



In re Estate of Joseph Omache Magati alias Omachi Mokuia (Deceased) (Civil Appeal E036 of 2023) [2025] KEHC 4099 (KLR) (18 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4099 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E036 OF 2023
DKN MAGARE, J
MARCH 18, 2025**

**IN THE MATTER OF THE ESTATE OF JOSEPH OMACHE
MAGATI ALIAS OMACHI MOKUA (DECEASED)**

BETWEEN

JOSEPH MBAKA NYAKWAMA APPELLANT

AND

EVANS NYAKWAMA BOSIRE RESPONDENT

(Appeal from the Ruling of the Honourable D.O. Mac'Andere (RM) made on 31.3.2023 in Kisii CMSUCC No. 140 of 2020.)

JUDGMENT

1. This is an appeal from the Ruling of the Honourable D.O. Mac'Andere (RM) made on 31.3.2023 in Kisii CMSUCC No. 140 of 2020. The same arose from an application filed by the Appellant to revoke the grant confirmed in the lower court. The Application sought the following orders:
 - a. That this Honourable Court be pleased to certify the summons for revocation or annulment of grant as urgent and the same be heard ex parte in the first instance and more particularly with regard to prayer 2 hereof.
 - b. That pending the hearing and determination of this Summons for Revocation or annulment of Grant, the Honourable Court be pleased to issue an order restraining the Respondent, the Respondent's servants, employees, workers, assignees, agents, and siblings, parents, children, brothers, relatives, or any other person working under the instructions and/or title and/or name of the Respondent from encroaching, trespassing, setting foot, residing and or staying and or occupying, trespassing, managing, charging, appointing a receiver, disposing or in any other way dealing with the land parcel Title Number Wanjare/Bogiakumu/8039 or the



preceding title being Wanjare/Bogiakumu/893 and the Officer Commanding Gesonso Police Station to ensure compliance with this order.

- c. That the grant of letter of letters of administration to Evans Nyakwama Bosire made on the 13th day of May, 2021 and the subsequent Certificate of Confirmation of Grant be revoked or annulled as it was procured through fraud, misrepresentation and material concealment of facts and the subsequent registration arising therefrom be canceled.
 - d. That costs of this application be borne by the Respondent.
2. The Summons for Revocation of Grant dated 1.9.2022 were supported by the affidavit of the same date sworn by the Appellant herein. The Appellant sought to revoke the grant made on 13.5.2021 on the ground that the same was obtained through fraud, misrepresentation and concealment of material facts. The Appellant also sought interim restraint on the disposal of Title No. Wanjare/Bogiakumu/8039 or the preceding title No. Wanjare/Bogiakumu/893.
 3. The Respondent filed a preliminary objection on points of law in the following terms:
 - i. That this honourable court is devoid of jurisdiction to deal with and entertain the application dated 1.9.2022.
 - ii. In the circumstances, the entire suit and notice of motion application herein is procedurally and substantively bad in law, hence suitable to be dismissed and or struck out with costs to the respondent.
 4. The Respondent filed a Preliminary Objection to the Summons on the ground that the lower court had no jurisdiction to entertain the summons as filed on 1.9.2022. Apart from disputing jurisdiction, the objection on its face did not express the basis for refusing jurisdiction.
 5. Upon hearing the parties the court made the following decision:
 - i. That I hereby direct that the respondent to respond to that application on the issue of the beneficiaries who had been left behind only within 14 days from the date of this ruling.
 - ii. That the applicant to file a further affidavit in response after service if need be within 14 days.
 - iii. That Pending the hearing and determination of the application, I grant interim order staying further dealings with the suit property Land Parcel Title Number Wanjare/Bogiakumu/893 by the respondent, their agents, assignees, or even any other family member before the hearing and determination of this application.
 - iv. That the other issues arising with regards to the title to the property and subdivisions of the same should be canvassed in an environment and land court. The same cannot be canvassed in this file which involves succession matters.
 - v. That mention on 4.5.2023 to confirm compliance.
 6. In short, only order [iv] relates to the preliminary objection. The rest are directions on the hearing of summons for revocation. The court had a very simple task, that is, to find whether the court had jurisdiction or not.
 7. The Appellant was aggrieved by the decision and filed a precise memorandum of appeal dated 5.4.2023, raising the following grounds:
 - a. The learned magistrate erred in law and fact in finding that the preliminary objection was limited to the jurisdiction to determine summons of revocation of grant.



