



**Kabebia v Mbiti (Being Sued as the Legal Representative of the Estate of Mbiti Mutua alias Mutua Mbiti - Deceased) (Environment & Land Case 15 of 2023) [2024] KEELC 1746 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1746 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 15 OF 2023  
A KANIARU, J  
FEBRUARY 14, 2024**

**BETWEEN**

**NTHIGA N'MBANYA KABEBIA ..... APPELLANT**

**AND**

**VIJINIA WANTHIGA MBITI (BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MBITI MUTUA ALIAS MUTUA MBITI - DECEASED) ..... RESPONDENT**

**RULING**

1. This ruling is on a Preliminary objection dated 13.09.2023 and filed on the same date. The objection has been brought by the Respondent – Vijinia Wanthiga Mbiti - as the Legal Representative of the Estate of Mbiti Mutua and the points on which it is based are set out here *ipsisima verba*:
  - i. The Appeal is improperly before this court as the Environment and Land Court has no jurisdiction to entertain appeals from decisions in Probate and Administration (succession) matters.
  - ii. That an appeal from any decision in Probate and Administration matters only lies in the High Court and not in the Environment and Land Court.
2. The Preliminary objection was canvassed through written submissions. The Respondents submissions were filed on 27.10.2023 whereas the Appellants submissions were filed on 15.11.2023.
3. The Respondent submitted that the Appellant has appealed against the Ruling delivered on 26.05.2023 in Succession Cause No. 175 of 2017 in the Senior Principal Magistrates Court at Siakago. That the Appellant is the protestor in Succession Cause No. 175 of 2017 at Siakago whereas the Respondent is the Petitioner in the said succession cause. That the Respondent filed the said succession cause at the Senior Principal Magistrates Court at Siakago in respect of the Estate of her father, Mbiti



- Mutua alias Mutua Mbiti, who is deceased. That the Appellant then filed an objection in the said cause claiming that Land Parcels No. Evurore/Nthambu/1778 and 1779 were not part of the Estate of Mbiti Mutua as the deceased only held the said parcels of land in trust for a section of the members of the Mukera family.
4. It was submitted further that this court lacks jurisdiction to entertain the Appeal by virtue of Section 13 of the *Environment and Land Court Act*, which provides for its jurisdiction. That the administration of estates of deceased persons is governed by the *Law of Succession Act* and not any other law. That Section 13(4) of the *Environment and Land Court Act* speaks to the jurisdiction of this court as an Appellate court whereas Section 50(1) of the *Law of Succession Act* provides for the place or court where appeals in succession matters such as Succession Cause 175 of 2017 at Siakago lie. It was further submitted, that the courts are guided by the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA in determining the merits or demerits of a Preliminary Objection.
  5. The case of *Owners of the Motor Vehicle M.V Lilian v Caltex Oil (Kenya) Ltd* (1989) Klr was also cited where it was observed that jurisdiction is everything and without it the court has no power to make one more step. The case of *Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & 2 others* (2012) eKlr was also cited where it was observed that a court's jurisdiction flows from either *the Constitution* or legislation or both and further the case of In The Matter of the Interim Independent Electoral Commission (Applicant) Constitutional Application No. 2 of 20111 was cited to emphasize the importance of courts confining themselves within their jurisdiction. The court was urged to note that the Appeal herein ought to have been filed in the High Court and therefore the said appeal and the Application dated 20.06.2023 ought to be struck out with costs.
  6. The Appellant on the other hand submitted that the jurisdiction of this court is set out under Section 13 of the *Environment and Land Court Act*. That to determine whether this appeal falls under the jurisdiction of this court, one must examine the contents of the Application dated 20.06.2023 and all the annexed documents. That the Appeal before this court is in relation to ownership of land parcels Evurore/Nthambu/1778 and 1779 which is in the domain of the land court. That it is not in contention that the appeal arises from Siakago succession cause No. 175 of 2017. However the issues that arise are on post transmission of the said parcel of land in favour of the Appellant and that these issues no longer fall under the purview of the succession court. That the Appellants claim is that the said parcels of land belong to the Mukera clan members which the Respondents late father, Mutua Mbiti, who is deceased held in trust for them as the chairman; and that instead of distributing the land to the clan members, he distributed the said land parcels to his family members.
  7. It was further submitted that the Appellant filed the appeal as he was dissatisfied with the ruling of 26.05.2023. It was urged that in the event that the court finds that it is not mandated to determine this appeal, the matter be placed in the proper court in the interest of justice and in the spirit of Article 159(2) of *the Constitution*. The case of *Josiah Ouma Mbori & Anor v Edward Odhiambo Oria (Being the legal representative of the estate of the late Chrysanthus Onyuka)* (2020) Eklr was cited to support their submissions.
  8. I have considered the preliminary objection as well as the rival submissions. The issue for determination is whether the preliminary objection has merit.



