



Mutave alias Gladys Syombua Kilonzo alias Salome Mule v Chairman, Katelembo Athiani Muvuti Farming & Ranching Society Limited & another; Registrar of Lands, Machakos Lands Registry (Interested Party) (Civil Miscellaneous Application E127 of 2024) [2024] KEHC 14073 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E127 OF 2024**

FR OLEL, J

NOVEMBER 13, 2024

BETWEEN

SYOMBUA MULE MUTAVE ALIAS GLADYS SYOMBUA KILONZO ALIAS SALOME MULE PLAINTIFF

AND

THE CHAIRMAN, KATELEMBO ATHIANI MUVUTI FARMING & RANCHING SOCIETY LIMITED 1ST RESPONDENT

CHARLES AK MULELA ALIAS CHARLES ANDREW KILONZO MULELA 2ND RESPONDENT

AND

REGISTRAR OF LANDS, MACHAKOS LANDS REGISTRY INTERESTED PARTY

RULING

A. Introduction

1. The Plaintiff/Applicant herein did file her Notice of motion Application dated 6th May 2024 brought pursuant to provisions of Section 1A,1B 3A, and 98 of the *Civil Procedure Act*, Section 4 of the *Appellate Jurisdiction Act*, Order 22 rule 48 & 67, , Order 40 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The applicant sought for orders that;
 - a. Pending the hearing and determination of this application inter parties, the authorized officials of katalembo Athiani Farming and Ranching cooperative Society Limited and Katalembo Athiani Muvuti Farming and Ranching Cooperative Society Limited be and are hereby



directed to furnish the court and the parties herein with copies of the title documents relating to all those properties known as Plot Nos 3445,3702 and 653 situated in Machakos town.

- b. Pending the hearing and determination of this Application inter parties, the court be pleased to issue a temporary injunction order prohibiting the respondents and interested party and/or any other person from transferring or charging all those properties known as Plot 3445, 3702 and 653 situated in Machakos town in any way, and all persons from taking any benefit from such purported transfer or charge.
 - c. The court be pleased to issue a vesting order directing the deputy registrar of the court to execute all relevant transfer documents relating to all those properties known as Plot Nos 3445, 3702 and 653 situated in Machakos town in favour of the Applicant herein GLADYS SYOMBUA KILONZO including but not limited to the original title documents, lands consent to transfer and valid clearance certificates for rates and rents and vacant possession of the said properties.
 - d. Subject to order 3 above, the court be pleased to issue an order directing the Registrar of Lands, MACHAKOS LANDS REGISTRY to register all those properties known as Plots Nos 3445, 3702, and 653 situated in Machakos town in favour of the Applicant herein GLADYS SYOMBUA KILONZO, subject to payment of the relevant statutory dues.
 - e. Subject to order Number 3 above, the court be pleased to issue an order directing the registrar of lands, MACHAKOS LANDS REGISTRY to issue the Applicant herein GLADYS SYOMBUA KILONZO with the original certificate of title for Plot Nos 3445, 3702 and 653 conferring the said Applicant with valid titles.
 - f. The Registrar of lands, Machakos lands registry be and is hereby directed to cancel all other titles over Plot Nos 3445, 3702 and 653 in compliance with the judgment of the court of Appeal in Nairobi Civil Appeal No 2 of 2015; Syombua Mule Vrs Charles A.K Mulela, Alias Charles Andrew Kilonzo Mulela
 - g. The costs of this Application be provided for,
2. The application is supported by the ground on the face of the said application and the supporting affidavit of the Applicant Gladys Syombua Kilonzo dated 6th May 2024.
 3. Upon being served, the 2nd Respondent and Interested party both filed their Notice of Preliminary Objection dated 4th June 2024 and 11th June 2024 respectively raising the following issues;
 - i. 2nd Respondent's grounds raised in their Preliminary Objection dated 4th June 2024.
 - a. That the Notice of Motion dated 6th May 2024 is incompetent and fatally defective and ought to fail because it has been made before a court that did not “pass the decree” within the meaning of law and in particular Section 29 of the [Civil Procedure Act](#).
 - b. That this court has no original jurisdiction to deal with questions relating to execution or satisfaction of the decree as the applicant seeks in the application and those questions can only be determined by the court executing the decree and not by a separate court and in a separate suit.
 - c. The applicant’s suit as filed is incompetent, bad in law, an abuse of the court process and the same should be dismissed with costs to the respondent.
 - ii. Grounds raised in the Preliminary objection filed by Interested Party



- a. That this Honourable Court lacks jurisdiction to entertain and determine the matter at hand.
 - b. That the application is an abuse of the court process as the court cannot amend/ alter the decision of the court of Appeal.
 - c. That the application is incompetent and ought to be struck out with costs.
4. The court prioritized disposal of both preliminary Objections and the 2nd respondent and the Applicant/decree holder both filed their Respective submission.

