



REPUBLIC OF KENYA



**Somoni v Muangi & another (Environment & Land Case 9 of 2024)  
[2024] KEELC 13964 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13964 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 9 OF 2024  
FO NYAGAKA, J  
DECEMBER 5, 2024**

**BETWEEN**

**JOYCE BOSIBORI SOMONI ..... PLAINTIFF**

**AND**

**SAMMY MUSILI MUANGI ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KITALE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed the instant suit on 01032024. She claimed that she was the wife of the 1<sup>st</sup> Defendant since the year 2009, having conducted their marriage under the Kisii Customary Law but had just undergone a divorce. She had entered into a purchase agreement in respect of all that property known as title No. 9, Gidea Scheme, measuring approximately 10 acres, from one Phyllis Moraa Nyakundi and Teresia Kwamboka Ondieki on 17122003. The vendors the administrators of the Estate of Samson Janai Mariita. Further, upon paying the entire purchase price the vendors handed over to her the completion documents for the transaction and she took possession of the parcel of land to this day. Prior to that transaction she and the defendant had cohabited from the year 2002 until 2009 when they got married.
2. Her further case was that the 1<sup>st</sup> defendant fraudulently transferred the property into his name to convert it into a matrimonial home and he had since moved onto it, attempted to evict the caretaker thereon in light of the ongoing case in Milimani High Court. She alleged further that she had just discovered that on 08062022 the 1<sup>st</sup> Defendant had fraudulently procured the transfer of the land to himself without her knowledge. She listed the particulars of the fraud. She averred further that the 1<sup>st</sup> Defendant had now continuously embarked on trespassing onto the property. She pleaded the particulars of the trespass.



3. She averred further that the defendant intended to take possession of the suit property by brute force and violence in order to then plead that he was possession when in fact it was her who had been in possession all through. Further, she alleged that the defendant, being a retired police officer, had been actively using his contacts by virtue of his previous work to influence and further gain unlawful access to the property. She pleaded that the defendant's actions were a blatant and flagrant assault of her constitutionally guaranteed right to own property and utilize it peacefully to the exclusion of any other person, yet the first Defendant's conduct was being done with impunity. She reiterated that this first defendant was not in any way involved in the purchase of the property and neither did he contribute towards its acquisition. Lastly, she alleged that she had been the sole owner of the property, having financed its acquisition alone.
4. She prayed for a declaration that she was the sole owner of the property. Also, that the court orders the cancellation of the title which was now in the name of the defendant instead to order it to be registered in her name, a permanent injunction restraining the defendant, whether by himself or his agents or servants, and damages for nuisance and trespass. She also prayed for the costs of the suit. She moved the Court also under certificate of urgency for interim orders of injunction. On 01032024 the Court issued them, ex parte, pending the hearing and determination of the application inter partes.
5. Upon the 1<sup>st</sup> Defendant being served with the Application but before filing his Defence, he raised a preliminary objection to the suit. The objection was dated 05042024. The gist of the objection was on three points. The first one was that the ownership of the suit property Title number Trans NzioaGidea9 (formerly plot No. 9 Gidea Settlement Scheme) is the subject of litigation between the same parties in Nairobi High Court, Family Division, Civil Suit Number E051 of 2023 (O.S). The second one is that the aforesaid property is for subdivision of the parties fifteen (15) matrimonial properties between them following the dissolution of their marriage, and it is the ideal forum to decide who owns the property and to what extent. The third, the suit was a duplication and an unreasonable use of judicial time and resources.
6. The Preliminary Objection was disposed of by way of written submissions. Only his part of the first defendant also gave the background of the preliminary objection by summarizing the pleadings. Then he submitted that the suit was res judicata because it was a subject in Nairobi High Court Succession Cause No. 2649 of 1996 - the Estate of the late Samson Nyakundi Janai which allocated the property to him, on an application by the wives of the deceased. He submitted further that Section 7 of the *Civil Procedure Act* provided that courts should not try any issue that has been directly or indirectly substantially issue before another court of competent jurisdiction between these parties. He relied on the case of Nyamira High Court Civil Appeal No. 9 of 2021, Kennedy Ongiri Mokuva v. John Nyasenda Mosioma
7. Regarding duplicity of the suits he submitted that the suit was pending in the High Court in Nairobi between the Plaintiff and the 1<sup>st</sup> Defendant for division of matrimonial property, in Civil Suit No. E051 of 2023 (O.S.), and there were orders of status quo issued therein. He relied on Section (6) of the Civil Procure Act. He submitted that the suit herein be stayed or struck out pending the hearing and determination of the older suit. He relied on the decision in Migori HCCA No. 14 of 2021 Stanley Koech vs. Transmara Sugar Co. Ltd and Another. He attached the copies of the authorities he relied on as given in the List filed.
8. The plaintiff, through learned counsel, began her submissions by giving a summary background of the objection. Then she gave the analysis of the issues before the court. First, he gave the basis of a preliminary objection in law by relying on the definition given in the Mukisa Biscuits Manufacturing Company Limited vs Western Distributors Limited [1969] EA 696 decision. Regarding jurisdiction,



