



Cheptanui (Suing as the Administrator of the Estate of the Late Sibilina Kosgei who is suing as Administratrix of the Late Cherono Mulwa) v Cherono & 5 others (Civil Appeal 003 of 2022) [2025] KEELC 4157 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
CIVIL APPEAL 003 OF 2022**

L WAITHAKA, J

MAY 14, 2025

BETWEEN

ANN CHEPTANUI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE SIBILINA KOSGEI WHO IS SUING AS ADMINISTRATRIX OF THE LATE CHERONO MULWA) APPELLANT

AND

**ERICK KIBET CHERONO 1ST RESPONDENT
JACOB KIPLIMO KANGONGO 2ND RESPONDENT
MAURICE KIPNGETICH KOECH 3RD RESPONDENT
JONATHAN KIPYATOR KIPEL 4TH RESPONDENT
LAND REGISTRAR, ELGEYO MARAKWET 5TH RESPONDENT
THE HON ATTORNEY GENERAL 6TH RESPONDENT**

(Being an appeal from the ruling of Hon. Charles Kutwa SPM delivered on 9th February 2022 in Iten SPMC ELC Case No.31 of 2018)

JUDGMENT

1. By a plaint dated 22nd March 2010 and amended on 3rd October 2011 and further amended on 5th September 2019, the plaintiff (now appellant) instituted a suit in the lower court to wit Iten SPMC ELC Case No.31 of 2018 seeking judgment against the defendants (now respondents) jointly and severally for a declaration that any dealings with the parcels of land known as Irong/Sergoit/387 and 450 (suit properties) by the 2nd, 3rd, 4th and 5th defendants is null and void;



2. A permanent injunction to restrain the 2nd and 3rd defendants by themselves, their agents and or servants from leasing out, selling, transferring or in any other way disposing off any portions of the suit properties; an order of eviction against the 4th and the 5th defendants; an order of permanent injunction to restrain the 2nd, 3rd and the 4th defendant from accessing, residing on, ploughing, using, developing or in any other way dealings with proceeds of the suit properties; an order of inhibition to inhibit the Land Registrar, Elgeyo Marakwet County or any lands registry whatsoever from making any entries in the land register of the suit properties; a declaration that any entries in the register of the suit properties made in consequence of the transaction by the 2nd and 3rd defendants of their part and the 4th and 5th defendants of the other part by themselves, their agent and or servants is null and void; an order of mandatory injunction compelling the Land Registrar Elgeyo Marakwet County to rectify the register of the suit properties made in consequence of the transactions between the 2nd, 3rd, 4th and the 5th defendants.
3. The suit is premised on the grounds that the suit properties belong to the estate of Cherono Mulwa, deceased; that the plaintiff is the administratrix of the estate of the deceased; that the 2nd and the 3rd defendant, who are relatives of the deceased person, fraudulently caused themselves to be registered as the proprietors of the suit properties and that the 2nd and 3rd defendant purported to sell portions of the suit property to the 4th and 5th defendant.
4. Further that pursuant to the impugned dealings with the suit property, the 3rd and 4th defendants took possession of portions of the suit properties and began developments thereon, construction.
5. Lamenting that owing to the activities and dealings of the defendants, the estate of Cherono Mulwa has suffered loss and prejudice, the plaintiff instituted this suit seeking the reliefs listed herein above.
6. The 1st to 5th defendants filed a joint statement of defence denying the allegations contained in the plaint and contending that the plaintiff's suit is bad in law.
7. Vide paragraph 8 of their statement of defence, the defendants intimated their intention to raise a preliminary objection against the plaintiff's suit on the ground that the suit offends the mandatory provisions of Order XXXVI Rule 1 and/or Order LIII Rule 1, 2, 3 and 4 of the Civil Procedure Rules.
8. In keeping with their notified intention to challenge the plaintiff's suit, the defendants filed the notice of preliminary objection dated 25th October 2021, seeking to strike the plaintiff's suit on the grounds that:-
 1. That the suit is bad in law and fatally defective for offending the mandatory provisions of Order 37 Rule 1 and 2 of the Civil Procedure Rules, Cap 21 Laws of Kenya; and
 2. That the suit offends the mandatory provisions of Section 13A of the *Government Proceedings Act*, Cap 40 Laws of Kenya.
9. The notice of preliminary objection was disposed off by way of written submissions.
10. In their submissions dated 29th November 2011, the defendants gave an overview of the plaintiff's pleaded case and based on the provisions of Order 37 rules 1 and 2 of the Civil Procedure Rules 2010 submitted that the plaintiff's suit does not meet the threshold of Originating Summons contemplated under Order 37 Rules 1, 2, 14 and 15 of the Civil Procedure Rules hence fatally defective for want of form.
11. Reference is made to the provisions of Order 24, on abatement of suits on account of death of parties, and based on the documents filed by the defendants showing that the initial plaintiff, Sibilina Kosgei,



passed on without being substituted within the time provided for substituting a deceased plaintiff, submitted that the suit abated, hence is none existent.

