



REPUBLIC OF KENYA



KENYA LAW
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**Gathegi & another v Muthoni (Environment and Land Case
E021 of 2024) [2025] KEELC 6308 (KLR) (23 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT AND LAND CASE E021 OF 2024
LL NAIKUNI, J
SEPTEMBER 23, 2025**

BETWEEN

JOHN NG'ANG'A GATHEGI 1ST PLAINTIFF

JULIEAH MUGURE MUTHAMA 2ND PLAINTIFF

AND

NJERI WA MUTHONI DEFENDANT

RULING

I. Introduction

1. Before the Honourable Court for its determination is the Preliminary Objection dated 27th May, 2025. It was raised by the Defendant/Applicant herein through the Law Firm of Messrs. Kakai Mugalo Advocates LLP.
2. The objection was when the matter was coming up for hearing of the main suit on the 4th June, 2025. The matter was initiated through a Complaint dated 20th February 2024.

II. The objection by the Defendant/Objector.

3. The objection raised by the Defendant/Objector under the following grounds: -
 - a. That by dint of Article 162 (2) (b) of *the Constitution* of Kenya as read with Section 13 (2) of the *Environment and Land Court Act*, No. 19 of 2011 of the Laws of Kenya, this Honourable Court lack the requisite jurisdiction to hear and determine this suit.



- b. That the issue of monies owed and or due fall within the Civil jurisdiction of the High Court (Commercial and Tax Division) by dint of Article 165 (3) of the Constitution of Kenya.

III. Submissions

4. On 4th June 2025, while in Court and in the presence of all the parties, they were directed to have the Preliminary objection disposed of as a matter of precedence by way of written submissions within stringent timelines.
5. Pursuant to that, all parties fully obliged. Thereafter, the Honorable Court reserved the 23rd July 2025 for delivery of the ruling and further direction. However, due to avoidable circumstances it was eventually delivered on 23rd September, 2025 accordingly.

A. The Written Submissions by the Defendant/Objector

6. The Defendant through the Law Firm of Messrs. Kakai Mugalo Advocates LLP. filed her written submissions dated 10th June 2025. Mr. Mugalo Advocate commenced his submissions by rehashing on the objection. He submitted three (3) key issues for determination. These were:-
7. Firstly, whether the Preliminary objection was merited. While relying on the famous case of “Mukisa Biscuit Manufacturing Co. Limited – Versus - West End Distributors Limited [1969] EA 696”, the Learned Counsel asserted that a preliminary Objection must raise a pure point of law, assuming the Plaintiffs’ facts as correct. The objection was said to protect judicial time and resources, as per the case of “Independent Electoral & Boundaries Commission – Versus - Jane Cheperenger [2015] eKLR”. The Learned Counsel argued that this Court, established under the provision of Article 162(2)(b) of the Constitution, lacks jurisdiction. Primarily, the subject matter of suit instituted by the Plaintiffs fell within the pecuniary jurisdiction of the Magistrates’ Court under the provision of Article 169 and Section 7 of the Magistrates’ Courts Act. The suit property (Kwale/Ukunda/160, 0.46 Ha, was valued at a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=)). According to the Counsel this was within the sum of Kenya Shillings Ten Million (Kshs. 10,000,000/=) which was the jurisdiction of Hon. B. Lewa, a Principal Magistrate sitting at the Kwale Law Courts.
8. Secondly, whether the suit should be dismissed in limine with costs. The Learned Counsel contended that the Plaintiffs had bypassed the Magistrates’ Court. This was engaging in forum shopping. It risked denying parties their right to appeal from lower Courts to this Court. To support his argument, the Legal Counsel referred Court to the provision of Order 2, Rule 15 of the Civil Procedure Rules, 2010 whereby he argued that the suit was frivolous, vexatious and an abuse of court process, warranting dismissal in limine.
9. Thirdly, whether the Defendant was entitled to costs. The Defendant sought costs, asserting the Court’s discretion to award them for defending a misguided suit.

