



**Chiro (Suing as Administrator of the Estate of Mwangolo Chiro Nyinge) & another v Chamangah & 2 others (Environment & Land Case E005 of 2023) [2023] KEELC 21483 (KLR) (8 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21483 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E005 OF 2023  
EK MAKORI, J  
NOVEMBER 8, 2023**

**BETWEEN**

**MATHIAS MBARUKU CHIRO (SUING AS ADMINISTRATOR OF THE ESTATE OF MWANGOLO CHIRO NYINGE) ..... 1<sup>ST</sup> PLAINTIFF**

**MKASI TUNJE MWAMBOJE & VINTON MATANDI TUNJE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MORRIS TUNJE ALSO KNOWN AS MWAMBONJE CHAMANGAH) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ROGINSON RIMBA CHAMANGAH (ESTATE OF HARRISON CHAMANGAH) ..... 1<sup>ST</sup> DEFENDANT**

**ERASTUS MUZUNGU CHAMANGAH ..... 2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR, KILIFI COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. 1<sup>st</sup> and 2<sup>nd</sup> defendantss (sic) have raised a preliminary objection that:
  - i. The suit violates section 2(1) and (2) of the *Succession Act*.
  - ii. The originating summons is a non-starter.
  - iii. It discloses no reasonable cause of action against the defendants.
  - iv. It is scandalous, frivolous, and bad in law, vexatious, and an abuse of the court process.
2. The 3<sup>rd</sup> defendants has filed grounds in opposition imploring that the application (sic) as filed is vague, ambiguous, and unsubstantiated to constitute an arguable case against it.



3. The plaintiffs (sic) aver that the claim herein is buttressed on the premises that the 1<sup>st</sup> and 2<sup>nd</sup> defendants (sic) are heirs to the estate of Harrison Chamangah their deceased father and are sued in that capacity.
4. The issue to settle is whether the preliminary objection is sustainable.
5. A preliminary objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises points of law. It also underscores the need for prudent management of time as a court resource by summarily flagging out a frail and hopeless suit that if admitted to full, trial will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether a preliminary objection is sustainable or not, but look at the pleadings and discover that the suit is a none starter - see Ogola J in [\*DJC v BKL\*](#) (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the Court held as follows: “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... 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 has to be ascertained or if what is sought is the exercise of judicial discretion”.

8. The Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

6. I have considered the claim by the plaintiffs. It is an originating summons to have land parcel Nos. Kilifi/Bandaralama/241 sub-divided and have 1/3 share transferred to Mathias Mbamku Chiro and therefore the said title be rectified.
7. The plaintiffs argued that the said land was adjudicated in favour of Morris Tunje, who is known as Tunje Mwambonje Chamangah, Harrison Chamangah, and Mwangolo Chiro Nyinge who were registered as common owners each with 1/3 undivided share. According to the plaintiffs, the record of adjudication shows exactly that. However, when checking the green card, the name of the father of the plaintiffs was omitted.
8. That the plaintiffs have been desirous of having the anomaly rectified but the Defendants seem to be intermeddling and are the real obstacles in achieving that.



9. Looking at the pleadings, the claim is directed at the estate of Harrison Changamah. The defendants claim they are not administrators and are improperly sued. They say they are not administrators of the estate of the late Harrison Changamah.
10. What the plaintiffs ought to have done was to bring up a citation cause in the probate and administration wing of the High Court to compel the defendants to take out letters of administration whose purpose as held by Musyoka J in *Re the Estate of Josiah Muli Wambua* [2014] eKLR, is:

“In intestacy, citations issue only in cases where no petition has been lodged in court. Citations are intended to trigger the process of applying for letters of administration intestate in circumstances where the persons entitled to apply are not willing or are slow in moving the court in that behalf. The citor should not be a person who has himself already applied for the grant, for the citor should only apply for grant after the citee fails to so apply.”
11. Therefore, the appropriate forum for the Plaintiffs in this matter is the succession court and not the ELC. I will therefore not have jurisdiction to entertain this suit. I guide the Plaintiffs to migrate to that court. They will be heard.
12. I can see the plaintiffs are not represented by Counsel. They brought this matter as an OS. An OS (Originating Summons) is one of the modes of commencing a civil action. An OS commences an action when - it is required by a statute or a dispute, which is concerned with matters of law, and is unlikely to have any substantial dispute of fact. This matter has substantial issues of law and ought to have been commenced perhaps through a plaint. The plaintiffs need help on how to approach the court. I have explained to them in this ruling. They need to look elsewhere. The claim they have filed cannot take them far. The manner they have couched their claim cannot be sustained. It is struck out with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 8<sup>TH</sup> DAY OF NOVEMBER 2023.**

**E. K. MAKORI**

**JUDGE**

**NB:** Ruling delivered in the absence of parties who had been notified. A copy of the ruling is to be supplied to them electronically.

