



REPUBLIC OF KENYA



Munikah & 3 others (Suing as the Personal Representatives and Administrators of the Estate of Grace Jewel Ayiemba alias Jewel Grace Ayiemba alias Jewel Grace Munikah) v Attorney General & 5 others (Environment and Land Case Civil Suit E001 of 2023) [2024] KEELC 13506 (KLR) (2 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE CIVIL SUIT E001 OF 2023**

AE DENA, J

DECEMBER 2, 2024

BETWEEN

**JAMES SIMON MUNIKAH 1ST PLAINTIFF
VIOLA JEANE RANGINYA 2ND PLAINTIFF
NELLY MUNIKAH 3RD PLAINTIFF
CHRISTOPHER MUYELA MUNIKAH 4TH PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES AND ADMINISTRATORS
OF THE ESTATE OF GRACE JEWEL AYIEMBA ALIAS JEWEL GRACE
AYIEMBA ALIAS JEWEL GRACE MUNIKAH**

AND

**THE ATTORNEY GENERAL 1ST DEFENDANT
BENJAMIN NOBALLA AMONYI 2ND DEFENDANT
HIGGIN WAMBUGHA MWADILO 3RD DEFENDANT
DREAMS ODV LIMITED 4TH DEFENDANT
HAMAMAH LIMITED 5TH DEFENDANT
SIMON WACIRA MURIUKI 6TH DEFENDANT**

RULING

1. The preliminary objection subject of this ruling is dated 7/10/2024. It is raised by the 2nd and 3rd Defendants pursuant to the provisions of Section 7[1] of the Magistrate Courts [Act No 26 of 2015](#). It



is contended that the Plaintiffs suit is wholly incompetent, fatally defective and ought to be struck out and dismissed with costs for reasons that ;

- a. This Honourable court lacks jurisdiction to entertain and take cognisance of the plaintiffs' suit in light of the express mandatory provisions of section 7[1] of the Magistrates Court [Act No 26 of 2015](#) pursuant whereeto, the law requires a suit whose monetary value is less than twenty million shillings to be filed in the Magistrate's Court.
- b. In view of the above, the Applicants suit is bad in law and a blatant abuse of the court process and should be dismissed and orders vacate.

Submissions

2. Pursuant to the court directions issued on 9/10/2024, the preliminary objection was canvassed by way of written submissions.

Defendants/Applicants Submissions

3. The Defendants submissions are dated 13th October 2024 and raise the following issues for determination; -
 - a. Whether the Notice of Preliminary Objection as taken is well founded, valid and merited;
 - b. Whether this Honorable Court lacks General Jurisdiction and Pecuniary Jurisdiction over this matter;
 - c. Whether the suit should be dismissed and/or struck out; and
 - d. Who should bear the costs of the Preliminary Objection.
4. On whether the objection is well founded, valid and merited, the Applicants submit that for a preliminary objection to succeed it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. That in the present case, the preliminary objection has undoubtedly been raised on a pure point of law and is argued on the assumption that facts as pleaded by the Plaintiffs are correct. That it was evident that the Defendant has met the required threshold of raising a preliminary objection as set in the Mukisa Biscuit case. The court is referred to the case of James Gathirwa Ngugi v Multiple Hauliers (E.A) & 2 Others [2016] eKLR, where Justice R.E. Aburili relied on the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.
11. On whether this Honourable Court lacks General and Pecuniary Jurisdiction to entertain this suit, reference is made to the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR. As regards the issue of Pecuniary Jurisdiction it is urged that given that the amount of the subject matter of the suit Property is Kshs. 20,000,000/= the same falls below the threshold required under Section 7(1) (a) of the Magistrate's Court [Act \(No.26 of 2015\)](#). This provision is to the effect that matters falling on or below this amount should be adjudicated at the Magistrate's Courts. That therefore from its inception, this suit should not have been filed in this Court. That the court lacks the pecuniary Jurisdiction as the cause is beneath it. The court is invited to be guided by statute and case law in reasoning in favour of the 2nd and 3rd Defendants/Respondents.
6. As to whether the suit should be dismissed and/or struck out, it is submitted that the present suit falls in the Magistrate's court jurisdiction and not in the High Court and should thus be dismissed and the interim orders vacated.