B. The Written Submissions by the 1st & 2nd Plaintiffs/Respondents

10. In opposition to the objection dated 4th April 2025, the Law firm of Messrs. Barayan & Associates on behalf of the Plaintiffs/Respondents filed the written submissions dated 13th May 2025. Mr. Inyangu Advocate submitted that the key issues for determination was whether the preliminary objection was merited. The Learned Counsel asserted that this Court has original jurisdiction under Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011, to hear all land disputes, including those concerning title and tenure. On this point, he cited the case of:- “Boniface



Waweru Mbiu – Versus - Mary Njeri & Another [2005] KEHC)”. He argues that the objection fell on issued which relied on disputed facts, such as the property’s value and existence allegedly non-existent per official searches. The Learned Counsel while citing the case of “Mukisa Biscuit (Supra)” he reiterated that required objections to be on pure points of law, not facts requiring ascertainment. With regard to the instant case, the Learned Counsel referred Court to the case of:- “Mutegi Mugwetwa – Versus - Chief Officer Lands & 4 Others [2019] KEELC”, he contended that pecuniary jurisdiction was not a bar when other issues like title disputes were raised. This was because, they required full hearing. Therefore, according to him, the objection was misconceived and should be dismissed with costs.

IV. Analysis and Determination

11. I have keenly considered the objection raised through the Notice of Preliminary Objection dated 27th May 2025 by the Defendant herein, the rival written submissions, the authorities cited, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
12. For the Honorable Court to arrive at a informed, fair and reasonable decision, it has crafted three (3) issues for determination. These are: -
 - a. Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 27th May 2025 meets the threshold founded in Law and precedents.
 - b. Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 27th May 2025
 - c. Who will bear the Costs of the Objection?

ISSUE No. a) Whether the objection raised by the Defendant through the Notice of Preliminary Objection dated 7th April 2025 meets the threshold founded in Law and precedents.

13. Under this Sub – heading, the Honourable Court, the main substratum of the matter is an objection raised by the Objector to have the entire suit by the Plaintiffs be struck out as the Court lacks jurisdiction to hear and determine it. the whole suit. Thus, the Court will first consider what amounts to a Preliminary Objection. Thereafter, the Court will then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.
14. According to the Black Law Dictionary a preliminary objection is defined as:-

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
15. To support this legal position, the Court wishes to cite several cases including “the Classicus locus’ case of: “Mukisa Biscuits Manufacturing Co. Limited (Supra)” described a preliminary objection as hereunder:-

‘So far as I am aware, 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, JA in the same case 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. The improper practice should stop.'

16. Similarly, the case of:- “Nitin Properties Limited – Versus - Singh Kalsi & Another [1995] eKLR” the court stated thus:- -

“ A Preliminary Objection 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.’

17. Further, the Tanzanian Court of Appeal sitting in Dar es Salaam, in the case of: “Karata Ernest & others – Versus - Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29th December 2010)”, (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), expounded the issue of preliminary objections in a more exhaustive manner as follows: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.’

18. The Supreme Court addressed its mind on this issue in the case of “Aviation & Allied Workers Union Kenya – Versus - Kenya Airways Limited & 3 Others [2015] eKLR” and stated:

“ Thus, a Preliminary Objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

19. Also the case of:- “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;

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

20. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR”: - 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.
21. Therefore, from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. The preliminary objection herein questions this court’s jurisdiction to handle this suit. It is well settled that jurisdiction is the backdrop against with the court is mandated to engage in determination of any matter brought before it, without it the court has no business proceeding with the matter.
22. The preliminary objection in this matter is founded on the notion that this court lacks jurisdiction to hear and determine this suit as the issue of monies owed and or due fall within the Civil Jurisdiction of the High Court (Commercial and Tax Division) by dint of Article 165 (3) of *the Constitution* of Kenya. The issue of jurisdiction is an issue of law and as such the preliminary objection is properly raised.

ISSUE No. b). Whether the Defendant is entitled to the relief sought from filed Notice of Preliminary Objection dated 7th April 2025

23. Under this sub – heading, having satisfied myself that the preliminary objection on the issue of jurisdiction is properly raised, I will now embark on the merits of the said preliminary objection. 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”.

16. Additionally, still on the same point, in the case of “County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR” whereby 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 dead 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.....”

24. Additionally, the Court of Appeal stated in the case of “Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others – Versus - Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another – Versus - Eric Cheruiyot & 15 Others (unreported)” in a decision rendered on 8th February, 2022 expressed itself on the doctrine of jurisdiction in general as follows:

“Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows: By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

25. Legally speaking, the Environment & land Court is a creature of *the Constitution* of Kenya, 2010 under the provision of Article 162(2)(b). The provision states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. Pursuant to that, the Environment & Land Court Act, No. 19 of 2010 was legislated. The provision of Section 13 of the *Environment and Land Court Act*, No. 19 of 2011 expounds on the jurisdiction of this Court 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.”