12. On his part, the plaintiff submitted that the notice of preliminary objection is not on points of law but on facts.
13. On the issue of time bar and/or abatement of the suit, it is submitted that it is not a pure issue of law as evidence is required to prove the alleged time bar or abatement of the suit hence not a proper province of a preliminary objection.
14. On the contention that the suit offends the mandatory provisions of Section 13A of the Government Proceedings Act, Cap 40 Laws of Kenya, the plaintiff submitted that the section was declared unconstitutional. In that regard, reference is made to the case of Kenya Bus Service Limited & another vs. Minister for Transport & 2 others (2012)e KLR where it was held:-

“Section 13A of the Government Proceedings Act as a mandatory requirement for institution of suit against the government violates the provisions of Article 48 of the Constitution.”

15. Upon considering the notice of the preliminary objection, the learned trial magistrate held/observed:-

“...I have considered the pleadings and submissions filed by the parties. The issue for determination is whether the plaintiff’s suit is defective, bad in law and offends the provisions of the Government proceedings Act. A preliminary objection is a point of law which if taken would dispose off the suit. It is what was formerly called a “demurrer”. The Respondents’ preliminary objection fits the definition of a preliminary objection per the leading case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd (1969)E.A.696.....

The respondents submitted that the plaintiff’s further amended plaint dated 5th July, 2019 is not verified and does not meet the threshold of Originating Summons as contemplated by Order 37 rule 1, 2, 14 and 15. That the suit by the plaintiff has abated by operation of law.

I have perused the amended plaint dated 5th July 2019. The said plaint was verified by the plaintiff and paid for.

On the issue of abatement, its order 24 which provides for the procedure in case of death of one of several plaintiffs or of a sole plaintiff. Because of its importance I reproduce here below the pertinent part of that provision.....

The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and where cause of action survives or continues is plain. Speaking generally, by operation of law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff but as was observed by the Court of Appeal in Said Swailem Gheithan Saanum v. Commissioner of Lands (Sued through Attorney General) & 5 others Malindi Civil Appeal No.16 of 2015 the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.....



The deceased died on 27th November 2017 and the application for substitution was made on 8th August 2018 and the same allowed on 20th February 2019. The application for substitution was therefore filed within a year.

Lastly, this is a matter to do with the estate of the late Cherono Mulwa. The subject properties are registered in the name of the deceased. The applicant had filed Eldoret P and A No.39 of 2007 wherein the High Court revoked the grant issued to the respondents. As of now the estate of the late Cherono Mulwa has no legal representative.

A court's jurisdiction flows from either *the constitution* or legislation or both.....

I have perused this file and noted that the grant that triggered the current controversy was confirmed on 28th May 2003 in Iten Succession Cause No.6 of 2001 in the estate of Cherono Mulwa. The said Cherono Mulwa was the grandfather of the plaintiff herein and the father to the 1st, 2nd and 3rd defendants. The properties in issue were distributed to the three defendants.

I have carefully considered the law and the background facts leading to the filing of this case emanated from the contents and the implementation of the grant that was issued on 28th May 2003. From the material before me, I am of the considered view that the issues in the suit herein are deeply rooted in the grant in succession cause No.6 of 2001 which only a succession court possesses the jurisdiction to hear and determine.

It's my view that this court sitting as a land court has no jurisdiction to hear and determine this case. The parties are therefore advised to file succession proceedings where the parties interests and intermeddling issues by the respondents will be determined by the court. In the premises I strike out the plaintiff's suit with no order as to costs."

16. Dissatisfied with the decision of the learned trial Magistrate, the plaintiff appealed to this court on 8 grounds which can be condensed to one broad ground namely that the learned trial magistrate erred by striking out his suit.
17. Pursuant to directions given on 17th October 2023 the appeal was disposed off by way of written submissions.

Submissions

Appellant's Submissions

18. In her submissions filed on 16th January 2024, the plaintiff/appellant submits that the notice of preliminary objection taken up by the defendants/respondents did not meet the threshold of a preliminary objection set in Mukisa Biscuits case because evidence was required to determine the issues raised in the preliminary objection.
19. Pointing out that the issues raised in her pleadings concern the propriety or otherwise of the process of acquisition of rights by the defendants over the suit properties, the plaintiff/appellant reiterates her contention that the learned trial magistrate erred by determining that the court, sitting as a land court, lacked jurisdiction to hear and determine the suit. In that regard, reference is made to the case of David Ngugi Kamau & Another v Waithera & 4 Others (2021)e KLR.
20. The plaintiff/appellant urges this court to set aside the impugned ruling and reinstate the suit for hearing on its merits.



