



**Cattani v Quaciari & 4 others (Commercial Case E007 of 2024)
[2025] KEHC 13802 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
COMMERCIAL CASE E007 OF 2024
M THANDE, J
SEPTEMBER 30, 2025**

BETWEEN

ALBERTO CATTANI PLAINTIFF

AND

RENZO QUACIARI 1ST DEFENDANT

**MARIA GIADA VISCHI AND AMINA LAURA VISCHI ADMINISTRATORS
OF THE ESTATE OF FERNANDO VISCHI 2ND DEFENDANT**

BARABINO GUGLIELMO 3RD DEFENDANT

ABLA REAL ESTATE LTD 4TH DEFENDANT

COUNTY LAND REGISTRAR MOMBASA 5TH DEFENDANT

RULING

1. By a plaint dated 7.5.24, the Plaintiffs seek a permanent injunction restraining the Defendants, by themselves, their agents, proxies, assigns and/or servants, from using, occupying, selling, transferring and developing and/or dealing with the properties in Malindi known as Plot Nos. 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1875 and 2111 (the suit properties). The Plaintiff also seeks an order directing the Land Registrar, Mombasa to cancel the titles in favour of the Defendants, rectify the register and issue a title of ownership in favour of Bayview Properties Limited. Also sought is an order of mesne profits from the time of illegal transfer of the properties until finalisation of the matter, and costs of the suit.
2. The Plaintiffs also filed an Application of even date seeking the following orders:
 - a. Spent.



- b. Pending hearing and determination of this application the court be pleased to issue an order restraining the defendant by themselves that assigns proxies agents, servants and employees from selling, transferring, developing, occupying and/or dealing with the suit properties in whatsoever manner.
 - c. That pending hearing and determination of the suit the court be pleased to issue and order restraining the defendants by themselves that assigns proxies, agents, servants and employees and/or any person acting on their behalf and instructions from disposing off, selling, transferring, developing, occupying and/or dealing with the suit properties in whatsoever manner.
 - d. That cost of this application be provided for.
3. The grounds upon which the Application is premised are set out in the Application and in the affidavit of the Plaintiff sworn on even date. The Plaintiff averred that Bayview Properties Limited (the Company) acquired the suit properties; that the Company had 7 shareholders, who included the 1st and 2nd Defendants and others; that majority shareholders of the Company appointed him as legal and lawful attorney to manage the affairs of the Company; that in 2023, he discovered that the Defendants had changed the structure of the Company and gave themselves the authority and power to irregularly dispose of the suit properties; that the Defendants have taken possession and occupation of the suit properties without any colour of interest and right; that the Defendants are in the process of selling and developing the suit properties which is wrongful and illegal and is done without the consent and authority of the owners of the Company; that the Defendants have fraudulently dispossessed the Company of its legally owned properties; that the Plaintiff as an attorney of the owners of the Company's properties stands to suffer loss and damages. The Plaintiff urged that the orders sought be granted.
4. The 1st Defendant opposed the Application vide a replying affidavit and a preliminary objection both dated 31.5.24. The objections raised are:
1. The Plaintiff is neither a member nor a director of Bayview Properties Limited.
 2. As averred in Paragraph 7 of the Plaint, the Plaintiff instituted this suit on the basis of special powers of attorney donated to him by what the Plaintiff terms as the majority shareholders of Bayview Properties Limited.
 3. The Application and suit have been brought in contravention of Order 9 Rules 1(a) and 2 (a) of the Civil Procedure Rules, 2010.
 4. Carlo Bresciani is neither a director nor a member of Bayview Properties Limited and as such he had no capacity to donate any power of attorney to the Plaintiff or any other person as relates to Bayview Properties Limited.
 5. Carlo Bresciani has no locus standi to institute this suit on behalf of the estate of his late father Aldo Bresciani as he does not have Letters of Administration.
 6. On the 9th day of January, 2024, the Specific Powers of Attorney Nos. 21462 by Marco Angelo Alimonti to the Plaintiff and 21466 by Giuseppe Pusterla to the Plaintiff were cancelled and rendered deleted from the Power of Attorney register as provided for in Section 16 and 33 of the *Registration of Documents Act*, Cap 285 of the Laws of Kenya.
 7. The Plaintiff has no locus standi to institute this suit.



5. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the locus classicus on preliminary objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold rendered himself thus:

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.

And Law, JA stated:

So far as I'm 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.

6. The law is that for a preliminary objection to be upheld, it must raise a pure point or points of law, which would completely dispose of the matter. As a minimum, the factual basis ought not to be disputed.
7. A preliminary objection cannot be raised where facts are to be ascertained. In this regard I am guided by the holding in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR where the Supreme Court stated as follows:

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.