- b. The learned magistrate erred in law and fact in finding that the issue of the respondent forging the death certificate did not go to the root of revoking the grant.
 - c. The learned magistrate erred in law and fact in denying the appellant the right to be heard by restricting the content of the affidavit to be filed to the issues of beneficiaries that were left out.
 - d. The learned magistrate erred in law and fact in failing to apply the principles on preliminary objections.
8. The ruling dated 31.3.2023 had the effect that the court found that the Preliminary Objection succeeded in part on the transfer of title, subdivision, cancellation, and adverse possession as such issues lay with the Environment and Land Court. The court declined to dismiss the summons and directed the Respondent to respond to the application on the issue of beneficiaries left out.

Submissions

9. The Appellant submitted that the matters raised in the preliminary objection did not meet the threshold for a preliminary objection and the court was wrong in finding for the Respondent on the basis that issues of title to land fall within the powers of the Environment and Land Court. Reliance was placed on *Mukisa Biscuits Manufacturing Co. Ltd v Westend Distributors Ltd* (1969) EA 696.
10. It was also submitted that there was fraud, misrepresentation and material non-disclosure as the deceased did not die on 10.5.2019. They stated that the correct date of his death was 31.5.2019. Therefore, the Appellant had met the conditions necessary for revocation of the grant under Section 76 of the *Law of Succession Act*.
11. On the other hand, the Respondent submitted that the lower court properly established that it had no jurisdiction to entertain matters that lay for determination by the Environment and Land Court. Reliance was placed on *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [supra].

Analysis

12. The issue is whether the lower court erred in its finding on jurisdiction as raised in the Respondent's Preliminary Objection dated 9.9.2022. Before determining the application on its merits, I have first to find whether the Preliminary Objection meets the test of what a preliminary objection is before venturing to determine its merit. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd* [1969] E.A. 696, made this pertinent observation as hereunder : -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.



13. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection as seen by two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd* (*supra*) as follows: -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

“...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.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

14. A preliminary objection must be based on current law, and be factual. The facts should not be disputed. It is paramount for this court to also discern whether the issues raised by the Respondent in the Preliminary Objection dated 9.9.2022 can dispose of the appellant’s Summons for Revocation of Grant dated 1.9.2022. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR as follows:

I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the 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, and 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. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

15. The preliminary Objection did not raise a pure point of law or any point of law. The Respondent alleged in the submissions to the purported preliminary objection that there was a decision of the Environment and Land Court that had decided on the matters raised in the summons for revocation. This was a matter of evidence and could not be raised as a pure point of law based on which to dismiss the Appellant’s summons. A court cannot expand its jurisdiction through judicial craft or innovation. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution*



confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

16. The court must therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The court was duty-bound to read the relationship between the issues raised as a Preliminary Objection and the principles that determine preliminary objections and interpret them as such. This is because the court was bound to down its tools where it had no jurisdiction. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

17. The question of wastage is a question of fact to be dealt with by the court dealing with the matter. It is not a question of law to be dealt with as a preliminary objection. The question of trespass is not a question of law. The administrator has powers as the Administrator to collect and preserve the estate. There was no basis at all for the court not dealing with the question of cancellation of title.
18. That was an issue that is to be dealt with while dealing with the application for revocation. The court has jurisdiction to determine, at the right time, whether the property forms part of the estate. If it finds otherwise, that is when the environment and land court comes in. If the property was bequeathed under the confirmed grant, the court has jurisdiction to cancel any title from the confirmed grant subject only to crucial findings under Section 93 of the Succession Act.
19. The question of forgery of the death certificate was not raised as a preliminary point. This will be among the issues to be dealt with. The aspect of degree of consanguinity and affinity are questions of fact. The question of property was addressed by Musyoka J, in re *Estate of Paul Maloba Mutanda (Deceased)* (Succession Cause 945 of 2007) [2022] KEHC 10153 (KLR) (13 May 2022) (Ruling):

On the second limb of the application, on the accounts, the law is quite clear. The office of an administrator is one of trust, for the property of the deceased vests in the administrator to be held by him on behalf of others, be they heirs, dependants, survivors, creditors, etc. The administrator is not the owner of the property, but a mere manager of it, pending the distribution of the property amongst the persons who are entitled to it in law. Since he handles property that does not belong to him, he would be in a fiduciary position concerning



the property and the persons who are beneficially entitled to it. He is a trustee and is accountable to the beneficiaries. That is trite trust law.

