



REPUBLIC OF KENYA



KENYA LAW
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**Martha & 2 others v Mwendwa & another (Environment and Land Appeal
6 of 2023) [2023] KEELC 20723 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 6 OF 2023
LG KIMANI, J
OCTOBER 12, 2023**

BETWEEN

**MWENDE NZAU MARTHA 1ST APPELLANT
WILLY NZAU 2ND APPELLANT
ZECHARIAH NZAU 3RD APPELLANT**

AND

**MATHEW KYALO NGALA MWENDWA 1ST RESPONDENT
JOEL MUTHUI KYAMBU 2ND RESPONDENT**

*(Being an Appeal from the Judgment of the Chief Magistrate Honourable S. Mbungi,
in Kitui Chief Magistrate's Case Number 51 of 2013 delivered on 20th January 2023)*

RULING

1. This appeal arises from the judgment of the Chief Magistrate Honourable S. Mbungi, in Kitui Chief Magistrate's Land case number 56 of 2018 delivered on 9th July 2021. What is before the court for determination is a Notice of Preliminary Objection by the 1st Respondent dated 10th May 2023 on the following grounds:
 1. That the intended Appeal against the decision of the Kitui Chief Magistrate's Court Civil Suit No.51 of 2013 is irregularly before this Honourable Court as the suit was instituted before the lower Court by parties who were non-suited as Letters of Administration over the Estate of the original registered owner were only applied for in Succession Suit No.125 of 2017, four years after the institution of the suit by the then unsuited parties.
 2. That the Intended Appeal is filed out of time and no explanation or no satisfactory reason and the Intended appeal is tainted by laches.



3. That the 1st Intended Appellant/Applicant was found by a Court of competent jurisdiction in Kitui Senior Principal Magistrate's Court Criminal Case No.639 of 2011 to be guilty of trespass upon the land of the 1st Respondent, a decision against which no appeal was preferred by the 1st Intended/Applicant.
 4. That the Intended Appeal could have the undesirable result of this Honourable Court issuing orders as against as against a person not party to this Appeal, namely the Land Registrar.
 5. That the affidavit in support of this Application is incompetent and should be expunged from the record; and
 6. That the instant Applicant is an abuse of court process.
2. The suit before the trial court was instituted vide plaint dated 6th March 2013 where the Plaintiff is the 1st Respondent herein. He averred that on or before the 24th of September 2011, the defendants started cutting down his fence, farming, grazing livestock on his Land Parcel Kyangiwithya/Tungutu/2010, claiming that the land belongs to the husband of the 1st Defendant and late father to the 2nd and 3rd Defendants respectively despite the fact that the Plaintiff has title to the land obtained for value and consideration from the third party. The suit was decided by the Trial Magistrate in favour of the Plaintiff and the Defendants were restrained from entering into or doing any activities on the suit land.
 3. Counsel for the intended Appellants filed an application dated 9th March 2023 seeking to admit the appeal out of time and for a stay of execution for the reason that judgment was delivered on 20th January 2023 in the absence of the parties and the advocate did not obtain a copy thereof until 22nd February 2023. They stated that the delay in appealing was caused by factors outside of their control and that they had planted on the land and were awaiting harvest.

1st Respondent's submissions on the Notice of preliminary objection

4. Counsel for the 1st Respondent submitted on ground 1 of the preliminary objection stating that trial magistrate had noted that, ..."the counter-claim would not have succeeded because the Defendant did not have the capacity to sue on behalf of the estate of the deceased the late Joseph Nzau Mwikya for they had not acquired letters of administration before filing the counterclaim." The 1st Respondent's position is that the Court must address the issue of locus standi counsel claims that the Appeal is an abuse of the court's process designed to engage the court in an academic exercise.
5. On ground number 2, counsel submitted that the Applicants have not placed any satisfactory evidence to invoke the court's discretion to enlarge the time within which to lodge the appeal since the judgment was to be emailed to the parties due to the Covid-19 pandemic and there is no evidence that it otherwise was not sent.
6. Submitting on ground number 3, the counsel noted that the intended appellant was convicted of trespass by a court of competent jurisdiction in Kitui Senior Principal Magistrate's Court Criminal Case no.639 of 2011 from which no appeal was preferred and the Trial Magistrate had noted this in his judgment, which record was before the trial court.
7. On ground number 4, the 1st Respondent was concerned that issuing the orders sought by the Intended Appellants would amount to issuing orders against a non-party, the Land Registrar and that it is too late in the day to enjoin additional parties.
8. On the 5th and 6th grounds the 1st Respondent summarized submissions on all the other grounds.
9. The other parties did not file submissions on the preliminary objection.



Analysis and Determination

10. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

11. The above legal preposition has been made graphically clear in the now famous case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“A preliminary Objection is in the nature of what used to be a demurer 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 has to be ascertained or if what is sought in the exercise of judicial discretion.”

