



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mailu v Kaindi & 2 others (Environment & Land Case  
E2 of 2020) [2023] KEELC 635 (KLR) (1 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 635 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E2 OF 2020**

**TW MURIGI, J**

**FEBRUARY 1, 2023**

**BETWEEN**

**JULIUS MUTETI MAILU ..... APPLICANT**

**AND**

**RICHARD MAUNDU KAINDI ..... 1<sup>ST</sup> RESPONDENT**

**BONFACE MUSYOKI KAINDI ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT SURVEYOR MAKUENI COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By an Originating Summons dated October 28, 2020 brought pursuant to the provisions of order 37 rules 1(a), (g) and 2(b) of the *Civil Procedure Rules* and all other enabling provisions of the law, the applicant seeks the following orders against the respondents:-
  1. A declaration do issue that the respondents hold land parcel number L R Makueni/Kakutha/628 in trust for themselves and for the applicant.
  2. That an order do issue compelling the Makueni district surveyor to visit L R no Makueni/Kakutha/628 and sub divide it into two equal portions.
  3. That an order of permanent injunction do issue prohibiting the 1<sup>st</sup> and 2<sup>nd</sup> respondents from transferring, the use of or in any other manner denying or interfering with land parcel No L R Makueni/Kakutha/628 until the Summons are heard and finally determined.
  4. That the costs to be borne by the respondents in any event.
2. The Originating Summons is premised on the grounds appearing on its face together with the supporting affidavit of the applicant sworn on even date.



3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the Originating Summons vide their joint replying affidavit filed on February 24, 2021 and denied the applicant's claim.
4. The 3<sup>rd</sup> respondent opposed the Originating Summons vide the grounds of opposition dated July 23, 2021 and filed in Court on August 30, 2021. On November 5, 2021, the 3<sup>rd</sup> respondent filed a Notice of Preliminary objection dated October 28, 2021 on the following grounds:-
  1. That the entire application as filed is a non-starter, fatally defective and bad in law as the dispute and the resulting orders sought are not simple matters as contemplated under order 37 of the Civil Procedure Rules.
  2. That the orders sought by the applicant directing the 3<sup>rd</sup> respondent to sub-divide the suit property raise complex and contentious questions of facts and law that can only be determined by an ordinary suit by way of a Plaint in accordance with section 19 of the Civil Procedure Act and order 3 of the Civil Procedure Rules.
  3. That the issues raised by the applicant herein are substantial issues of law that can only be determined after full trial and after being proved through *viva voce* evidence.
  4. That the applicant has failed to adhere to the procedure set out under section 22(2) of the Land Registration Act 2012 prompting sub-division of the claimed suit property.
  5. That the suit is null and void ab initio and is an abuse of the court process.
  6. That the application is devoid of merit and should be dismissed with costs.
5. The parties were directed to canvass the preliminary objection by way of written submissions.
6. Though duly served, 1<sup>st</sup> and 2<sup>nd</sup> respondents did not file any response or submissions on the preliminary objection.
7. At the time of writing this ruling, the 3<sup>rd</sup> respondent had not filed its submissions on the preliminary objection.

#### **The applicant's submissions**

8. The applicant's submissions were filed in court on November 5, 2022.
9. Counsel for the applicant submitted that the issue that arises for determination is whether the grounds set out in the preliminary objection are points of law. With regard to ground one of the preliminary objection, counsel submitted that order 37 of the Civil Procedure Rules stipulates who may take out an originating summons in respect to civil matters and not on simple matters. Counsel went on to submit that the questions upon which the Originating Summons is based are listed under order 37 of the Civil Procedure Rules.
10. Counsel submitted that prayer no 1 of the application falls within the ambit of order 37 rule 1 (a), (b) and (c) which provide for the determination of any question arising directly out of the administration of the estate or trust while prayer no 2 has its bearing on order 37 rule 2 (b) and (c) of the Civil Procedure Rules which allows the applicant to apply and obtain an order for the administration of the estate of the late Musengyá Mutwambwii (deceased) and or the administration of the trust in relation to prayer no 1. Counsel contended that the 3<sup>rd</sup> respondent ought to respond to the application since the prayers sought are anchored in the law.



11. Counsel further submitted that section 19 of the *Civil Procedure Act* and order 3 of the Civil Procedure Rules are in support of filing the present application.
12. Counsel further submitted that the wrong procedure cannot be used to invalidate the proceedings herein and referred the court to several decisions. To support this argument, counsel placed reliance on the authorities in the list of authorities dated July 7, 2022.

### **Analysis and determination**

13. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law.
14. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated;

“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.”

15. Further on Sir Charles 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.”

16. 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.”

17. The Court of Appeal in *Nitin Properties Ltd Vs Singh Kalsi & Another* (1995) eKLR also captured the legal principle when its stated as follows;

“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.”

