



**Dzombo v Bongp (Environment and Land Appeal 81 of 2021)
[2023] KEELC 17356 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 81 OF 2021**

LL NAIKUNI, J

MAY 4, 2023

BETWEEN

MBURA DZOMBO APPELLANT

AND

JOHNSON MWANGALA BONGP RESPONDENT

*(Being an appeal against the entire Judgement/decision of Pamela
Lisasa the District Land Registrar Kilifi dated 12th November 2021)*

RULING

(In respect of the Respondent's Preliminary Objection dated 16th March, 2022 challenging the ownership of Plot Number 466 but a beneficiary of plot no. 26 hence no capacity to appeal.)

I. Introduction

1. The Respondent herein, Mbura Dzombo, through a Notice of Preliminary Objection dated 16th March, 2022 raised a Preliminary Objection in limine against the instant suit on the following grounds:-
 - a. The suit is an utter abuse of the due process of the law.
 - b. The instant suit is premature and incompetent for reasons that Appellant has not obtained grant of letter administration of the estate relating to the suit property Kilifi/Nyalani/26 and thus lacks capacity to sue.
 - c. The Appellant herein is not the owner of plot number 466 but a beneficiary of Plot no. 26 hence no capacity to appeal on its behalf.
 - d. The entire suit is therefore incompetent, vexatious and otherwise gross abuse of the process of court therefore fit for being struck out with costs.



2. From the records, it is indicative that the Appellant never responded to the issues of the Preliminary objection raised. Furthermore, the parties did not canvass the application by way of written submission as directed by the Honourable Court on 16th February, 2023. Hence the Honourable Court retired to write the ruling with the ruling date set on notice.

II. Issues for Determination

3. I have considered the gist of the preliminary objection and the attachments thereon, the relevant provisions of the *Constitution* of Kenya, 2010 and statutes.
4. There are three (3) main issues for determination by this Honourable Court from the filed objections. These are:-
 - a. Whether the Preliminary Objection dated 16th March, 2022 raised by the Respondent herein meets the threshold of any objection as per the Law and precedents.
 - b. Whether the Appellant has capacity to institute this appeal.
 - c. Who will bear the costs of the objection.

III. Analysis and Determination

ISSUE No. a). Whether the Preliminary Objection dated 16th March, 2022 raised by the Respondent herein meets the threshold of any objection as per the Law and precedents.

5. The starting point is to define what a preliminary objection is. The case of *Mukisa Biscuits – Versus - West End Distributors Ltd* (1969) E.A 696 held as follows:

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as 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 ...

Justice Newbold in the said suit argues 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.”

6. Legally speaking, an objection to the court’s jurisdiction may be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from the Constitution or Statute. If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. This position was stated by the Supreme Court in the case of “*Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Limited & 2 Others* (2012) eKLR.
7. In the instant appeal, the Respondent has based his preliminary objection on two prong issues. Firstly, that the Appellant has not obtained Grant of letters of Administration of the Estate of the deceased in relation to the suit land and thus lacks capacity to sue or institute the appeal on its behalf. Secondly,



the Appellant was not the legal registered owner of all that parcel of land known as Plot number 466 but a beneficiary of Plot number 26 and therefore the entire suit should be struck out with costs.

