



**Joseph v Kathangichu (Environment and Land Appeal E016 of 2023)
[2024] KEELC 6919 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E016 OF 2023
A KANIARU, J
OCTOBER 16, 2024**

BETWEEN

JAMES NYANJUI JOSEPH APPELLANT

AND

NYAGA KATHANGICHU RESPONDENT

RULING

1. This is a ruling on a preliminary objection filed here on 8.2.2024 vide a notice of even date. The objection is premised on eight postulates as follows:
 1. The appellants' appeals are a non-starter, incompetent and fatally defective
 2. That ELC Appeal No Eo16 of 2023 is fatally defective and bad in law having been lodged by a deceased person.
 3. That Purity Njeri Kinyanjui lacks the locus stand, to prosecute ELC Appeal No E016 of 2023.
 4. That ELC Appeal No E016 of 2023 is incompetent and otherwise an abuse of the court process being an appeal challenging the jurisdiction of the trial court which issue the alleged Purity Njeri Kinyanjui did not raise at the trial Court.
 5. That ELC Appeal No E016 of 2023 is incompetent and otherwise an abuse of the court process being an appeal where exparte judgement was delivered against the appellant.
 6. That ELC Appeal No E014 of 2023 is incompetent and bad in law being an appeal against an order that has been overtaken by events, the order having been made on 25.7.2023 and final judgment having been delivered on 22.8.2023.
 7. That ELC Appeal No E014 of 2023 is fatally defective having been instituted by a non-party to the suit at the trial court.



8. That the appellants appeals as consolidated are bad in Law and otherwise an abuse of the court process and the same ought to be dismissed with costs.
2. The objection was canvassed by way of written submissions. The respondents submissions are dated 19.9.2024 while the appellants two sets of submissions are dated 20.9.2024 and 23.9.2024.
3. The respondent submitted, inter alia, that ELC Appeal No E016 of 2023 is fatally defective as it was filed in the name of a deceased person. The deceased person is said to be James Nyanjui Joseph indicated in the appeal record as the first appellant. One Purity Njeri Kinyanjui, said to be behind the filing of the appeal, was faulted for not explaining her relation to the deceased appellant and she was also said to have failed to annex a grant from any probate court. To drive the point home, the case of *Touristick and Another Vs Jane Mbeyu and Another (1993) eKLR* was cited and quoted.
4. Further, ELC Appeal No E016 of 2023 was said to be incompetent for raising issues not raised in the trial court. The issue of jurisdiction was for instance said not to have been raised at the trial court. Purity Njeri Kinyanjui who has raised the issue here, was therefore said to be estopped from doing so. Further, Purity was said not to have filed a defence and/ or participated in the hearing at the trial court. She didn't even file an application to set aside the *ex parte* judgment entered by that court. She can not therefore be entertained to do so in the appeal. The decided case of *Mary Njoki Wachira Vs John Mboremu Moru (2020) eKLR* was proffered for persuasion and/or effect.
5. The respondent also submitted that ELC Appeal No E014 of 2023 is against an order of 25.7.2023 concerning an application to arrest judgment and grant the applicant leave to defend the suit. The order to arrest judgment was declined and judgment was subsequently delivered. That being the case, an appeal against that order is said to be overtaken by events. The respondent cited and quoted the case of *Natural World Mombasa Safaris Ltd Vs Karuri: Civil Appeal E045 of 2022: (2022) (Ruling)* to make the point.
6. The court was ultimately urged to allow the objection.
7. The 1st appellants started his submissions by giving some history and antecedents surrounding the matter. He then said that some grounds raised in the objection are not points of law. Noting that one of the grounds alleges that a deceased Party is shown in the memo of appeal as a living party participating in the appeal, it was submitted that that was a mistake that can be rectified through amendment. It was submitted further that the person to be brought on board to replace the deceased party already has a grant *ad litem* from the probate court and is therefore a proper party to take the place of the deceased party.
8. The issue of jurisdiction raised by the respondent in the preliminary objection was said to have been also raised in the lower court and the respondent was faulted for alleging that it was being raised in the appeal for the first time. Further, there was an allegation that the order being appealed against was overtaken by events. It was submitted that this was not the case as the order has not been implemented.
9. Ultimately, the court was urged to dismiss the objection.
10. The 2nd appellant on his part submitted that it is necessary to hear the appeal as his application for joinder in order to participate in the lower court proceedings was dismissed. the court was urged to hear the appeal on merit.
11. I have considered the objection as raised, the rival submissions, and the entire court record generally. The essence and definition of what a preliminary objection is was spelt out in the decided case of *Mukisa Biscuit Co Ltd Vs West End Distributors Ltd (1969) Ea 696* as follows:



Per Law JA:

“So far as I am aware, a preliminary objection consist of a pure point of law which has been pleaded, or which arises by clear implication 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, 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”

Per Sir Charles Newbold P:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued in the assumption that all the facts pleaded by the other side are correct. It can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

12. It is a debatable point whether the points raised in the objection are pure points of law. Infact one of the appellants has submitted that they are not. Majorly, the points raised in the objection allege that the appeal is “defective” “incompetent” “bad in law” or a “non starter”. All this is alleged without pointing out the specific provisions of law violated. The appellants have seriously contested these allegations and have emphasized the need for the matter to be heard on it merits. I agree with the appellants. Even in the submissions filed by the respondent, no single or specific provision of law is cited to demonstrate the statutory anchor on which some points are premised.
13. Further, even on points that can be said to be proper points of law – Like Jurisdiction or the issue of lack of Locus Standi – the appellants have been able to counter the respondents submissions. On Locus Standi, for instance, the inclusion of a deceased party as appellant was said a remediable mistake. The person intended to substitute the deceased party was well shown to have the appropriate grant to enable substitution. On jurisdiction, contrary to the respondents averments that the issue was never raised in the lower court, the appellants submitted that it was. Whether it was raised or not is therefore a contested issue and a contested issue is never suitable for consideration by the court by way of a preliminary objection.
14. The scenario that emerges then is that what the respondent has filed as a preliminary objection lacks the necessary attributes or character of a proper preliminary objection. In *Oraro Vs Mbaja* (2005) KLR 141, Ojwang J (as he then was) delivered himself as follows concerning what is a proper preliminary objection:

“A preliminary objection correctly understood is now well defined as, and declared to be, a point of law which must not be blurred by factual details liable to be contested, and in any even to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seek 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”
15. The need to hear any given case on its merits was emphasized in the cases of *Peter Ngugi Kabiri Vs Esther Wangari Githinji & Another* (2015) Eklr And *Kutima Investments Limited Vs Muthoni Kihara & Another* (2015) Eklr where the court of Appeal pointed out that it is a fundamental right for the parties to be heard on merits. This position is actually the desirable way forward in this matter.



16. It is in the light of all the foregoing that the objection as raised fails to meet the criteria of a proper preliminary objection. Its merits have not also been demonstrated. I therefore dismiss it. Costs in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH OCTOBER, 2024.

A. KANIARU

JUDGE – ELC, EMBU

In the presence of:-

Muchangi for 1st Appellant,

Maina Kamau for 2nd Appellant and

Ms Mukami for Respondent.

Court Assistant – Leadys

