



**Kimali v Muthembwa & another (Environment & Land Case
E022 of 2022) [2024] KEELC 794 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 794 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND CASE E022 OF 2022

TW MURIGI, J

FEBRUARY 14, 2024

IN THE MATTER OF THE ESTATE OF KIMALI MUTHEMBWA (DECEASED)

BETWEEN

MOSES KIOKO KIMALI PLAINTIFF

AND

COSMUS MULWA MUTHEMBWA 1ST DEFENDANT

ALICE MUUSI KISYULA 2ND DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated on 13th September, 2022 raised by Defendants' on the grounds that: -
 - 1) That this Honourable Court does not have jurisdiction to entertain the suit herein either in form or in substance.
2. On basis of the objection, the Defendants urged the Court to dismiss the suit with costs.
3. The preliminary objection was canvassed by way of written submissions.

The Defendants' Submissions

4. The Defendants' submissions were filed on 24th April, 2023.
5. On their behalf, Counsel submitted that the Plaintiff ought to have attached a grant of representation since he has sued the Defendants in his capacity as a beneficiary of the Estate of Mutuli Kimali (Deceased). Counsel submitted that this Court lacks jurisdiction to declare the Plaintiff and his siblings as the beneficiaries of the Estate of their late mother or to redistribute the Estate of their late grandfather, Kimali Muthembwa.



6. Counsel submitted that this Court derives its jurisdiction from Article 162(2)(b) of the Constitution in addition to Section 13 of the Environment and Land Court Act. Counsel submitted that matters touching on inheritance lie within the jurisdiction of the probate and succession court.
7. Counsel further submitted that Section 82 of the Law of Succession Act confers power to a personal representative to file a suit on behalf the deceased estate. Counsel argued that the Plaintiff does not have locus standi to institute the instant proceedings. Counsel urged the Court to dismiss the suit with costs.
8. To buttress her submissions, Counsel relied on the following authorities: -
 - i. Nashon Onyango Otieno v George Onyango Otieno [2021] eKLR
 - ii. Dinah Chepkering Kembu v Annah Kimitei & another [1999] eKLR
 - iii. Beatrice Michere Mugo v James Muriithi Gichura [2015] eKLR

The Plaintiff's Submissions

9. The Plaintiff's submissions were filed on 12th June, 2023.
10. On his behalf, Counsel submitted that the preliminary objection herein is based on disputed facts as opposed to pure points of law. Counsel contended that the instant preliminary objection was filed in order to delay the hearing of this suit. Counsel relied on the provisions of Section 13 (2) of the Environment and Land Court Act to advance the position that this Court has the requisite jurisdiction to hear any dispute relating to environment and land.
11. Counsel further submitted that the present suit does not fall under the realm of a probate court because the dispute is in respect of the fraudulent and illegal acquisition of title deeds for the suit property of which the Plaintiff has ownership rights. It was submitted that the Defendant did not appeal or review the decision made in Makueni Land Disputes Tribunal delivered on 4th July, 2007 which was duly adopted by the subordinate court.
12. Counsel submitted that after the award of the Tribunal was adopted as the judgment of the court, it crystallized the Plaintiff's rights over the suit property and therefore, he is well placed to sue the Defendants in his own capacity. Counsel further contended that the provisions of the Law of Succession Act are not applicable in the present suit since the suit property is registered in the names of the Defendants and not of the deceased. Concluding his submissions, Counsel submitted that the preliminary objection is devoid of merit and urged the court to dismiss the same with costs.
13. To buttress his submissions, Counsel relied on the Plaintiffs list and bundle of authorities dated 9th June, 2023.

Analysis and Determination

14. Having considered the preliminary objection in light of the pleadings and the rival submissions, the only issue that arises for determination is whether this court has the requisite jurisdiction to hear and determine this suit.
15. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

16. Further on Sir Charlse Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

17. In *Oraro vs Mbaja* 2005 eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

18. For a preliminary objection to be valid, it must be on a point of law and must be founded on facts that are not in dispute. It should not be proved through facts or evidence or deal with disputed facts.