8. According to the filed Memorandum of Appeal, the Appellant, Mr. Mbura Dzombo being aggrieved by the entire Judgment/Decision of Pamela Lisasa the District Land Registrar Kilifi dated 12th November 2021 hereby Appealed to this court on the following grounds:-
 - a. The District Land Registrar erred in fact and in law in proceeding with a dispute against boundary of Land Reference Number Kilifi/Nyalani/26 when the registered owners of are all deceased making the proceeding a nullity.
 - b. The District Land Registrar erred in fact and in law by failing to appreciate the boundaries identified by the parties particularly the Appellant, Respondent and owner of Plot No.466 on the ground and instead adopting the RIM measurement.
 - c. The District Land Registrar erred in fact and in law by disregarding the evidence of the parties on their boundaries thereby arriving at a wrong conclusion.
 - d. The District Land Registrar erred in fact and in law by failing to record the evidence and statements of the witnesses present thereby in essence disregarding the same.
 - e. The District Land Registrar erred in fact and in law by failing to establish whether acreage of the Appellants and Respondents parcel of land was intact in determining the boundary or whether it reduced or, increased.
 - f. The District Land Registrar erred in fact and in law by making a brief report which excluded the recounts of the witnesses present and their evidence.
9. The Appellant prayed for the Appeal to be allowed and Judgment be entered against the Respondent as follows;
 - i. The Judgment/Decision of Pamela Lisasa the District Land Registrar Kilifi dated 12th November 2021 be set aside, discharged and or varied.
 - ii. The boundary dispute to be heard a fresh.
 - iii. Costs of the appeal.
10. As regards the appellate Jurisdiction of this Court is well founded under the provision of Section 13 (1) of the [Environment and Land Court Act](#), No. 19 of 2011 provides that:-
 - 13.(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.
 - (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 environmental planning and protection, climate issues, land use planning, 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, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
11. Additionally, the provision of Section 13 (2) (e) of the ELC Act, provides that jurisdiction of the court extends to ‘any other dispute relating to the environment and land’ the same ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to environment and the use and occupation of and title to land as captured under Article 162 (2) (b) as well as the preamble to the *Environment and Land Court Act*, which reads as follows:-
- “An Act of Parliament to give effect to Article 162 (2) (b) of the constitution; to establish a superior court to hear and determine disputes relating to environment and the use and occupation of and title to land, and to make provisions for its jurisdiction functions and powers and for connected purposes.”
12. The Honourable Court herein is required to determine what the law says and whether indeed the court lacks jurisdiction emanating from the Applicant’s lack of the *locus standi* to institute this application and will not require the probing of evidence. All that the Court would then need to do is determine what the law says, and this would only mean that the same raises a pure point of law.
13. In the case of “*The Law Society of Kenya – Versus - Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that:-
- “Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
14. Further to this, in the case of “*Alfred Njau and Others – Versus - City Council of Nairobi* (1982) KAR 229, the Court also held that:-
- “the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
15. Indeed, as the issue of the *locus standi* of the Applicant goes to the root of the matter, poring over and examining of their documents cannot be avoided as this court will have to be satisfied that they had jurisdiction to institute the proceedings herein. Lack of *locus standi* can dispose of the matter preliminarily without having to resort to ascertaining of facts. The Preliminary Objection raised by the Defendant fits the description of Preliminary Objection as stated in the “Mukisa Biscuit case (*Supra*).
16. The provision of Article 159(2)(d) of the *Constitution* of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities. See the case of “*Quick Enterprises Limited v Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, where the Court held that:-
- “When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”



17. I also wish to refer to the case of “*United Insurance Co. Limited v Scholastica A. Odera*, Kisumu HCCA No.6 of 2005, where the Court held that: -

“ A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”

18. As has been seen hereinabove, the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort. From a perusal of the grounds, it is apparent that they do not raise pure points of law. They require production of empirical oral and documentary evidence and cannot be argued in limine. They require scrutiny of facts. The facts therein are contested and as such they need to be ascertained. Therefore, the Court finds that the test laid down in the case of “*Mukisa Biscuit Manufacturing Co Ltd (supra)* has not been met.

19. Additionally, this Honourable Court is not satisfied that the grounds being relied on by the Respondent had reached the threshold of dismissing the present appeal. Upholding the said Preliminary Objection at this stage would be draconian to the filed Appeal as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said appeal.

ISSUE No. b). Who will bear the costs of the Objection

20. The issue of Costs is at the discretion of Court. Costs mean the award that a party is granted at the conclusion of any legal action and proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result of the said legal action and proceedings. In the Instant case taking that the Preliminary objection raised by the Respondent herein dated 16th March, 2020 has been disallowed the Appellant are entitled to costs. However, since the suit is still proceedings on further to full trial I direct that the Costs to be in the cause.

IV. Conclusion and disposition

21. In view of the above, when all is considered therefore, the Court finds and holds as follows:-

- a. That the Notice of Preliminary objection dated 16th March, 2022 is not merited and the same is overruled in its entirety with costs.
- b. That for expediency sake, the Appeal to be fixed for hearing within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling from 31st October, 2023. There shall be a mention on 8th June, 2023 for purposes of confirming filing and admission of the Records of Appeal and taking directions of the appeal under the provisions of Sections 79B & G Order 42 Rules 11, 13 & 16 of the *Civil Procedure Rules*, 2010.
- c. That costs of the objection to be in the cause.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 4TH DAY OF MAY 2023.

HON. JUSTICE L. L. NAIKUNI



(JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

- a. M/s. Gillian, the Court Assistant.
- b. Non Appearance by the Plaintiffs.
- c. No appearance for the Defendant

