



Muthengi t/a Mutisya & Company Advocates v Mbuvi & another (Miscellaneous Application E007 of 2023) [2025] KEELC 4901 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E007 OF 2023**

**JA MOGENI, J
JUNE 26, 2025**

BETWEEN

**MARTIN MUTISYA MUTHENGI T/A MUTISYA & COMPANY
ADVOCATES APPLICANT**

AND

**JACINTA WANGOVE MBUVI 1ST RESPONDENT
ADMINISTRATORS OF THE ESTATE OF KYALE MWENDWA
(DECEASED) 2ND RESPONDENT**

RULING

1. I have before the Court three applications; the first is the Applicant’s Advocate/Client Bill of Costs dated 10/07/2023, a Preliminary Objection dated 29/11/2023 filed by the 2nd Respondent and the last is the Notice of Motion dated 3/04/2024.
2. When the parties appeared in Court on 23/07/2024 it was agreed that all the applications shall be canvassed by way of written submissions and a Ruling date was reserved for the three applications.
3. The Advocate/Client Bill of Costs dated 10/07/2023 was filed directly to this Court necessitating the filing of the Preliminary Objection where the Objector raised the issue of jurisdiction. I will therefore determine the Preliminary Objection first. Before then, allow that I enumerate what the 3rd application is all about.
4. The 3rd Application is dated 3/04/2024 the Applicant seeks the following orders:
 - a. That this Honorable Court does grant leave to the Intended Interested Parties/Applicants to be enjoined as Interested Parties to these proceedings
 - b. That the costs of this application be provided for



5. The application is based on the following grounds and the Supporting Affidavit of Mumo Mwendwa and other grounds to be adduced at the hearing:
 1. That the intended interested Parties together with the herein 1st Respondent are among the beneficiaries of the Estate Kyale Mwendwa (Deceased) thus have an interest in the proceedings of the said Applicant's Bill of Costs against the Estate of the Deceased represented here by the 2nd Respondent.
 2. That the position of the herein 2nd Respondent has not yet been confirmed as the Certificate of Confirmation of Grant is yet to be issued by the Superior Court in H.C. Succ. Cause No. E2167 of 2021 (Milimani) In the matter of the Estate of Kyale Mwendwa (Deceased).
 3. That the position of the herein 2nd Respondent is not being challenged but the herein Intended Interested Parties having an interest in the state of the Estate have a right to participate in the proceedings.
 4. That the herein 2nd Respondent availed no information to the Intended Interested Parties as to how he intended to oppose these proceedings despite the 2nd Respondent owing the herein Applicants a fiduciary duty.
6. So as already intimated before I canvass the Applicant's Bill of Costs and the Application for Joinder it is important that I first consider the Preliminary Objection filed by the 2nd Respondent.
7. The Preliminary Objection was filed under Article 162 (2) (b) as read with Article 162 (3) of *the Constitution*, Section 150 of the *Land Act* No. 6 of 2012, Section 13 (2) of the *Environment and Land Court Act*, 2011, Section 4 (1) of the *Limitation of Actions Act*.
8. The 2nd Respondent prior to the taxation of the Bill of Costs dated 10/07/2023 raised the Preliminary Objection alluding to the jurisdiction of the Honorable Taxing Officer on the following points of law:-
 - i. In so far as the Bill of Costs arises out of the Applicant's alleged representation of Kyale Mwendwa (deceased) in the High Court of Kenya at Milimani in Milimani High Court Civil Suit No. 6 of 2011 (formerly Nairobi High Court (ELC) Civil Suit No. 249 of 2011) Mumo Ikui Mwendwa & 2 Others -Versus- Jacinta Wangove Mbuvi & 5 Others, neither the Environment and Land Court nor its Deputy Registrar has the jurisdiction to hear and determine a taxation for proceedings that took place before the High Court.
 - ii. The Deputy Registrar of the Environment and Land Court stated that the Court File for the alleged case to wit Milimani ELC 249 of 2011 (O.S.) Mumo Ikui Mwendwa & 2 Others - Versus- Jacinta Wangove Mbuvi & 5 Others cannot be traced in the Court Registry or Records for the Environment and Land Court at Milimani, which further proves that the Bill of Costs is before the wrong Court devoid of jurisdiction to hear and determine High Court matters.
 - iii. In so far as Applicant's Bill of Costs dated 10 July 2023 lacks any supporting documents or proof for any of the services charged for including the alleged retainer by Kyale Mwendwa (deceased) and the alleged Court attendances, the Bill of Costs ought to be struck out with costs.
 - iv. The Bill of Costs has charged for services allegedly rendered after Kyale Mwendwa (deceased) passed away on 3 November 2020 which would mean that the Applicant acted without instructions and intermeddled with his Estate.