she submitted that this Court is the one clothed with the jurisdiction to hear the matter as provided for under Article 162(2)(b) of *the Constitution* of Kenya and Section 13 of the Environment and *Land Act*. She also relied on the case of Samuel K. Macharia and Another versus Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Appl. N0. 2 of 2011 in which the Supreme Court of Kenya reiterated on the importance of the jurisdiction of a court. She summed it up that the pleadings ELCOSE05 of 2023 as amended on 19032024 indicated, the dispute between the parties was basically on ownership. She stated that the dispute herein was in regard to ownership of the suit property which she bought and took possession of and had been residing on it since. She went on to argue that ownership disputes cannot be a subject of the Succession court. Further, she stated that the dispute related to fraud which she alleges had been occasioned by the 1<sup>st</sup> defendant in transferring the property, among others, to himself, facts which he was aware of. She prayed that the Preliminary Objection be dismissed. She attached the two decisions she cited.

### **Analysis and Discussion and Determination**

9. The preliminary objection herein raises three points but which this Court fails to relate to a specific provision of law. It should not be lost to the parties that a preliminary objection is always grounded solely on points of law, raised by either a Defendant or Plaintiff. It arises from pleadings. It does not touch on any facts at all, otherwise it would go to the merits of a dispute, which would call for adduction of evidence, a clarification of the same by way of testimony in chief or deposition testing its veracity, weight or proof by way of cross-examination. Thus, where a party purports to raise a point that calls for clarification by way of evidence or a rebuttal by way of evidence, that is not a point of law raised. Such a ‘preliminary objection’ will not succeed on that account.
10. This was held in the case of Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, where Sir Charles Newbold defined a Preliminary objection as follows:-

“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... 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.”
11. Also, in Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR, the same Court held that,

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that “the application is bad in law” without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”



12. Similarly, in *Susan Wairimu Ndiangui V Pauline W. Thuo & Another* [2005] eKLR, Musinga J. as he then was held as follows:-
- “ a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”
13. A careful interpretation of the law regarding preliminary objections renders the view that when determining such a point of law, the court has to rely on pleadings only. It ought not and should never venture into the analysis of the facts of a case otherwise it will be deciding the merits of the case itself at a preliminary stage and without hearing the parties’ testimony. This Court can only analyze the Plaintiff vis-a-vis the law. Thus, this is the basis for this Court to now determine the objection dated 05042024.
14. The first ground of the Preliminary Objection is that the ownership of this property is the subject of another litigation between the same parties, being, Nairobi High Court - (Family Division) Civil Suit number E051 of 2023 (OS). I have carefully analyzed the contents of the Plaintiff. It does not, anywhere, allude to the existence of the alleged Civil Suit No. Nairobi High Court (Family Division) E051 of 2023 (OS). Even assuming that the Plaintiff pleaded about the existence of such as a suit, for this Court to appreciate the similarity between the two suits, it would have to go outside of the pleadings and trudge onto the facts about that existence as would be given by way of a List of Documents (perhaps the Originating Summons or Plaintiff or Claim, whichever that was filed, and the Defence or response thereto) so to find the similarity or dissimilarity. The moment the Court resorts to use facts to resolve the ‘Preliminary Objection’ the said objection would cease to be one properly so called and must fail. Thus, the first ground herein fails.
15. But even as it fails, it raised a cardinal point of law which when gleaned from the facts ousts the jurisdiction of the High Court (Family Division) or indeed any other court other than the Environment and Land Court or the subordinate ones clothed with such power, to determine ownership of land, particularly the suit land herein. Article 162(2)(b) of *the Constitution* of Kenya provides that, (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to- (b) the environment and the use and occupation of, and title to, land.
16. Which Court did Parliament establish pursuant to Article 162(2)(b)? It is the *Environment and Land Court Act* through the *Environment and Land Court Act, Act No. 12 of 2012*. Section 13(1) of the Act provides that,
- (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.”
17. Further, Section 13(2)(a) of the Act then lists title as one of the disputes the Court is supposed to determine. It therefore follows that the only court that has jurisdiction to determine ownership of the land is none other than this court, the Environment and Land Court or a subordinate court which has been given that jurisdiction by law.
18. Jurisdiction cannot be interchanged or exchanged. Neither can it be arrogated by a court nor given to a court by consent of the parties. It does not matter whether a party has raised an objection or not. The court is under a duty to satisfy itself that it has jurisdiction to determine a matter because any decision made by a court without jurisdiction is a nullity in law. It remains to be and is inconsequential, and must be set aside as fast as ever.