B. Analysis & Determination

5. I have carefully considered the ground raised in both Preliminary Objections as filed and also considered both sets of submissions filed.

i. Whether the preliminary objection is merited.

6. The Black's Law Dictionary defines a preliminary objection as;
- “...an objection that, if upheld, would render further proceedings before the tribunal unnecessary”. It goes on to list an objection to the court's jurisdiction as an example of a preliminary objection.
7. The parameters for consideration in determining a preliminary objection are now well settled and in general it should raise only issues of law. The same were set out in the case of Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696 , Where at page 700 Law JA stated that:
- “ 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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case, at page 701, Sir Charles Newbold, P. 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.
8. It is not in dispute that the Court of Appeal in Nairobi Civil Appeal No. 2 of 2015; Syombua Mule Vrs Charles A.K Mulela, Alias Charles Andrew Kilonzo Mulela, affirmed ownership of Plot 3445, 3702, and 653 held at Katelembo Athiani Muvuti Farm and Ranching Cooperative Society Limited in favour of the Applicant, which decree she seeks to enforce.
9. The question that arises from the objection filed is whether this court is clothed with proper jurisdiction to entertain and determine the matter at hand, to wit; enforcing the execution of the decree passed by the Court of Appeal.



10. Section 4 of the *Appellate Jurisdiction Act* does provide that;
- “ Any Judgement of the Court of Appeal given in exercise of its jurisdiction under this Act may be executed and enforced as if it were a judgment of the High Court.”
11. Section 30 of the *Civil Procedure Act*; provides that;
- “ A decree may be executed either by the court which passed it or by the court to which it is sent for execution.”
12. The aforesaid provision, should be read together with Section 29 of the *Civil Procedure Act*, which defines the expression “court which passed a decree” to mean
- a. Where the decree to be executed has been passed in the exercise of appellate jurisdiction, the court of first instance; and
 - b. Where the court of first instance has ceased to exist or to have jurisdiction to execute it, the court which, if the suit wherein the decree was passed were instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.
14. Further Section 34 (1) of the *Civil Procedure Act*, also provides that;
- “ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
14. The primary suit, between the parties herein, was filed at Machakos High Court, and though the pleadings filed did not specify the suit Number, the Court of Appeal Judgment (Court of Appeal in Nairobi Civil Appeal No 2 of 2015; Syombua Mule Vrs Charles A.K Mulela, Alias Charles Andrew Kilonzo Mulela) made reference to the Appeal being against the Judgement of Honourable Makhandia. J dated 20th September 2013 sitting at High Court Machakos.
15. Section 34 of the *Civil Procedure Act* expressly bars the filing of separate proceedings to determine issues emanating or arising from the execution of decrees. It is plain and obvious that the decree, which the Applicant seeks to enforce can only be executed within the initial suit filed at Machakos High court. See OLOO VRS MAKHOKHA (CIVIL APPEAL E044 OF 2023) {2023}KEHC 19764 (KLR).
16. The Applicant’s recourse is to file this Application in the primary High Court file and have it determined therein.

C. Disposition

14. The court finds merit in the Preliminary objections dated 4 June 2024 and 11 June 2024 and must down its pen as it does not have jurisdiction to entertain these proceedings. The final orders issued are that;
- (a) The Applicant’s notice of Motion Application dated 6th May 2024 lacks merit and it is hereby dismissed, with no orders as to Costs.
 - (b) This Misc Application file is marked as closed.
14. It is so Ordered.



RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 13TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 13TH DAY OF NOVEMBER 2024

In the presence of: -

No appearance Appellant

No appearance Respondent

Susan/Sam Court Assistant

