. According to the Black Law Dictionary, "Cost" is defined to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other". The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter. The case before Court being a Constitutional Petition, Rule 26 (1) and (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules 2013) provides: -

- "(1) The award of costs is at the discretion of the Court.
- (2) In exercising its discretion to award costs, the Court shall take appropriate measures to ensure that every person has access to the Court to determine their rights and fundamental freedoms."

33. Further, these legal principles were upheld in the Supreme Court case of "Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR" and the Court of Appeal cases of "Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR" the Courts held:-

".....the basic rule on attribution of costs is that costs follow the event....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case".

34. In the instant case, the Preliminary objection raised by the Defendant has failed to sustain the fundamental threshold of such an objection in law and thus it is been defeated. It follows that the Plaintiff is entitled to the costs thereof.

VI. Conclusions & Disposition

35. Consequently, upon causing an in-depth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are: -



- a. That the Notice of Preliminary Objection dated 7th April, 2025 be and is hereby found to lack merit and thus it is dismissed entirely.
- b. That all parties are granted 21 days to fully comply with the provisions of Orders 7 and 11 of the Civil Procedure Rules, 2010.
- c. That for expediency's sake, there be a mention on 21st October, 2025 for purposes of conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010. There should be a hearing date of the matter on 16th December, 2026 through physical means.
- d. That the costs of the Preliminary objection be awarded to the Plaintiff.

It Is Ordered Accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 11th DAY OF JULY 2025

.....

**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT**

AT

KWALE.

Ruling delivered in the presence of: -

- a. Mr. Daniel Disii, the Court Assistant.
- b. M/s. Nyawira Advocate for the Plaintiff/Respondent.
- c. M/s. Wanjiku Advocate for the 1st Defendant/Applicant.
- d. Mr. Kai Advocate holding brief for Mr. Mtana for the 2nd Defendant.
- e. No appearance for the 3rd and the 4th Defendants.

