



**Mwangi v Kimotho & another (Environment & Land Case
E099 of 2022) [2025] KEELC 3937 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3937 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E099 OF 2022**

JA MOGENI, J

MAY 14, 2025

BETWEEN

LYDIA WANGUI MWANGI PLAINTIFF

AND

LUCIA WANGARI KIMOTHO 1ST DEFENDANT

ISAAC THUKU KIMOTHO 2ND DEFENDANT

RULING

1. What is before this Court for determination is the Preliminary Objection dated 12/09/2024. The grounds are;
 - a. That the 1st Defendant namely Lucia Wangari Kimotho is deceased and therefore this suit is misplaced, irregular and an abuse of the Court process.
 - b. That the instant suit is res-judicata as the issues raised and/or prayers sought in the main suit have already been determined by 2 (two) Courts of competent jurisdiction namely; High Court Of Kenya At Kiambu Succession Cause No. 10 Of 2017 And In Chief Magistrates Court Succession Cause No. 311b Of 2008, Estate Of John Kimotho Karanja.
2. The Preliminary Objection is premised on the grounds that the Originating Summons is res judicata the issues having been litigated in Chief Magistrate Court at Thika, Succession Cause Number 311B of 2008, Estate of John Kimotho Karanja and High Court Succession Cause Number 10 of 2017, In the matter of the Estate of John Kimotho Karanja.
3. The Plaintiff in response to the Preliminary Objection filed a Replying Affidavit sworn on 22/10/2024 and deposed that this Court has jurisdiction as provided in Section 13 of the Limitation of Action's Act Cap 22 and under Order 37 Rule 7 of the [Civil Procedure Act](#).



4. The Plaintiff averred that she has been in possession of the suit property since 1989 and without interruption for 12 years thus she has adversely acquired property from the year 2001.
5. On the issue of res judicata the Plaintiff states that HCCC No. 10 of 2017 was for Revocation of Grant which was dismissed since the Plaintiff was found to have no locus standi. Whereas Thika CMSUCC Case No. 311B of 2008 was a Succession Case of Estate of John Kimotho Karanja therefore the doctrine does not apply.
6. It is the contention of the Plaintiff/Respondent that she has sued both Defendants as administrators of registered owner who alienated one (1) acre of the Ndarugu/Gacharage/1516 in 1989.
7. On 23/09/2024, when this matter came up for directions, the parties were guided by Honorable Court whereby they agreed to have the said Preliminary Objection be canvassed by way of written submissions. Unfortunately, by the time of penning down the Ruling, the Court had only accessed the submissions from the Applicant/Respondent dated 19/10/2024. The Respondent/Plaintiff did not file any submissions. Pursuant to that, directions and strict timelines were given by the Court to that effect the Court reserved its Ruling date on its own merit accordingly.

Analysis and Determination

8. I have keenly considered the Objection raised through the Notice of Preliminary Objection dated 12/09/2024, the pleadings and detailed written submissions by the Applicant/Respondent, the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and Statutes.
9. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) issues for its determination. These are:-
 - a. Whether the Objection raised through the Notice of Preliminary Objection dated 12/09/2024 meets the threshold founded in Law and precedents.
 - b. Whether the Applicant is entitled to the relief sought from filed Notice of Preliminary Objection dated 12/09/2024.
 - c. Who will bear the Costs of the Objection?

a. whether the objection raised through the Notice of Preliminary Objection dated 12/09/2024 meets the threshold founded in Law and precedents.

10. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary”
11. The above legal proposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd. [1969] EA 696. Where Lord Charles Newbold P. held that a proper Preliminary Objection constitutes a pure point of law. The Learned Judge then held that:-

“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 demurer 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 in 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.”

12. There is also the decision in the case of Attorney General & Another v Andrew Mwaura Githinji & Another [2016] eKLR where the Court held as follows:-

“... As it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of Preliminary Objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.”

13. It is trite law that a Preliminary Objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of the issues and facts of contention in this objection are to be adduced during a full trial.

14. Similarly, the Court in the case Oraro v Mbaja [2005] eKLR 141, on the nature of Preliminary Objections observed that:

“A Preliminary Objection 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. 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. Where a Court needs to investigate facts, a matter cannot be raised as a Preliminary Objection anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

15. The Preliminary Objection in this matter is founded on the notion that the Plaintiff has sued a deceased person. This is a matter of fact and not a pure point of law. Whereas it is not contested but it is a point of fact that Lucia Wangari Kimotho the 1st Defendant is deceased. However the point of departure is that by the time the Originating Summons was filed the 1st Defendant was dead, she died in 1995. Therefore the action of filing a suit against a dead person the point of law. That a suit was brought against a dead person.

16. It is not in dispute that the suit was filed against the 1st Defendant who was Deceased. It also appears to be the common position of the parties that the Plaintiff was aware that the 1st Defendant was deceased but she still chose to file a case against a dead person.



17. In the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others* [2018] eKLR, the Court stated as doth:-

“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the Court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to Court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.”

