



**Kabaru (Suing as the Legal Administrator of the Estate of Peter Kabaru Muiruri) v Maria  
(Environment & Land Case E137 of 2021) [2023] KEELC 15853 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15853 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E137 OF 2021**

**JG KEMEI, J**

**MARCH 2, 2023**

**BETWEEN**

**JANE WAMBUI KABARU (SUING AS THE LEGAL ADMINISTRATOR OF THE  
ESTATE OF PETER KABARU MUIRURI) ..... PLAINTIFF**

**AND**

**PETER KABARU MARIA ..... DEFENDANT**

**RULING**

1. The plaintiff moved this court vide a Plaint filed against the defendant on November 22, 2021.
2. Almost a year later the defendant denied the plaintiff's claim vide his Statement of Defense filed on October 11, 22.
3. On July 26, 2022 the defendant raised a preliminary objection dated May 16, 2022 on grounds that;
  - a. The suit herein is incompetent, bad in law and incurably defective for the reason that, pursuant to the provisions of the Civil Procedure Rules and Law of Succession Act Cap 160 Laws of Kenya, this Court lacks the mandate and jurisdiction to determine succession matters.
  - b. The suit herein, in form and substance, offends the mandatory provisions of the Civil Procedure Act and Rules 2010 and the Law of Succession Act cap 160 hence untenable and liable to striking out in limine.
  - c. The issues arising for determination in the instant suit are in respect of enforcement of the certificate of confirmation of Grant of the estate of John Muiruri Kabaru alias Kabaru Muiruri issued on February 24, 2016 in Nairobi Succession Cause 2046 of 2009.
  - d. The aforementioned succession cause is still active in Court and is scheduled for mention for directions on June 8, 2022.



- e. Consequently, this honorable Court lacks the requisite competent jurisdiction to hear and determine the matter.
4. The parties elected to argue the application orally on October 25, 2022.
5. Supporting the preliminary objection, the defendant’s counsel Ms Sarange submitted that the issues raised in the instant suit relate to succession and administration of the Estate of John Muiruri Kabaru, deceased. That there is an ongoing suit, HCCC Succ Cause no 2046 of 2009 and proceeding with this suit contravenes section 6 of CPA on the doctrine of *sub judice*. Reliance was placed on the cases of *Samwel Macharia & Anor v KCB & Anor*. [2012] eKLR, *the Estate of Alice Mumbua Mutua* [2016] eKLR and *Isaac Kinyua & 3 Others v Hellen Kanigongi* [2018] eKLR.
6. Mr Gachau learned counsel for the plaintiff opposed the preliminary objection and contended that a preliminary objection must raise pure points of law only and not facts. That there is already a grant issued 11 years ago in respect of the deceased’s estate which has been determined and distributed hence the plaintiff is suing in her capacity as the administrator of her deceased husband. On *subjudice*, the learned counsel was clear that for the doctrine of *subjudice* to be founded, the court will be called upon to inquire/examine evidence thus ousting the objection from being a pure point of law. He invited the court to consider the cases of *the Estate of Teresa Wangui Mungai* [2021] eKLR and *Auma Mbori & Anor v Edward Odhiambo Oria* [2020] eKLR.
7. In a brief rejoinder, Ms Sarange maintained that *sub judice* is a point of law and that there is a pending application in the High Court seeking rectification of grant in the estate of John Kabaru.
8. The germane issue for determination is whether the preliminary objection is merited.
9. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“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.” [Emphasis added]
10. At page 701 Sir Charles Newbold, P added:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”
11. For a preliminary objection to succeed the following tests ought to be satisfied: firstly, 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. A valid preliminary objection should, if successful, dispose of the suit.



12. It is trite that a court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB & 2 Others*, Civil Application no 2 of 2011 stated 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.

We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application no 2 of 2011. 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. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

13. In *Owners of the Motor Vehicle M V Lillians v Caltex Oil (Kenya) Limited* [1989] KLR1, the court had this to say on the issue of jurisdiction;

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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.”

14. It is clear that the issue of jurisdiction is one that goes to the heart of the case. Without jurisdiction a court cannot take one more step. It must down its tools immediately. I therefore find that the objection raises a pure point of law as far as jurisdiction is concerned.

15. The next issue is whether the objection has merited.

16. Article 165(3) of the Constitution confers the High Court with jurisdiction and provides:-

“(3) Subject to clause (5), the High Court shall have  
a) Unlimited original jurisdiction in criminal and civil matters.”

17. The jurisdiction of the High Court is subject to article 165(5) of the Constitution which provides as follows:-

“(5) The High Court shall not have jurisdiction in respect of matters:-  
a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or



- b) Falling within the jurisdiction of the Courts contemplated in article 162(2).”

18. This court is a creature of law. It draws its power and existence to article 162(2)(b) Constitution of Kenya which states as follows;

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
- a. employment and labour relations; and
  - b. the environment and the use and occupation of, and title to, land.”