9. The Court of Appeal in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 laid out the circumstances under which a preliminary objection may be raised as follows:

“ 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 effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a point 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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

10. From the foregoing provisions, it is apparent that in order for a preliminary objection to hold, it must be demonstrated by the party bringing the preliminary objection that there is no contest as to the facts; that the preliminary objection has been raised on a point of law. The nature of the issue of jurisdiction goes to the heart of every matter and is potentially capable of disposing of a suit. It is therefore proper ground to raise in a preliminary objection.
11. It is trite law that where the jurisdiction of a court to hear a dispute before it is challenged, the court must determine that question at once, and should it find that it lacks jurisdiction, it should down its tools. This position was set down by the court in the cases of *The Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd* [1989] eKLR as cited in *Virginia Wamubu Kamiti & another v Lydia Nyambura Mabinda & 5 others* [2022] eKLR

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...”

Similarly in *Kalpna H Rawal & 2 others v Judicial Service Commission & 2 others* [2016] eKLR as cited therein, the court cited with approval the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 *Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* where Walter Samuel Nkanu Onnoghen, JSC expressed himself as follows: -

“...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”

The jurisdiction of a court flows from *the Constitution* and or statute or both. This position was affirmed by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where it pronounced itself thus:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. .... Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must



operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

12. The Appellant herein had filed an application dated 20.6.2023 accompanied by a Memorandum of Appeal dated 14.06.2023. Through the application, the Appellant was seeking to stay the ruling made on 26.05.2023 in Siakago Succession Cause No. 175 of 2017. He was also seeking to appeal the said ruling. The application as well as the appeal was met with the Preliminary Objection herein which challenges the jurisdiction of this court to entertain the same, as according to the Respondent, the nature of the matter being appealed against was a succession one and therefore the right forum to file the Appeal was in the High Court.
13. The jurisdiction of the Environment and Land Court emanates from Article 162(2)(b) which provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. To give effect to Article 162 (2) (b) of *the Constitution*, Parliament enacted the *Environment & Land Court Act*. Section 13(2) of the said Act provides as follows:-
  - “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 inland; and
    - (e) any other dispute relating to environment and land.”
14. The *Law of Succession Act* under Section 50 (1) provides for the jurisdiction of the High Court to determine appeals on matters falling under the Act as follows;
  1. An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.
15. From the above provisions of law, it is clear that the jurisdiction to determine appeals on succession matters is vested in the High Court. It is not in dispute that the ruling sought to be appealed from is the result of a succession cause in Siakago the same being Succession Cause No. 175 of 2017. This being an appeal, it cannot be said that the issues raised in the appeal are post transmission issues of the suit lands to the Appellant as has been suggested by the Appellant. An appeal means that this court has to re-evaluate and re-assess the lower court case and the evidence adduced or produced therein to determine the issues complained of by the Appellant. This court lacks the capacity and jurisdiction to determine the same, which means that the said Notice of Motion as well as the Appeal cannot be entertained by this court. The proper place for the matter is the high court.
16. In essence, I find the preliminary objection dated 13.09.2023 has merit. I am therefore inclined to dismiss the appeal for want of jurisdiction. It would otherwise have been in the best interest of the parties as well as my delight to transfer the appeal to the High Court for determination. However my



hands are tied by the law in that regard as courts have ruled previously that a court lacking jurisdiction to entertain a claim, has no power to transfer the same to another court as the claim is a nullity ab initio. Such matter can not be given life by transferring it to another court with jurisdiction. In making my decision, I am guided by the cases of *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR where the court held that;

“The suit is to be transferred from a Court with no jurisdiction, then it means it is not only an incompetent suit, but also a nullity in law and thus there is nothing to transfer.”

17. The court in *Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another*[2012]Eklr also observed that;

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further.”

18. The preliminary objection herein is therefore upheld and the appeal before me is hereby dismissed with costs to the respondent.

**RULING DATED SIGNED and DELIVERED in open court at EMBU this 14<sup>th</sup> day of FEBRUARY, 2024.**

In the presence of Ms Masaba for appellant, Akotsi for Okwaro for respondent and Leadys – Court Assistant.

**A. KANIARU**

**JUDGE – ELC EMBU**

**14.2.2024**