18. In the Indian case of *C. Muttu v. Bharath Match Works* AIR 1964 Kant 293 the Court observed,

“If he (Defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the Defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

19. In yet another Indian Case of *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 the Court citing another decision observed as follows,

“.... If a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the Court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

It is common ground that the 7th Defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct Counsel and that Counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the Plaint, the extraction of the Summons; the entering of appearance and filing of the Defence were a nullity. The cases cited by Counsel for the Plaintiffs include, *Benjamin Leonard Mc foy v. United Africa Company Limited* [1961] All ER 1169. In that case the Court stated as follows,

“If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

20. This is exactly what the Plaintiff is attempting to do. In the words of the cited case above this is an attempt to place something on nothing and expect it to retain ground. This cannot happen.



21. Further, in *Geeta Bharant Shah & 4 Others –vs- Omar Said Mwatayari & Another* (2009) eKLR, the Court of Appeal while considering an Appeal over a matter in which the suit was filed against a Defendant who was dead at the time of filing suit stated as follows:

“We have anxiously considered the appeal. This is a first appeal. We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the Court to do so for once the Respondent also admitted he sued a dead person, the Court was duly bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first Defendant was already dead by the time the suit was filed meant that the Plaintiff (now first Respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first Defendant was long dead”

22. In the instant case, the Court is aware that the Originating Summons was filed against the 1st Defendant who was deceased at the time of the filing. I note that it was also the common position of the parties and therefore there was no dispute that by the time the Respondent instituted the suit as against the Deceased, the Deceased was a deceased person.
23. Therefore, the suit was fatally instituted against a non-existent person and remained so. Ipso facto, the suit was nullity ab initio. It was dead on filing because something could not be placed on nothing and be expected to remain there.
24. In the decision I relied on in *Oraro v Mbaja* [supra] in which Ojwang, J (as he then was) expressed himself 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. The first matter relates to 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 pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a Preliminary Objection, 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. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the Applicant’s



instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a Preliminary Objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the Respondent's very detailed "affidavit in reply to an affidavit in support of Preliminary Objection", which replying affidavit was expressed to be "under protest"...The Applicant's "notice of Preliminary Objection to representation" cannot pass muster as a procedurally designed Preliminary Objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said Preliminary Objections are matters of great controversy, as their factual foundations are the subject of dispute."

25. The Preliminary Objection is hinged on the fact that the Plaintiff sued a deceased person. It is my view that all the relevant facts as summarized above are not in dispute. Resultantly therefore the objection is a pure point of law.

b. Whether the Applicant is entitled to the relief sought from filed Notice of Preliminary Objection dated 12/09/2024.

26. I have considered the Objection the question for determination is not whether the Defendant is dead but whether the property is one vesting in the Estate of the Defendant. I am afraid that the question is actually whether the Defendant had died at the time that this suit was filed and if I find for a fact that he was deceased at the time, then I will have no choice but to strike out this suit as null and void. I say so for one cannot sue a dead man and claim that the suit is properly before Court.

27. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR where he reviewed various authorities as follows:-

28. In the Indian case of *C. Muttu v Bharath Match Works* AIR 1964 Kant 293 the Court observed,

"If he (Defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the Defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person."

29. In yet another Indian Case of *Pratap Chand Mehta v Chrisna Devi Meuta* AIR 1988 Delhi 267 the Court citing another decision observed as follows,

"... If a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the Court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment."



30. No grant of representation has been presented to Court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity. Going by the materials on record, I am persuaded that suit filed against the 1st Defendant estate cannot be sustained. Having said so, the Preliminary Objection hereby succeeds and the said claim is declared incompetent, null and void as it is founded on proceedings that were also null and void ab initio against a deceased person

c. Who will bear the Costs of the Objection?

31. It is trite law that issues of Costs are at the discretion of the Honorable Court. Costs are award granted to a party at the conclusion of any legal action or proceedings in a litigation process. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other.” The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. By events it means the results and outcome of any legal action, proceeding or process in any litigation. In the case of Reids Hewett & Company v Joseph AIR 1918 cal. 717 & Myres v Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it ...”

32. The events in the instant case is that the Preliminary Objection raised by the Applicant/2nd Defendant herein has succeeded. For that very reason, the Applicant herein will have the Costs of the Objection to be borne by the Plaintiff/Respondent herein.

Disposition

33. From the foregoing the Court finds and orders as follows:

- a. That the Notice of Preliminary Objection dated 12/09/2024 by the Respondent herein be and is hereby found to have merit and the same is hereby sustained with costs.
- b. That consequent to (a) above, the Origination Summons Application against the 1st Defendant/Respondent dated 29/08/2022 be and is hereby struck out on the grounds of being null & void ab initio.
- c. That the costs of the Notice of Preliminary Objection to be awarded to the Applicant/ Defendant.
- d. It is so ordered accordingly.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 14TH DAY OF MAY 2025.

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MOGENI J

JUDGE

In the presence of:-



Mr. Mugo for the Defendants/Respondents

Mr. Kereu holding brief for Njoroge for the Plaintiff

Mr. Melita - Court Assistant

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MOGENI J

JUDGE