- v. In so far as the last service allegedly provided by the Applicant to Kyale Mwendwa (deceased) was on 23 April 2012, the Bill of Costs is time-barred under Section 4 (1) of the *Limitation of Actions Act*.
 - vi. The Bill of Costs is incompetent, an abuse of this Honourable Court's process and ought to be struck out with costs.
 - vii. That the fiduciary duty owed by the 2nd Respondent extends to his handling of the property that he holds in trust for the Applicants grounded on the trust created over estate property when the same is vested in the 2nd Respondent to hold on behalf of the Applicants.
 - viii. That the herein Applicants having a real and vested interest in the Estate and not being minors have every right to participate in the proceedings of the Estate as the 2nd herein Respondent is merely vested with the property of the Estate pending the distribution of the Estate.
 - ix. That the 2nd Respondent has no ownership over the Estate and it is the herein Applicants who stand to be prejudiced if not able to participate in the proceedings.
 - x. No prejudice will befall the parties if the application is allowed.
9. Now a Preliminary Objection is usually raised as the Applicant herein has done at the beginning of a case or lawsuit, before the main issues are addressed as is the case here. It aims to address procedural or jurisdictional matters. The instant Preliminary Objection is challenging the jurisdiction of this Court to address the Bill Costs filed vide the Application dated 10/07/2023.
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. This issue has been canvassed in our Courts many times on end and therefore I will just borrow and rely on precedents emanating from our Superior Courts and Courts of equal status. The leading case which many Courts rely on is the case of Mukisa Biscuits -Versus- Westend Distributor Ltd [1969] EA 696, where it was stated that:-
- “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 the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.”
12. This position was also articulated in the case of Nitin Properties Limited –Versus- Jagjit S. Kalsi & Another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257 where the Court held that;
- “A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”



13. Further the Court also in the case of United Insurance Company Limited –Versus- Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396 had this to say on the same subject and held that;

“ A Preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed.”

14. It is therefore clear that a Preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of In the matter of Siaya Resident Magistrate Court Kisumu HCC Misc. App No. 247 of 2003 where the Court held that;

“ A Preliminary Objection cannot be raised if any facts has to be ascertained.”

15. I do also place reliance on the case of Attorney General & Another -Versus- Andrew Mwaura Githinji & Another [2016] eKLR where the Court concisely described what the scope, nature and meaning of Preliminary Objection entails by stating as follows:-

- 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.

16. The Objector has questioned the Jurisdiction of this Court on matters regarding taxation of the Advocate/Client Bill of Costs for the professional services rendered thereof. Taking into account the above findings and holdings of various Courts on what amounts to a Preliminary Objection, I am satisfied and strongly hold that the objections on the Jurisdiction of Court is a pure point of Law. Therefore, the Court now turns to the grounds raised by the Applicant herein.

Issue No. 1: Whether this Court has the jurisdiction to hear and determine a taxation for proceedings that took place before the High Court.

17. Jurisdiction means a Courts power to decide case or issue a decree. From the very onset, on the issue of Jurisdiction of a Court of Law, I am compelled to cite now famous case of Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya) Limited (1989) IKLR dealt with a Court, jurisdiction thus:-

“Jurisdiction is everything. Without it, a Court has no powers to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction ... where a Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.