19. The operationalization of article 162(2) (b) of the *Constitution* is enacted in section 13 of the *Environment and Land Court Act* 2011 [ELCA]. This section confers the Environment and Land Court with jurisdiction as follows:-

- “(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 environment planning and protection, climate issues, land use plannings, 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, chooses in action or other instruments granting any enforceable interests in land; and
  - e) Any other dispute relating to environment and land.”

20. Further under sub-section (7) of the said section, this court is empowered to grant the following remedies;

- “(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including-
- (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (g) restitution;
  - (h) declaration; or
  - (i) costs.”



21. The [Law of Succession Act](#) provides for jurisdiction of the High Court in respect of matters falling under the Act as follows:-

“The High Court shall have jurisdiction to entertain any Application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”

22. The power of the probate court were highlighted in the case of *Estate of M’Murianki M’Mugwika (Deceased)*[2019]eKLR where the court held that;

“The [law of Succession Act](#) and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate Court in the circumstances would be to facilitate collection and preservation of the estate identification of survivors and beneficiaries and distribution of the assets.”

23. In the case of *Joseph Koori Ngugi v Stephen Ndichu J Mukima* [2017]eKLR, where it was held that;

“A claim for an equitable interest in land is a claim against the legal owner of land and hence a dispute over ownership of the land. I am persuaded that the drafters of the Kenyan Constitution intended such questions to be determined in the ELC. The text of [the Constitution](#) and Section 13 of the ELC Act seems perfectly clear to me on that question.”

24. In the case of *Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR the court held as follows:

“... The [Law of Succession Act](#), and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate Court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets amongst the survivors and the persons beneficially interested. The function of the probate Court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries, and distribution of the assets.

Disputes of course do arise in the process. The provisions of the [Law of Succession Act](#) and the Probate and Administration Rules are tailored for resolution of disputes between the personal representatives of the deceased and the survivors, beneficiaries and dependants. However, claims by and against third parties, meaning persons who are neither survivors of the deceased nor beneficiaries, are for resolution outside of the framework set out in the [Law of Succession Act](#) and the Probate and Administration Rules. Such have to be resolved through the structures created by the [Civil Procedure Act](#) and Rules, which have elaborate Rules on suits by and against executors and administrators (emphasize added).

The Probate and Administration Rules recognize that, and that should explain the provision in Rule 41(3). Clearly, disputes as between the estate and third parties need not be determined within the succession cause. The legal infrastructure in place provides for resolution elsewhere, and upon a determination being made by the civil Court, the decree or order is then made available to the probate Court for implementation. In the meantime, the property in question is removed from the distribution table. The presumption is that



such disputes arise before the distribution of the estate, or the confirmation of the grant. Where they arise after confirmation, then they ought strictly to be determined outside of the probate suit, for the probate Court would in most cases be functus officio so far as the property in question is concerned (emphasize added). The primary mandate of the probate Court is distribution of the estate and once an order is made distributing the estate, the Court's work would be complete. The proposition therefore is that not every dispute over property of a dead person ought to be pushed to the probate Court (emphasize added). The interventions by that Court are limited to what I have stated above.”

25. The defendant's claim is that this is a succession issue and should be left for determination by the probate court. Infact he pointed the court to a pending succession cause in HCCC no 2046 OF 2009 where he has applied to be enjoined as an administrator as well as for rectification of the grant issued in the estate of John Kabarú Muiruri, his deceased father. It is not in dispute that the estates of Peter Kabarú and John Kabarú have been succeeded and the assets distributed. The suit property was distributed to the Plaintiffs husband to hold 50% and the balance of 50 % to be shared by other beneficiaries equally. The Defendant has alluded to the rectification of the grant in the estate of John Kabarú. I have however perused the said grant issued on September 6, 2011 and rectified on July 1, 2022 and note that the suit land is not included.
26. I must state that the fact of analyzing the grants and documents ousts the Preliminary Objection from being a pure point of law. I must also add that the cause of action in the Plaint is that of ownership of land after the distribution of the estate of the deceased. This is certainly a cause of action, for which the jurisdiction of this court has been properly invoked.
27. On the issue of *subjudice*, section 6 of the *Civil Procedure Act* provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

Explanation. - The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.
28. For the court to determine whether or not the suit is *subjudice* evidence will be needed to arrive at a conclusion whether the proceedings are directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
29. Having said that I shall invite the parties to address me on the pending proceedings in probate court and how it affects this current suit. As at now the court has not been afforded any evidence in form of pleadings which would lead it to direct otherwise.
30. I find that the objection is not a pure point of law and it is dismissed.
31. The costs shall be in favour of the plaintiff.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 2<sup>ND</sup> DAY OF MARCH, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**



**JUDGE**

**Delivered online in the presence of;**

**Nyamu HB Gitau for plaintiff**

**Wacheke HB Odero for defendant**

**Court assistants – Esther / Kevin**