18. The preliminary objection if allowed may dispose of the entire suit without giving the parties an opportunity to be heard. Having considered the preliminary objection, the pleadings and the applicant’s submissions, I find that the issue that arises for determination is whether the preliminary



objection raised by the 3<sup>rd</sup> respondent fits the description of a preliminary objection stated in the Mukisa Biscuits case *supra*.

19. In summary, the 3<sup>rd</sup> Respondent based its preliminary objection on the grounds that the application is fatally defective and bad in law as the dispute and the resulting orders are not simple matters as contemplated in order 37 of the Civil Procedure Rules. The Hon AG contended that the issues raised in the Originating Summons are substantial issues of law which can only be determined in a full trial by way of *viva voce* evidence in accordance with section 19 of the [Civil Procedure Act](#) and order 3 of the Civil Procedure Rules.
20. On the other hand, counsel for the applicant submitted that the orders sought are within the ambit of order 37 of the Civil Procedure Rules. Counsel submitted that wrong procedure cannot be used as a ground to invalidate the proceedings herein.
21. Order 37 rule 1 of the Civil Procedure Rules is clear on the categories of litigants who can take out an originating summons and seek a determination on that platform and provides as follows;
  - 1) The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—
    - a. any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or *cestui que* trust;
    - b. the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
    - c. the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
    - d. The executors or administrators of a, (d) the payment into court of any money in the hands of the executors, administrators or trustees;
    - e. directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
    - f. the approval of a sale, purchase, compromise or other transaction;
    - g. the determination of any question arising directly out of the administration of the estate or trust.
22. Order 37 rule 2 deals with persons who may apply for the administration of an estate or trust and provides as follows:-

Any of the persons named in rule 1 may in like manner apply and obtain an order for:-

  - a. The administration of the personal estate of the deceased;
  - b. The administration of the real estate of the deceased;



c. The administration of the trust.

23. In *Kibutiri Vs Kibutiri* (1982-88) 1 KAR 60 Law J A had this to say;

“The procedure by way of originating summons is intended to enable simple matters to be settled by the court without the expense of bringing an action in the usual way, not to enable the court to determine matters which involve a serious question.”

24. The question here is whether the filing of an Originating Summons as opposed to a Plaintiff makes this matter fatally defective or whether procedural breach can attract an order of striking out as sought by the 3<sup>rd</sup> Defendant.

25. A question of form or procedure is a technical issue. Article 159 (2) (d) of the *Constitution* of Kenya 2010 provides as follows:

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) .....

(d) justice shall be administered without undue regard to procedural technicalities;

26. In the case of *Martha Wangari Karua Vs Independent Electoral & Boundaries Commission & 3 Others*[2018] eKLR the Court of Appeal stated as follows;

“We draw from the judgment of this Court in *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR (Civil Appeal no (Application) 228 of 2013) where Ouko, JA. in the majority stated that:

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness... it ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why { the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities.



We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ....., particularly because those lapses did not go to the fundamental dispute that was before the court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...

The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that article 159 of the Constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence. ...”

27. Similarly, sections 1A, 1B and 3A of the Civil Procedure Act enjoins the courts to administer justice in a just expeditious, efficient and cost effective manner.
28. The 3<sup>rd</sup> defendant has not cited any injustice that has been occasioned or will be occasioned to it by the procedure the plaintiff has adopted. Lack of procedure is not fatal to a cause. The wrong procedure does not invalidate the proceedings herein. The overriding objective under section 1A and 1B of the Civil Procedure Act and article 159 (2) (d) of the Constitution enjoins the court to do substantive justice without being hindered by technicalities of procedure. Moreover, order 37 rule 19 of the Civil Procedure Rules empowers the court to convert an Originating Summons into a Plaint and to proceed with the hearing of the matter as if the action had been commenced by way of a Plaint. The rule provides as follows:-
  - 19(1) Where, on an originating summons under this order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.
    - (2) Where the court makes an order under sub rule (1), order 11 shall apply.
    - (3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.
    - (4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under sub rule (1).
29. In view of the foregoing, this court is mandated to overlook procedural technicalities and do substantive justice to the parties herein.
30. Consequently, the preliminary objection dated November 5, 2021 is dismissed. I further Order that:-
  - a. The proceedings herein shall continue as if this cause had been commenced by filing a Plaint.
  - b. The Originating Summons dated October 28, 2020 and the affidavit in support thereof shall be collectively deemed to be the Plaint.
  - c. The plaintiff to file and serve the documents referred to in order 3 rule 2 (b) (c) and (d) of the Civil Procedure Rules within 14 (fourteen) days from the date of delivery of this ruling.
  - d. The defendants to file and serve the Defence and all compliance documents within 14 (fourteen) days of service of the documents referred to in (c) above.
  - e. Costs of the preliminary objection shall be in the cause.



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**HON T MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 1<sup>ST</sup> DAY OF FEBRUARY 2023.**

**IN THE PRESENCE OF: -**

**Court assistant – Mr Kwemboi**

**In the absence of the parties.**