8. Duly guided I find that the objections that Plaintiff is neither a member or director of the Company; that the donors of the powers of attorney had no capacity to donate the same to the Plaintiff as relates to the Company; that the powers of attorney donated to the Plaintiff were cancelled, are all question of fact that require to be ascertained. These objections thus fail.
9. I now turn to the objection that the Application and suit have been brought in contravention of Order 9 Rules 1(a) and 2(a) of the Civil Procedure Rules. Under the Rules, a party may make an application, appear or do any act in court in person, by a recognized agent or by an advocate. Order 9 Rule 1 stipulates as follows:

Any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf:

10. While the law permits a party to make an application, appear or do any act in court by a recognized agent, this may only be done with the approval of the court. Order 9 Rule 2(a) provides:

The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

- a. subject to approval by the court in any particular suit persons holding powers of attorney or an affidavit sworn by the party authorizing them to make such appearances and applications and do such acts on behalf of parties;



11. In the case of *Carolyn Mpenzwe Chipande v Wanje Kazungu Baya* [2014] eKLR, Meoli, J. had occasion to consider the import of the above provisions and stated:
19. The foregoing issue was not canvassed before me and there is not sufficient material to enable me draw any conclusions. Be that as it may, the wording of Order 9 rule 1 and 2 of the Civil Procedure Rules leaves no doubt that the court has wide discretion in determining whether or not to allow an agent to appear or do any act in a suit. That discretionary power must be invoked by way of an application and is exercised judicially. No party should presume to act or appear before the court merely on the basis of the power of attorney without first obtaining the court's approval, howsoever sought. The appellant believed himself properly authorized by the power of attorney alone to act on behalf of the donor. That was an erroneous understanding of the rules.
12. I fully concur with the learned Judge. The Plaintiff herein presumed to file the present suit only on the basis of the power of attorney donated to him, without first obtaining the Court's approval. The requirement to seek and obtain approval is not a procedural technicality that can be overlooked. It goes to the root of the capacity of the Plaintiff as a recognized agent to bring the suit or to act on behalf of the donor of the power of attorney.
13. The Court finds that, the objection that the suit was brought by a party lacking locus standi for contravening of Order 9 Rule 1 and 2 of the Civil procedure Rules is a pure point of law in respect of which the preliminary objection, has been validly raised. This alone renders the suit defective.
14. One more thing. While the Plaintiff claims that the shareholding in the Company was altered fraudulently, the gravamen of his claim is the ownership and occupation of the suit properties.
15. Does this Court have the jurisdiction to entertain the suit and the Application before it? The law, is that a court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. This was succinctly stated by the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, as follows:
- A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.
16. This Court derives its jurisdiction principally from Article 165(3) of *the Constitution* which confers upon it, unlimited original jurisdiction in criminal and civil matters. The provision clearly delineates and demarcates what the Court can and cannot do.
17. Article 165(5) limits the jurisdiction of this Court as follows:
- The High Court shall not have jurisdiction in respect of matters—
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162(2).



18. Article 162(2) provides:

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-

- a. employment and labour relations; and
- b. the environment and the use and occupation of, and title to, land.

19. In his plaint, the Plaintiff seeks a permanent injunction restraining the Defendants, from using, occupying, selling, transferring and developing and/or dealing with the suit. He also seeks an order directing the Land Registrar, Mombasa to cancel the title in favour of the Defendants, rectify the register and issue a title of ownership in favour of the Company. Lastly, he seeks an order of mesne profits from the time of illegal transfer of the properties until finalisation of the matter, and costs of the suit. Similarly, in the present Application, the Plaintiff seeks interim orders restraining the Defendants from selling, transferring, developing, occupying and/or dealing with the suit properties in whatsoever manner. All these prayers have to do with the ownership, use and occupation of the suit properties.

20. The suit is couched as a commercial dispute relating to shareholding of the Company, and the structure thereof. Of note however, is that not a single prayer has been made seeking cancellation or revocation of the altered shareholding in the Company. The dispute is clearly a matter relating to title, use and occupation of land disguised as a commercial dispute. The suit before me is thus incompetent for want of jurisdiction.

21. It is trite law that without jurisdiction the Court cannot continue with proceedings before it. In this regard, the Court is guided by the holding in Owners of the Motor Vessel “Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1., where Nyarangi, JA. famously stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that 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.

22. Duly guided, the Court finds that the suit and the Application are by dint of Article 165(5) of *the Constitution*, incompetent for want of jurisdiction. Accordingly, the Court has no power to make one more step and must down its tools.

23. In the end, the Court upholds the preliminary objection with the result that the suit and Application being incompetent are both struck out with costs to the Respondents who filed responses.

DATED SIGNED AND DELIVERED IN MALINDI THIS 30TH DAY OF SEPTEMBER 2025

M. THANDE

JUDGE