20. On jurisdiction, the lower court sitting as the succession court had jurisdiction to intervene to preserve the estate of the deceased. It was not correct for the lower court to make a finding that the issues of title and ownership were properly to be laid before the Environment and Land Court. The prayer in the application was not to assert ownership or title to the property. It was to preserve the estate pending the application for revocation of the grant
21. Therefore, the succession court had jurisdiction to direct interim protection of the estate of the deceased pending distribution. This is fortified by the decision in *Floris Piezzo & Another – vs- Giancarlo Falasconi (2014) eKLR*, where the Court of Appeal, while considering whether an injunction can be issued in a Succession Cause expressed itself as follows:

“We have carefully considered the grounds of appeal, rival written and oral submissions, and the law. The application before the high Court was for temporary injunction to restrain the appellants from dealing with the suit premises in a manner inimical to the estate of the deceased. The question which arose and had to be determined first was whether the Court had jurisdiction to grant an injunction in a Succession Cause.

The appellants took the position that the Court had no such jurisdiction whereas the Respondent took the contrary position. However, the High Court was persuaded that Rule 73 of the Probate and Administration Rules reserved the Court’s inherent jurisdiction to allow for the grant of injunctions in deserving cases. We are in total agreement with this conclusion. We have no doubt at all that the *Law of Succession Act* gives the Court wide jurisdiction in dealing with testamentary and administration issues of an estate. Indeed Section 47 of the said Act gives the Court jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decree and orders as may be expedient. It cannot be said that such decrees and orders would exclude injunction orders. In other words, we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the Probate and Administration Rules which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”

22. Consequently, the ruling regarding jurisdiction had no basis. The court cannot on a preliminary point of law, settle a priori, essentially a factual dispute.
23. Consequently, I set aside the order to the effect that:

“That the other issues arising with regards to the title to the property and subdivisions of the same should be canvassed in an environment and land court. The same cannot be canvassed in this file which involves succession matters.’

24. This question did not arise from the preliminary objection. The property covered was the property in the confirmed grant. The court has the power to set aside the title by the Respondent if it finds that the grant was obtained by material non-disclosure.



25. The court has jurisdiction to hear and determine the questions before the court. The result is that the appeal succeeds in part. The net result is that the pending summons for revocation of grant should be heard on a priority basis with this ruling in mind.
26. On costs, an award of costs in this court is governed by Section 27 of the *Civil Procedure Act*. They are discretionary. The Supreme Court has set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
- (18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
27. Since costs follow the event, the appellant has spent costs. It does not matter if the success is razor thin. In the circumstances, the appeal is allowed with costs of 45,000/=. The preliminary objection is dismissed with costs.

Determination

28. In the upshot, I make the following orders:
- a. The appeal is allowed in part. The order that “the other issues arising regarding the title to the property and subdivisions of the same should be canvassed in an environment and land court and that the same cannot be canvassed in this file, which involves succession matters”, is hereby set aside.
 - b. The preliminary objection lacks merit and is consequently dismissed with costs.
 - c. The file shall be placed before the Chief Magistrate Kisii Law Courts for priority hearing and determination of the Summons for Revocation of Grant dated 1.9.2022.
 - d. The lower court file be be listed for directions on 24.4.2025 before the court assigned to hear this matter.
 - e. The Respondent is to bear the costs of Ksh. 45,000/= for this appeal.
 - f. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18TH DAY OF MARCH, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE



In the presence of: -

No appearance for the Appellant

Ms. Chepkorir for the Respondent

Court Assistant – Michael