12. The law therefore requires that a Preliminary Objection be brought only on a point of law as Lady Justice Mary Kasango noted in *Kenya Breweries Limited & another v Keroche Breweries Limited* [2020] eKLR while quoting Mativo J in the case of:

“*J. N. & 5 others v Board of Management St G. School Nairobi & another* [2017] eKLR thus:

“A preliminary objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

13. The 1st ground is that the intended appeal against the decision of the Kitui Chief Magistrate’s Court Civil Suit No.51 of 2013 is irregularly before this Honourable court as the suit instituted before the lower Court was by parties who were non-suited as letters of administration over the estate of the original registered owner were only applied for in Succession Suit No.125 of 2017, four years after the institution of the suit. Their contention is that they lacked the locus standi because the Defendant did not have the capacity to sue on behalf of the estate of the deceased the late Joseph Nzau Mwikya for they had not acquired letters of administration before filing the suit and counter-claim.

14. On this ground, the court finds that the issue of whether or not the Appellant was the administrator of the estate of the late Joseph Nzau Mwikya and whether she was sued before the trial court and appeals to this court in the capacity of legal representatives are issues of fact the will need to be proved by way of evidence. This will require this court to examine the trial courts proceedings, judgement and record to ascertain whether or not these issues were raised, heard and determined by the said trial court in which case the said issues would be raised in reply to the substantive appeal.

15. It is further noted that the 1st Respondent being the party raising the preliminary objection was the Plaintiff before the trial court, he is thus the one who instituted the suit. He cannot, in the court’s view, turn around and state that the same party he sued was non-suited. In the event that this objection is raised only as relates to the counterclaim filed before the trial court, the court again will be required



to read through the proceedings, judgement and record of the trial court to ascertain the claim before the trial court and the capacities of the parties before the trial court. The said proceedings are not yet before this court.

16. In the court's view this ground of preliminary objection is one that bears factual aspects calling for proof and/or seeks to adduce evidence for its authentication, and in the courts view is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.
17. On ground number 2 of the preliminary objection the 1st Respondent states that the intended appeal is filed out of time and no explanation or no satisfactory reason is given and the intended appeal is tainted by laches.
18. As a point of correction, the appeal has not been filed since the applicant seeks in the application dated 9th March 2023 seeking leave to appeal out of time. In the courts view this is not a ground for consideration as a preliminary objection since it does not raise purely points of law. As was stated in the case cited above of *Kenya Breweries Limited & another v Keroche Breweries Limited* [2020] eKLR (*supra*)

“A “preliminary objection” correctly understood, is now well defined 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 processes of evidence.”
19. In this particular case whether or not the reasons given in support of the application for extension of time are satisfactory or whether there was delay in filing of the application for extension of time are issues of fact for consideration by the court when determining the said application for extension of time dated 9th March 2023.
20. The court will combine grounds 3 and 4 of the Preliminary Objection. The 1st Respondent states that the 1st intended Appellant/Applicant was found by a court of competent jurisdiction in Kitui Senior Principal Magistrate's Court Criminal Case No.639 of 2011 to be guilty of trespass upon the land of the 1st Respondent, a decision against which no appeal was preferred by the 1st intended applicant. The said grounds also state that the intended appeal could have the undesirable result of this Honourable Court issuing orders as against a person not party to this appeal, namely the Land Registrar.
21. In the court's view the two grounds require an in-depth examination of arguable matters such as the necessity of the Land Registrar in the proceedings and whether or not the absence of the said party is fatal to the appeal herein. Again the court notes that the trial court suit was filed by the 1st Respondent and he did not join the Land Registrar to the suit. This court can only ascertain the necessity of the Land Registrar as a party to the suit upon hearing the application herein or making a determination on the entire appeal.
22. Grounds 5 and 6 of the preliminary objection are that the application is an abuse of the process of the Court and that the supporting affidavit is incompetent. The 1st Respondent's Counsel's submissions on this ground are a summary of the other grounds and would in the court's view form arguments on the merits of the application dated 9th May 2013. The said grounds will also require examination of contested facts as to what in the circumstances of the application herein constitutes an abuse of the court process and what constitutes incompetence on the part of the supporting affidavit.
23. For the foregoing reasons, the court finds that the preliminary objection herein lacks merit and the same is dismissed with costs to the Applicant.

DATED, SIGNED AND DELIVERED AT KITUI THIS 12TH DAY OF OCTOBER, 2023.



L. G. KIMANI

JUDGE

Ruling read in open Court and virtually in the presence of

Musyoki – Court Assistant

Mutisya holding brief for Mwalimu for the Applicant

Kaguri for the 1st Respondent

Joel Muthui present in person