18. Additionally, still on the same point, in the case of County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR where the Court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“ 10. The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme Court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme Court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-“ it is settled that jurisdiction is the life blood of any adjudication because a Court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a Court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost”

19. The Environment and Land Court is a statutory creation by *the Constitution* of Kenya under the provision of Article 162 (b). The Court is vested with original and unlimited jurisdiction. From the preamble of the *Environment and Land Court Act*, No. 19 of 2011 the jurisdiction of the Court is defined as “... a Superior Court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes”
20. Under the provision of Sections 4 and 13 (1) of the *Environment and Land Court Act* this Court has the legal mandate to hear any matter related to environment and land including the one filed by the Applicant hereof. In the case of the ELC (Malindi) in the Kharisa Kyango – Versus - Law Society of Kenya (2014) eKLR.
21. The jurisdiction of the ELC Court is limited by the provision of Article 162(2) and (3) of *the Constitution* of Kenya and Sections 101 of the *Land Registration Act*, No. 3 of 2012, Section 150 of the *Land Act*, No. 6 of 2012 and 13(2) of the ELC *Act No. 19 of 2011*. Article 162(2)(b) which states that Environment and Land Court has the mandate to hear and determine disputes relating to use and occupation and title to land.
22. The provision of Section 13 of the *Environment and Land Court Act* contains detailed information on the jurisdiction of the Court.
23. In this instant case, the Applicant filed a Notice of Motion application dated 10/07/2023 seeking to have Judgment entered in his favour for the sum of Kenya Shillings Seventeen Million Four Hundred and Fifty One Thousand Eight Hundred and Four Shillings and twenty four cents. (Kshs. 17,451,804.24/-) only as per the draft Bill of Costs emanating from instructions to take over the matter and act on behalf of the 1st and 3rd Respondents in respect of shares or shareholding in the family business, to wit, Muvokanza Limited, Academic Service Limited Riverside Investments Co. Limited valued at Kesh 2 billion.



24. Rendering itself on the question of jurisdiction the Court of Appeal in the Peter Kangethe case (Supra) stated as follows:-

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the Court’s jurisdiction to deal with disputes connected to “use” of land as discussed herein above. Such contracts, in our view, ought to be incidental to the “use of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.”

25. Clearly just by reading the instructions drawn by the Applicant it shows that the issue related to matters touching on shares and shareholding in the family business. The resultant activities undertaken by it attendance in Court, perusal of Court documents, photocopying of documents to be used in Court all related to the first instruction about shareholding and family business.

26. There was certainly a contract between the Parties on the said process of determining shares and shareholding which however does not show anywhere that it involved any issue of proprietary rights in land which confers the jurisdiction of the issue under the environment and land Court but being that this matter involved fees and a bill of costs, in shares or shareholding in the family business it is clear that this Honourable Court has no jurisdiction to determine the fees payable to the Advocate in the transaction and that nature.

27. The jurisdiction for taxation of matters related to shareholding in a Company generally lies with the High Court, not the Environment and Land Court (ELC). The High Court has unlimited original jurisdiction in civil matters, including those related to corporate shareholding. While the Environment and Land Court handles Land and Environmental disputes, it does not typically deal with corporate shareholding matters.

28. Given the foregoing I do hold that the Preliminary Objection is merited and in so doing it settles the other applications filed herein since the Court not having jurisdiction it downs its tools and moves no further. The other two applications suffer the fate of not being attended to since they were tied to the Application dated 10/07/2023 where this Court has no jurisdiction. The costs are awarded to the Respondents in the Preliminary Objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF JUNE 2025 VIA MICROSOFT TEAMS.

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MOGENI J

JUDGE

In the presence of:

Applicant – Absent

1st Respondent – Absent

Mr. Waweru for the 2nd Respondent

Mr. Melita – Court Assistant