19. Jurisdiction is everything, and without it the Court should not take any single step in a matter apart from ordering the payment of costs in such a matter which it finds incompetent before it. The locus classicus on jurisdiction is the case of Owners of the Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1 in which Nyarangi, J.A., (as he then was) 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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

20. Similarly, the Supreme Court of Kenya has rendered itself on the issues in Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Application No. 2 of 2011, It held as follows

“[68]. 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 itself jurisdiction exceeding that which is conferred upon it by law.”

21. For the above reasons the 1<sup>st</sup> Defendant’s contention that this Court should not handle this matter because it is before another court for determination on ownership is neither here nor there. If it has not been raised by the Plaintiff who is a Defendant in that matter it is only a matter of time that the Court will discover the trickery and subtlety of the plaintiff therein and strike out the suit.

22. Regarding the second limb the 1<sup>st</sup> Defendant alleged and contented that the property was a subject of division between the Plaintiff and him, being fifteen (15) matrimonial properties to be distributed by the Court between them upon the dissolution of their marriage. This court will explain below the import of that argument vis-à-vis the first ground which this court has already declined and dismissed. Suffice it to say that such a ground is one that calls for factual information as to whether indeed such a property is a subject of another existing suit. Therefore, it is not a point of law the 1<sup>st</sup> Defendant has raised.

23. Similarly, regarding their third ground, which is that the suit is a duplication and therefore an unreasonable use of judicial time and resources, this code respectfully disagrees with him that such a ground can form a preliminary objection. It is not a point of law which stands alone without facts. The argument that it is a duplication can only be settled by a comparison between two pleadings of two different suits in order for the court to form an opinion on that, indeed there is duplicity. For that reason, the ground does not hold water. It too fails.

24. It therefore follows that the entire preliminary objection hearing was misplaced and is itself an abuse of the process of the court. It must be dismissed with costs to the plaintiff.

25. Needless to say, the defendants filed a List of Documents dated 26062024 to which he annexed copies of four documents: perhaps with intent to supplement his argument and demonstrate to the Court that indeed there existed another suit as between the parties over the suit property. Of these, the second copy was an Originating Summons in Nairobi High Court Civil Case Number E051 of 2023 (OS) between Sammy Musili Muangi versus Joyce Bosibori Somoni (as Defendant). The Court perused the copy of the document. Indeed, it was an originating summons that listed at paragraph 1(k) the suit property herein.

26. This Court carefully considered the said pleading. The predominant issue in that originating summons is the division of the properties listed, between him and the Plaintiff. At paragraph 1, he asks the court



to declare that the same were acquired and developed during the subsistence of their marriage. In my humble view, such a property becomes the subject of the matrimonial property dispute when there is no issue about ownership, that is to say, when it is settled between a divorced couple that indeed they jointly owned the property, and they call on the Court to declare the extent to which one owns(ed) it hence distributed it accordingly. That is not the case herein.