21. At the time of writing this judgment, the defendants/ respondents had not filed submissions, and if they had, the submissions were not in the court file.

Analysis and determination

22. As pointed out hereinabove the defendants/respondents premised their preliminary objections on two grounds namely:-
1. The suit is bad in law and fatally defective for offending the mandatory provisions of Order 37 Rule 1 and 2 of the Civil Procedure Rules, Cap 21 Laws of Kenya; and
 2. That the suit offends the mandatory provisions of Section 13A of the *Government Proceedings Act*, Cap 40 Laws of Kenya.
23. Through their submissions filed in respect of the notice of preliminary objection, the respondents added another ground not contemplated in their pleadings, statement of defence and the notice of preliminary objection namely; the suit had by operation of law abated.
24. I have carefully read and considered the decision of the trial court appealed from. Whereas the ruling addresses the issues of law raised in the preliminary objection and the submissions, I note that the learned trial magistrate did not determine the objection on the basis of the issues raised in the preliminary objection but on a different issue of law namely; the court sitting as a land court lacked jurisdiction to hear and determine the issues raised in the suit.
25. In exercise of the duty vested in this court as a first appellate court, I have re-evaluated the evidence adduced before the lower court with a view of reaching my own conclusion on it. I have reminded myself that a first appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or were based on misapprehension of the evidence or unless it is demonstrated that the trial court acted upon wrong principles in reaching the finding. In that regard, see *Selle & another vs. Associated Motor Boat Co. Ltd* (1968)E.A 123, *Mwanasokoni vs. Kenya Bus Service Ltd* (1982-88)1 KAR and *Kiruga vs. Kiruga & Another* (1988)KLR 348.
26. While it's true that the plaintiff's suit emanates from issues touching on administration of the estate of the Cheronon Mulwa, deceased, I note that the suit raises issues of fraud touching on acquisition of rights to the estate by the defendants. It is the considered view of this court that the issues raised in the plaint are better dealt by a land court and not a Probate and Administration Court. In reaching that determination, I am persuaded by the decision in the case of *David Ngugi Kamau vs. Waithera Mohoyo & 4 others* (2021)e KLR cited by the plaintiff/appellant where the court stated:-

“...To determine whether this matter falls under the jurisdiction of this court, one must examine the contents of the plaint and the orders sought therein.....A review of decisions from the Succession Courts indicate that the Succession Court only deals with administration of the estate of the deceased and does not extent to determination of disputes with third parties, or other rights, even though such rights may arise from the deceased's estate....In the case of *Re Estate of Alice Mumbua Mutua (Deceased)* (2017) e KLR the Court held that when disputes arise after confirmation of the grant, the same ought to be determined outside the probate court....In the present case, the dispute in question relates to ownership of land, which is within the domain of the Environment and Land Court. Even though the origin may have been a succession cause, issues that arise post transmission respecting any property subject of succession within the purview of Article 162(2)(b) of *the Constitution* and section 13 of the Environment and Land Court...Quite evidently the issues



raised in the present suit are whether an implied or continuing trust was established when the 1st defendant was registered as the sole owner of the suit property following succession cause. This is a post transmission issue and cannot fall for determination by the succession court. It is this Court which has jurisdiction to deal with the matter.”

27. I also note that the Learned trial magistrate relied on documentary evidence to determine the issues raised in the preliminary objection. Clearly, all the issues taken up by the respondents required evidence to determine.

28. It’s trite law that a preliminary objection cannot be raised if any fact had to be ascertained or if what is sought is exercise of judicial discretion. In that regard see the case of Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696 where Charles Newbold JA, as he then was) stated:-

“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 had to be ascertained or if what is sought is exercise of judicial discretion.”

29. The upshot of the foregoing is that the appeal has merit. Consequently, I set aside the decision of the lower court striking out the plaintiff’s suit and reinstate the suit.

30. I also award the costs of the appeal to the plaintiff/appellant.

31. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 14TH DAY OF MAY, 2024.

L. N. WAITHAKA

JUDGE

Judgment read electronically in the presence of:-

Ms. Ledisha Kipsei for the appellants

Mr. Owuondo holding brief for Mr. Komen Kipchirchir for the 2nd – 5th respondents

N/A for the 1st & 6th respondents

Court Asst.: Christine Towett

