



REPUBLIC OF KENYA



Nkoyai v Oleunwa Tonkei & 4 others (Environment & Land Case E003 of 2023) [2023] KEELC 17839 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17839 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E003 OF 2023**

EM WASHE, J

JUNE 8, 2023

BETWEEN

KEJOOLO ENOLE NKOYAI PLAINTIFF

AND

OLEUNWA TONKEI 1ST DEFENDANT

JOEL LETAYA RAKITA 2ND DEFENDANT

JOEL NAKUTIT MELOBU 3RD DEFENDANT

**LAND ADJUDICATION OFFICER TRANSMARA SOUTH, WEST & SOUTH
SUB-COUNTIES 4TH DEFENDANT**

LAND REGISTRAR, KILGORIS 5TH DEFENDANT

RULING

1. The present Preliminary Objection dated 18th February 2023 (hereinafter referred to as “the present P.O”) has been raised by the 1st, 2nd and 3rd Defendants (hereinafter referred to as “the Applicants”) based on the following grounds; -
 - a. The Honourable Court herein is devoid and divested of jurisdiction to entertain and/or adjudicate upon the subject notice of motion application and the instant suit herein.
 - b. The Applicant herein are devoid of the requisite locus standi, to mount and/or maintain the instant suit/proceedings herein.
 - c. In any event, the instant application and suit amounts to and/or constitutes an abuse of the due process of the court.



- d. The Plaintiff/Applicant is non-suited.
2. Due to the fact that the present P.O raised jurisdictional issues against the Plaintiff's (hereinafter referred to as "the 1st Respondent") Plaintiff dated 2nd of February 2023 and therefore by extension the Notice of Motion dated 2nd February 2023, the same ought to be dispensed with first.
 3. The significance of the jurisdiction in any legal proceedings was underscored in the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989):

"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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."
 4. The Honourable Court directed that parties do file written submissions to the present P.O.
 5. The Applicants filing theirs on 14th of March 2023 and the 1st Respondent filing his on the 20th March 2023.
 6. The perimeters of filing a preliminary objection as established in the *Mukhisa Biscuits Manufacturing Company Limited-versus- West End Distributors Limited* (1969) EA 696 are 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."
 7. In another case of *Avtar Singh Bhamra & Another -versus- Oriental Commercial Bank*, KSM HCCC No. 53 of 2004, the Honourable Court made the following observation; -

"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."
 8. Turning to present P.O, the Applicants herein have raised the present P.O against the Plaintiff dated 2nd February 2023 on the issue of jurisdiction and therefore by extension challenged the ability of the Honourable Court to determine the pending Notice of Motion dated 2nd February 2023.
 9. It is settled law that a Preliminary Objection should strictly be raised on pure points of law, which emanate from facts that have been admitted to be correct by all the parties in the suit.
 10. In instances where the facts of the case are not agreed by the parties or require the Honourable Court to determine their veracity, then a Preliminary Objection cannot succeed.
 11. In this suit, the 1st Respondent filed a Plaintiff dated 2nd February 2023 seeking to be declared as the registered owner of the property known as L.R.No. Transmara/kimintet "D"/1681 measuring approximately 95.81 Hectares and a permanent injunction restraining the Defendants from interfering with the ownership and/or occupation of the said property in issue.
 12. The 1st Respondent has pleaded particulars of fraud on the part of the Defendants as the main reason of seeking the prayers contained in the Plaintiff dated 2nd February 2023.



13. The Complaint dated 2nd February 2023 was duly served on the Defendants and in particular the 1st, 2nd and 3rd Defendants who are the Applicants in the present P.O.
14. However, a perusal of the Court file indicates that the Applicants have not yet filed their Defence to the Complaint dated 2nd February 2023.
15. The only document filed by the Applicants apart from the present P.O is the Ground of Opposition dated 18th February 2023 which responds to the 1st Respondent's Notice of Motion dated 2nd February 2023.
16. In other words, the Applicants herein have not responded to the substantive Complaint filed on the 2nd of February 2023.
17. The Grounds of Opposition dated 18th of February 2023 oppose the Notice of Motion Application dated 2nd February 2023 by disputing the 1st Respondent's ability to file this suit based on the provisions of Section 30 of the Land Adjudication Act, Cap 284 Laws of Kenya.
18. Further to that, the Applicants pleaded in the Grounds of Opposition that the dispute concerns a boundary dispute which should be dealt through the provisions of Section 17 and 18 of the Land Registration Act.
19. The first issue for determination by this Honourable Court is whether in the absence of a Defence, the pleadings have crystallized for a Preliminary Objection to be raised.
20. In the case of George Waweru Njuguna-versus- Pauline Chesang Gitau Kamuyu (2017) eKLR, the Court made the following Observation while dismissing a Preliminary Objection; -

"I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff's claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant's preliminary objection has no basis"
21. In the case of Unilever Tea Kenya Limited-versus- Andrew Cheruiyot Rotich & 3 Others (2020) eKLR, the Court again have the following opinion; -

"I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence."
22. The above authorities which this Honourable Court associates itself with indicate that a preliminary objection should always be filed after a Defence has been filed and pleading closed thereof.
23. This exercise will enable the Court to evaluate whether or not the facts pleaded by the parties are correct and admitted.



24. In the absence of a Defence, the Honourable Court is not certain as to whether the Defendants have admitted the facts pleaded by the Plaintiff or intends to dispute the same.
25. In the circumstances, such a Preliminary Objection can only be deemed to be pre-mature and cannot be entertained as it falls short of the parameters dealing with preliminary objections.
26. Further to this, the Grounds of Opposition filed on 18th February 2023 by the Applicants indicate that there are at least two issues namely the legal capability of the 1st Respondent to institute this suit in terms of Section 30 of the [Land Adjudication Act](#), Cap 284 and a boundary dispute under Section 17 and 18 of the [Land Registration Act](#).
27. The issues raised by the Applicants as well as the Fraud allegation pleaded by the 1st Respondent confirm to this Honourable Court that indeed, the facts around this suit can not be deemed to be correct and admitted by all the parties to facilitate the filing of a preliminary objection.
28. In conclusion therefore, the Preliminary Objection dated 18th February 2023 be and is hereby dismissed with costs thereof.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 8TH JUNE 2023.

EMMANUEL.M.WASHE

JUDGE

In The Presence of:

Advocates for the Applicants: Miss Mireri

Advocates for the Respondent: Mr. Miruka