26. Inevitably, the Honourable Court is compelled to critically conduct a careful examination of the pleadings herein. From the very onset, the Court holds that the suit relates to monies due and owing to the Plaintiff in respect to the purchase of suit property known as Land Reference Numbers Kwale/Shimoni ADJ/735. As per Paragraphs 16 and 17 of the Complaint dated 20th February 2024;

16. By reason of the above-mentioned breach of agreement all the moneys paid under the sale agreement became returnable to the Plaintiffs together with damages for breach of contract, loss of bargain, being the difference between the contract price of Kshs. 6 18,912,500/- and the value of the land at the time of breach being Kshs. 34,000,000/-, and costs of the transaction.

17. The Defendant has implicitly acknowledged the aforesaid breach by refunding the Plaintiffs part of the money paid under the sale transactions being the sum of USD 94,551.00. A sum of USD 45,310.38 remains due and outstanding from the Defendant to the Plaintiffs.

27. Furthermore, the specific prayers sought by the Plaintiff also relate to an order requiring the Defendant to pay certain amount of money as follows:-

Reasons Wherefore, the Plaintiffs pray that judgment be entered against the Defendant for: -

- a) USD 45,310.38 or its current Kenya shillings equivalent.
- b) Kshs. 15,087,500/- for loss of bargain.
- c) Kshs. 172,400/= legal costs of the transaction.
- d) Kshs 15,000/- being legal cost of the demand letter.
- e) Costs of the suit.
- f) Interest on (a) to (d) at commercial rates.

28. Critically speaking, and particularly guided by “the Principles of Pre – dominant test”, I reiterate that the main object and purpose of the suit is predominantly to recovery the monies due to the Plaintiff. Certainly, it is not on ownership of al that suit property Kwale/Shimoni Adj/ 735. Clearly this is a dispute or declaration that can only be resolved by the High Court. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3).

29. In saying so, I am guided by the Court of Appeal case of:- “Co - operative Bank of Kenya Limited – Versus - Patrick Kangethe Njuguna & 5 Others [2017] eKLR”, where the Court of Appeal determined that the ELC jurisdiction to deal with disputes connected to ‘use’ of land and do not include mortgages, charges, collection of dues and rents are within the civil jurisdiction of the High Court. The Court



further held that exclusive jurisdiction of the ELC is limited to: Articles 162 (2) (b) of the Constitution and Section 13 of the ELC Act which are not concerned with accounting questions whereas the jurisdiction of the High Court in accounting matters is evidenced by Article 165 (3) of the Constitution.

30. Consequently, based on the foregoing discussions, I find the preliminary objection has merit and the suit is hereby struck out.

Issue No. c). Who will bear the Costs of the Objection?

31. It is now well established that the issue of Costs is the discretion of Courts. Costs mean the award that a party is granted at the conclusion of the legal action or proceedings of any litigation. According to the Black Law Dictionary, “Cost” is defined to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”. The provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. By the events, it means the results or outcome of any legal action or proceedings thereafter.

32. Further, these legal principles were upheld in the Supreme Court case of: “Jasbir Rai Singh – Versus – Tarchalans Singh, (2014) eKLR” and the Court of Appeal cases of “Cecilia Karuru Ngayu – Versus – Barclays Bank of Kenya & Ano. (2016) eKLR” the Courts held:-

“.....the basic rule on attribution of costs is that costs follow the event.....it is well recognized that the principles costs follow the event is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

33. In the instant case, the Preliminary objection raised by the Defendant has succeeded on the fundamental threshold of such an objection in law. Thus, it is been allowed. It follows that the Defendants are entitled to the costs thereof.

V. Conclusions & Disposition

34. Ultimately, upon causing an in-depth analysis to the framed issues herein, the Honourable Court on Preponderance of Probabilities and the balance of convenience reaches at the following findings. These are: -
- a. That the Notice of Preliminary Objection dated 23rd May, 2025 be and is hereby found to be merited.
 - b. That it follows therefore that the suit is struck out.
 - c. That the costs of the Preliminary objection together with the costs to the suit to be borne by the 1st and 2nd Plaintiffs/Respondents be and are hereby awarded to the Defendant.

It is ordered accordingly.

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 23RD DAY OF SEPTEMBER 2025

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**HON. MR. JUSTICE L.L NAIKUNI,
ENVIRONMENT & LAND COURT AT KWALE.**

Ruling delivered in the presence of: -



- a. Mr. Daniel Disii, the Court Assistant.
- b. Mr. Inyangu Advocate for the 1st & 2nd Plaintiffs.
- c. Mr. Mugalo Advocate for the Defendant.