19. The Defendants’ preliminary objection is based on the grounds that this Court lacks jurisdiction to hear and determine this suit because it falls under the realm of the *Law of Succession Act*.

20. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the Defendant’s Preliminary Objection is based on a pure point of law. This court is called upon to determine whether it has jurisdiction to hear and determine this suit.

21. It is trite law that jurisdiction is everything and without it the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of *Owners of Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited* (1989) eKLR where the Court held as follows:-

“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...”

22. Similarly, the Supreme Court in the case of *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others* [2012] eKLR 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....”



23. A court derives its jurisdiction from the Constitution or legislation or from both. The jurisdiction of this court is derived from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act. Article 162(2) (b) of the Constitution 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.
24. To give effect to Article 162 (2) (b) of the Constitution, Parliament enacted the Environment & Land Court Act. Section 13(1) and (2) of the said Act provides as follows:-

“ 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, chose in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”
25. In paragraphs 10 – 13 of the Plaintiff, the Plaintiff pleaded that the Defendants unlawfully and fraudulently subdivided the suit property into Parcel Nos. 2103 and 1364 in the wake of the Land Disputes Tribunal’s decision which was subsequently adopted by the subordinate court. That the said decision required that the suit property be divided equally into three which the Defendants contravened.
26. The prayers as sought by the Plaintiffs in their Plaintiff dated 3rd August, 2022 are based on occupation and ownership of land.
27. In Republic v Senior Principal Magistrate Shanzu & 5 others; Two Thirds Investment Limited (Interested Party); Ex-parte Kalama Said Kalama & 40 others [2020] eKLR the court held that:-

“The matter herein being an application for judicial Review orders arising from a dispute over land in my view, falls within the purview of Article 162(2)(b) of the Constitution and the Environment and Land Court Act. In my view, it is irrelevant that the matter arose in a criminal court. As long as the dispute touches on land and environment, the court no doubt has the power to hear and determine the matter. I note that the Constitution and the



Environment and Land Court Act did not exclude the court’s jurisdiction where the dispute relates to the environment and land.”

28. At paragraph 13 of the Defendants’ submissions, Counsel raised a fresh preliminary objection that the Plaintiff lacks the legal capacity to file the suit on behalf of the Estate of his deceased mother because he is not a personal representative in accordance with Section 82 of the Law of Succession Act. Counsel submitted as follows;

“ 13. It is further our humble submission that not only does this honourable court lack jurisdiction to entertain the case herein, the Plaintiff lacks legal capacity to file the suit herein on behalf of the estate of his late mother without a grant of letters of administration. Section 79 of the Law of Succession Act provides that all the property of a deceased person shall vest on the personal representatives who are the administrators or executors of the deceased’s estate. The personal representative has powers under Section 82 of the Law of Succession Act to file suit for and on behalf of the deceased person. As it stands, the Plaintiff does not have locus standi before this honourable court.”

29. It is not permissible to raise a fresh preliminary objection midway within Counsel’s submissions as that would amount to an ambush on the part of the opponent who may not have sufficiently prepared to respond accordingly.

30. In so finding, I am persuaded by the holding in the case of Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR where the Court of Appeal held as follows: -

“ A party coming to court seeking a remedy or to have a claim by the other side struck out ought to make full disclosure of material facts or the specific law that has been breached. In our view, the legal status of the respondent regarding its officials was an important matter that was in issue before the trial Judge and the respondent was obliged to make a clear disclosure. The learned Judge needed to know the actual legal status of the respondent and its officials which was in issue while dealing with the preliminary objection.”

31. It is crystal clear that this Court has jurisdiction to hear and determine the dispute before it.

32. The upshot of the foregoing is that the Preliminary Objection dated 13th September, 2022 is devoid of merit and the same is dismissed with Costs to the Plaintiffs.

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HON. T. MURIGI

JUDGE

**RULING DELIVERD DATED AND SIGNED VIA MICROSOFT TEAMS THIS 14TH DAY OF
FBRUARY 2024.**

IN THE PRESENCE OF:

Ms. Kitenge for the Defendants.

