



**Makwana v Makwana & 2 others (Family Originating Summons E003 of 2025) [2025] KEHC 9230 (KLR) (16 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9230 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY ORIGINATING SUMMONS E003 OF 2025**

**G MUTAI, J  
JUNE 16, 2025**

**BETWEEN**

**KAMLESH JAYANTILAL MAKWANA ..... PLAINTIFF**

**AND**

**SAMEET MAKWANA ..... 1<sup>ST</sup> DEFENDANT**

**FAREED MOHAMED HUSSEIN SHERIFF ..... 2<sup>ND</sup> DEFENDANT**

**AHMED AWADH SALIM ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The property known as Title No Mombasa/Block XXI/141 and constituting the 1<sup>st</sup> floor of the said property is registered in the name of Narendra Megji Jadavji Makwana (deceased). Mr Narendra Makwana was the father of the 1<sup>st</sup> defendant and the uncle of the plaintiff. The said person died on 6<sup>th</sup> October 2020.
2. The Plaintiff avers that the deceased bequeathed him the said property during his lifetime and that the 1<sup>st</sup> defendant renounced any interest/right over the same. However, despite the foregoing, the 1<sup>st</sup> defendant obtained a grant of representation, which was subsequently confirmed and thereafter transferred the property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. For that reason, the plaintiff sought permanent injunctive orders preventing the defendant from interfering with the plaintiff's possession of the property, declaratory relief, restitution ad integrum, damages for fraudulent misrepresentations and negligence, and costs and interests. The plaintiff also sought to be registered as the owner of the property.
3. In response, the defendants filed a replying affidavit and a preliminary objection dated May 9, 2025, in which they averred that the suit was incurably defective, bad in law, incompetent, frivolous, and vexatious, and an abuse of the court's process. They further stated that the plaintiff was not a dependent within the meaning of Section 29 of the [Law of Succession Act](#), and that the application offends the



mandatory provision of Articles 162(2) and 165(5)(b) of the Constitution of Kenya. For this reason, the Court lacked jurisdiction to hear and determine the matter in its entirety.

4. Since the preliminary objection concerned jurisdiction, I ordered that it be heard first. I gave the parties leave to file skeleton submissions.
5. In the submissions dated 20th May 2025, the defendants submitted that the suit was an abuse of the court's process, as orders of eviction could only be issued by the Environment and Land Court. It was argued that since a confirmed grant already existed, no new application could be submitted.
6. It was urged that the plaintiff wasn't a dependent under section 29 of the Law of Succession Act. Further, counsel submitted that the Court had no jurisdiction to entertain the matter.
7. The submissions of the plaintiff in response are dated 30<sup>th</sup> May 2025. Counsel for the plaintiff submitted, based on the holding in the case of *Wenyong & another v Barasa* [2023] KEHC 19161 (KLR), that since no defence was filed, a preliminary objection could not be raised in vacuo.
8. Counsel submitted that the claim of the plaintiff was founded on the doctrine of *donatis mortis causa*, and was not a suit under sections 29 of the Law of Succession Act.
9. On the jurisdiction of the Court, it was urged that the Court had the jurisdiction under section 47 of the Law of Succession Act to issue any order as would be just, and that denying the application would negate the provisions of section 31 as read with section 32 of the Law of Succession Act.
10. Counsel for the plaintiff urged this Court to dismiss the notice of preliminary objection filed herein.
11. Has a valid preliminary objection been raised, and does it have merit? What orders should be issued? Those are the issues that I am tasked with determining at this point.
12. What amounts to a preliminary objection was defined by the Court of Appeal of Eastern Africa in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696. Law JA, as he then was, said 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.”

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....”

13. My understanding of the above holding is that a preliminary objection must be based on pure points of law and is raised on the assumption that the facts pleaded by the other side are correct. It would seem to me that a defendant objecting to the jurisdiction of the Court need not file a defence if all he is objecting to is the jurisdiction of the court as discerned from the pleadings. With respect, I disagree with the holding by my sister, JWW Mongare, J in *Wenyong & another v Barasa* [2023] KEHC 19161 (KLR) that it was necessary to file a defence and that in the absence thereof the Court was being invited to consider the preliminary objection in vacuo.



14. The jurisdiction of the High Court is stated in Article 165 of the *Constitution*. the *Constitution* explicitly denies the High Court jurisdiction to hear and determine certain matters under Article 162(2), as read in conjunction with Article 165(5) of the *Constitution*. In particular, the High Court may not consider the right to title to land as this is within the constitutional remit of the Environment and Land Court.
15. Section 13 (1) and (2) of the *Environment and Land Court Act* states as follows:-
- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (b) relating to compulsory acquisition of land;
- (c) relating to land administration and management;
- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (e) any other dispute relating to environment and land.”
16. The 1<sup>st</sup> defendant has a confirmed grant. He sold the property to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiff denies claiming an interest in the said property on account of dependency, but rather that his claim is founded on a donation made in contemplation of death. Based on that, it would seem to me that his claim is one of ownership, or of the right to use or the right to title to land.
17. At the heart of the matter is the jurisdiction of the Court. The Court of Appeal in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) stated as follows:-
- “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.”
18. Looking at the plaint, it is clear, as I have indicated, that the crux of the matter is the land title. In my view, this Court lacks jurisdiction to hear and determine the matter; that jurisdiction lies with the Environment and Land Court. I must therefore, with respect, down my tools.
19. In the circumstances, I find and hold that the preliminary objection has merit. This honourable court has no jurisdiction to hear and determine the matter. I therefore strike out the plaint filed herein with no orders as to costs.



20. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 16<sup>TH</sup> DAY OF JUNE 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Oduor Opalo, for the Plaintiff;

Ms Matoke, holding brief for Mr Opwapo, for the Defendants; and

Arthur – Court Assistant.

