



REPUBLIC OF KENYA



**Nzioki & another v Mang’oka & another (Environmental and Land Originating Summons E001 of 2024) [2025] KEELC 3966 (KLR) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3966 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2024**

**EO OBAGA, J**

**MAY 22, 2025**

**BETWEEN**

**JOHN MUTUNGA NZIOKI ..... 1<sup>ST</sup> PLAINTIFF**

**GRACE MUKINA KIIO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MBENGWA MANG’OKA ..... 1<sup>ST</sup> DEFENDANT**

**FELIX KYALO KALELI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs filed the Originating Summons herein dated 15<sup>th</sup> January, 2024 seeking orders for registration as proprietors of the suit property Title Number Nzau/Nziu/XXX by way of adverse possession.
2. On 31<sup>st</sup> January, 2024, the Respondents filed a preliminary objection raising the following grounds: -
  - i. That the Plaintiffs do not have locus standi to institute the instant proceedings since they are neither appointed executors under any valid will or appointed administrators as colligenda bona for the estate of Mang’oka Thati whose right to the subject land they claim.
  - ii. The 1<sup>st</sup> Defendant does not have the locus standi to act as the legal representative of the estate of the late Mang’oka Thati.
  - iii. The subject parcel of land being Nzau/Nziu/XXX registered under the name of the late Mang’oka Thati and any proceedings in regard to that land and in clear violation of the provisions of the Law of Succession Act.
3. The Plaintiffs filed a replying affidavit sworn by the John Mutunga Nzioki on 22<sup>nd</sup> November, 2024. The deponent averred that the argument by the 1<sup>st</sup> Defendant that she lacks locus standi is unfounded



as she has instituted criminal proceedings against them in Makueni MCCR No. E577 of 2024. That in the said criminal proceedings, the 1<sup>st</sup> Defendant accused the 1<sup>st</sup> Plaintiff of cutting down citrus trees contrary to Section 334 of the [Penal Code](#).

4. It was averred that nothing prevents the 1<sup>st</sup> Defendant from seeking the relevant grant ad litem unless she wishes for the suit to proceed undefended. It was averred that it is in the interest of justice that the preliminary objection herein should be dismissed with costs.
5. Parties agreed to dispose of the preliminary objection by way of written submissions.
6. In the Defendants' submissions dated 13<sup>th</sup> May, 2024, Counsel identified the following issues for determination: -
  - i. Whether the Plaintiffs have the locus standi to institute the proceedings;
  - ii. Whether the 1<sup>st</sup> Defendant has locus standi to act as the legal representative of the estate of the late Mang'oka Thati
7. On the first issue, Counsel submitted that the Plaintiffs are neither appointed executors under any valid will nor appointed administrators as colligenda bona for the estate of Mang'oka Thati. Counsel contended that the Plaintiffs are in violation of Section 45 of the [Law of Succession Act](#) which prohibits against intermeddling.
8. On the second issue, Counsel submitted that the 1<sup>st</sup> Defendant is not a legal representative as per the provisions of Section 2 of the [Civil Procedure Act](#) and therefore she cannot be sued in these proceedings. Counsel further contended that the 1<sup>st</sup> Defendant had not applied for letters of grant of representation to the estate of her late husband Mang'oka Thati in whose name the suit property is registered.
9. Concluding his submissions, Counsel asserted that all the parties to this suit lack locus standi and the court should not entertain the proceedings herein. It was urged that the suit should be struck out with costs.
10. The Plaintiffs filed their submissions dated 22<sup>nd</sup> November, 2024. On their behalf, Counsel contended that the Plaintiffs' claim is predicated upon a valid claim for adverse possession over land in which they have occupied for more than 50 years. For that reason, Counsel submitted that the Plaintiffs do not require a grant of representation ad colligenda bona to bring and sustain the suit.
11. Counsel stated that the argument that the 1<sup>st</sup> Defendant does not have locus standi to defend the suit is flawed for the reason that she has instituted criminal proceedings against the 1<sup>st</sup> Plaintiff for allegedly cutting down crops of cultivated produce contrary to Section 334 of the [Penal Code](#) when she has not obtained a grant ad litem.
12. It was further contended that the 1<sup>st</sup> Defendant had admitted to selling the suit property to the 2<sup>nd</sup> Defendant at paragraph 16 of the replying affidavit sworn on 31<sup>st</sup> January, 2024. Therefore, Counsel took the view that the 1<sup>st</sup> Defendant could not approbate and reprobate on her capacity to defend the suit when she herself was violating Section 45 of the [Law of Succession Act](#) for selling the suit property without having taken out a certificate of confirmation of grant.
13. On the merits of the preliminary objection, Counsel submitted that the same is contestable and contradictory on the basis of the pending criminal proceedings and also on the basis of the averments in the 1<sup>st</sup> Defendant's replying affidavit sworn on 31<sup>st</sup> January, 2024. Counsel urged the court to dismiss the preliminary objection with costs.
14. The sole issue for determination is whether the Defendants' preliminary objection herein is merited.



15. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. Justice Law coined an apt description of what constitutes a preliminary objection in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 (at page 700) wherein the learned judge held as follows: -

“In so far as I am aware, 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.”
16. In the same case, Sir Charles Newbold, P. held as follows: -

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
17. In *Oraro v Mbaja* [2005] eKLR, J.B. Ojwang J. (as he then was) described it as follows: -

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified 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 process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”
18. The Defendants have sought that the suit herein be struck out on the basis that the parties herein lack locus standi to either prosecute or defend the suit.
19. The Plaintiffs filed the suit herein on 17<sup>th</sup> January, 2024. Alongside the originating summons, they also filed the Notice of Motion on even date supported by the affidavit of the 1<sup>st</sup> Plaintiff. Subsequently, the Defendants filed a replying affidavit on 1<sup>st</sup> February, 2024 in reply to the Notice of Motion which was sworn by the 1<sup>st</sup> Defendant.
20. When the parties appeared in court on 23<sup>rd</sup> October, 2024, Counsel for the Plaintiffs applied to withdraw the application. The same was allowed with costs being awarded to the Defendants having filed their response.
21. As the matter stands, the Defendants have not filed a defence/reply to the Plaintiffs’ originating summons. The preliminary objection herein is thus premature in the absence of pleadings from the Defendants as the facts thereto are contestable.



22. In the case of Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others [2020] eKLR, the court observed as follows; -

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1<sup>st</sup> – 4<sup>th</sup> 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.”

23. Similarly, in George Waweru Njuguna v Pauline Chesang Gitau Kamuyu [2017] eKLR, the court aptly held as follows: -

“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.”

24. In the absence of a defence to the Plaintiffs’ suit, the preliminary objection herein is premature as it is not based on any substantive pleading. The same has been raised unprocedurally and it is on that score that it must be dismissed with costs.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22<sup>ND</sup> DAY OF MAY, 2025.**

.....

**HON. E. O. OBAGA**

**JUDGE**

In The Presence Of:

Ms. Kyalo for Defendant/Respondent

Court assistant – Steve Musyoki