7. On who should bear the costs of the Preliminary Objection. It is submitted that the Preliminary Objection herein is merited and the same should be allowed with costs.

Plaintiffs/Respondents Submissions

8. It is submitted that under Article 165[3] of *the Constitution*, this court has unlimited jurisdiction in criminal and civil matters. That at Article 165[6] the High Court has supervisory jurisdiction over the subordinate courts and over any person body or authority exercising a judicial or quasi-judicial function but not over a superior court. That under clause 3 of Article 162, Parliament enacted the Environment and Land Court and whose jurisdiction is outlined under Section 13 of the *Environment and Land Court Act*. The Plaintiffs submit that the issues raised in this suit fall under the purview of Section 13 of the *Environment and Land Court Act* as they are on ownership of the suit property herein. The Plaintiffs maintain that this court therefore has the requisite jurisdiction to determine the instant suit.
9. On whether the preliminary objection is merited it is submitted that the 2nd and 3rd Defendants have invited the court to establish whether the value of the suit property is below 20 million. The same calls for the court to either examine the parties or to call for a valuation report and which is an issue of fact. That in view of the foregoing this ground is not properly raised as a preliminary point of law since it invites the courts discretion to deal with the matter as it invites court to probe evidence. That a preliminary objection should not bear any factual aspects for proof. The Plaintiffs submit and reiterate that this court has jurisdiction to hear and determine this suit as it relates to use and occupation and title to land. On costs of the suit the Plaintiffs submit that they are entitled to the same being the successful parties in the instant application.

Determination

10. Having considered the submission of the respective parties as outlined above herein, I will 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.....”

11. In *Nitin Properties Ltd V 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.'
12. The Tanzanian Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & others vs 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 dear 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.'

13. The court in *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd* (1969) EA 696 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.’

14. 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. The Defendants/Applicants state that the court is devoid of pecuniary jurisdiction to determine the instant suit as the value of the suit property in contest is below Kshs 20 million. The Plaintiffs/Respondents on the other hand states that the issue of pecuniary jurisdiction is a matter of fact which requires interrogation of evidence as to the value of the property. This issue, according to the Respondents, is a matter of fact and definitely not a pure point of law.
15. It is trite that jurisdiction is everything and without it a court cannot take any valid step. The Environment and Land Court was created by *the Constitution* of Kenya under the provision of Article 162 (b). Here, the Courts are vested with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as;-

“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”

16. Under Sections 4 and 13 (1) of the Environment Land Court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. See *Karisa Kyango – Versus - Law Society of Kenya* (2014) eKLR.
17. 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.
18. It is common knowledge that the former Chief Justice has 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.
19. The question that arises therefore 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.
20. 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 can only be ascertained through such evidence as would indicate the value of the suit property.
21. 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. The Preliminary objection, automatically ceases to be a point of law and cannot be sustained.
22. Consequently, this court finds that the Notice of Preliminary Objection dated 7/10/2024 is not merited. The same is hereby dismissed with costs to the Plaintiffs/Respondents.

Orders accordingly.

RULING DATED SIGNED AND DELIVERED THIS 2ND DAY OF DECEMBER 2024

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A E DENA

JUDGE

Ms Oloo Holding brief for Ms. Ochieng

Mr. Simiyu for Plaintiff in E001/23 and JR E001/23

Mr. Oronga for 4th Defendant E001/23 and 4th Respondent in JR E001/23

Ms. Buluma Holding brief for Kibet for 2nd Interested Party



Mr. Mungai for 6th Defendant

No appearance for 5th Defendant

Daniel Disii – Court Assistant