27. In the instant case, the plaintiff alleges that the property is hers and that she acquired it solely to the exclusion of the 1<sup>st</sup> Defendant. Further, the Preliminary Objection by the 1<sup>st</sup> defendant indicates itself that the ownership of the suit property herein is a subject of the suit the Milimani High Court (Family Division) as he stated above. Once the term “ownership” in relation to land comes into play in a dispute, that must raise antennas of a court different from the ELC or an appellant Court handling a matter that has been appealed against from a decision of the ELC. The said Court needs to ask itself whether it has jurisdiction to determine an issue of ownership or allegations that ownership of a property has passed onto another person by fraud.
28. In any event this Court has looked at the copies of the documents filed by the plaintiff, particularly, the sale agreement the Plaintiff and the two vendors who were acting as administrators of the Estate of Samson Janai Mariita. That agreement is dated 1712 2003. It does not bear the name of the 1<sup>st</sup> Defendant as one of the buyers. The defendant alleges that the property is registered in his name. On her part, the Plaintiff alleges that that registration was carried out fraudulently on 08062022 just only a year before the institution of the suit in the High Court but many years after the agreement was entered into. If indeed, there is a title to the suit land registered in the name of the first defendant, it automatically becomes an issue for this court to determine whether indeed, the first defendant legally and procedurally, and without fraud or other illegal process. This is because the ownership thereof seems to have been in favour of the buyer, the Plaintiff, as at the year 2003. She avers that at that time she and the first defendant had not been married, and nowhere in that agreement it is said that the property was acquired by the plaintiff herein in trust for both or for the first defendant. This court has the jurisdiction to determine whether the plaintiff will discharge her burden of proof over ownership of the property, or whether it lawfully moved from her to the 1<sup>st</sup> defendant and also, if it did, the Plaintiff voluntarily, willingly and without any coercion or misrepresentation transferred it to the first defendant. In my humble view the Family Court in Nairobi High Court civil case number E051 of 2023 (OS) or indeed any Family Court in the Republic of Kenya does not and cannot have jurisdiction over the ownership of the suit property herein or its distribution until this court determines who the owner is as between the plaintiff alone or both the plaintiff and the first defendant as a couple at the time of acquisition. Put in another way, ownership of a property has to be determined first before it becomes a subject of distribution as matrimonial property upon a dissolution of marriage.
29. In any event when they are is an allegation of acquisition of land by fraud or other illegal means and the court is called upon to determine the dispute the only court that has jurisdiction is the Environment and Land Court as established under Article 162(2)(b) of the *Constitution* of Kenya as read with Section 13 of the *Environment and Land Court Act*. Therefore, in my considered opinion the first defendant should submit to the jurisdiction of this court to determine whether or not the suit land herein belongs to him as an individual or to the former wife as an individual or both him and the former wife.
30. The upshot is as I have stated at paragraph 24 above Preliminary Objection is not merited and it is dismissed with the costs.
31. This Court, in the interest of justice, gives the Defendant Respondent only four (4) days to respond to the Application dated 28022024 and serve the response, in default of which the Application shall stand unopposed and automatically allowed after the lapse of the four days. In the event the applicant is served with a response within the four days, she has only three (3) days to file and serve written



submissions which should not exceed three (3) pages, New Times Roman Font 12, 1.5 spacing. The 1<sup>st</sup> Respondent or all the Respondents should submit and swerve within three (3) days of that service their submissions which should also be in keeping with the specifications given above in regard to the Applicant. In the meantime, the interim orders of injunction that were granted on the 01032024 are extended to the date of hearing of the Application, which is now fixed for 18122024, subject to the fulfillment of the first condition above regarding the filing of the response to the application.

32. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM THIS 5<sup>TH</sup> DAY OF DECEMBER, 2024.**

**HON. DR. IUR F. NYAGAKA**

**JUDGE, ELC KITALE**

In the presence of:

Omondi Advocate-----for the Plaintiff

Muthama Advocate-----for the 1<sup>st</sup> Defendant

No Appearance-----for the 2<sup>nd</sup> Defendant

