



Kasyoka & another v Munyao & 2 others (Environment and Land Appeal E036 of 2024) [2025] KEELC 6168 (KLR) (24 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E036 OF 2024
NA MATHEKA, J
SEPTEMBER 24, 2025**

BETWEEN

RAPHAEL MUMO KASYOKA 1ST APPELLANT

NDINDA RAPHAEL KASYOKA 2ND APPELLANT

AND

JACKSON MUTUKU MUNYAO 1ST RESPONDENT

THE PRINCIPAL LAND REGISTRAR, MACHAKOS 2ND RESPONDENT

ABDALLAMANI MUTUA DAUDI 3RD RESPONDENT

JUDGMENT

1. The Appellants, dissatisfied with the Orders from the Ruling of the Honourable Chief Magistrate Daniel Ole Keiuwa delivered on 31st July, 2024 in Kangundo Chief Magistrate’s Environment and Land Court Case No. 173 of 2019, appealed to this Court against the whole of the said Orders on the grounds that;
 1. The learned Magistrate erred in law and fact by misdirecting himself on the applicable provisions of the law and *the Constitution* and misapplying the same on the evidence presented before him on the 1st Respondent’s Preliminary Objection dated 14th November, 2023 to the Appellants’ Counter-claim in the further amended Statement of Defence and Counter-Claim dated 21st February, 2024 in Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019.
 2. The learned Magistrate erred in law and fact by misapprehending the Appellants’ said Counter-claim in the totality of the pleadings in the said suit thereby arriving at a wrongful finding that he lacked the jurisdiction to hear and determine the Counter-claim.



3. The learned Magistrate erred in law and fact in finding that the 1st Respondent had made out a case on the Preliminary Objection that the trial Court lacked jurisdiction to hear and determine the Counter-claim and proceedings to dismiss the Counter-claim.
 4. The learned Magistrate erred in law and fact in dismissing the Counter-claim on the basis of a non-existent or invalid Preliminary Objection and in issuing Orders of dismissal of the Appellants' Counter-claim thereon when the same were neither prayed for nor provided for in law.
 5. The learned Magistrate erred in law and fact by wrongfully exercising the powers of summary dismissal of pleadings in the matter and failing to appreciate that in dismissing the Counter-claim which was an integral part of the Appellants' said further amended Statement of Defence he had condemned the Appellants without being heard on both the Statement of the Defence and the Counter-claim hence denying them the right to a fair hearing.
 6. The learned Magistrate erred in law and fact by failing to apply his mind properly on the evidence tendered by the Appellants on the Preliminary Objection hence arriving at an erroneous evaluation of the same.
 7. The learned Magistrate erred in law and fact by failing to properly exercise his discretionally powers on the Preliminary Objection, failing to take into consideration relevant matters and taking into consideration irrelevant matters.
 8. The learned Magistrate erred in law and fact by arriving at a decision on the Preliminary Objection which was against the weight of the evidence presented to him.
2. The Appellants prays for Orders that;
1. The Appeal be allowed.
 2. The Orders issued on 31st July, 2024 by the trial court in Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019 on the 1st Respondent's Preliminary Objection dated 14th November, 2023 be set aside.
 3. The hearing of the said Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019 do proceed before a differently constituted competent court.
 4. The costs of this Appeal and of the proceedings on the said the 1st Respondent's Preliminary Objection dated 14th November, 2023 in the said Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019 be to the Appellants.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and



in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

4. The Appeal is based on the fact that on the 31st July 2024 the trial court dismissed the Counter claim on the 1st Respondent’s preliminary objection dated 14th November 2023 on the claim that the court lacks jurisdiction. That the title number Machakos/Nguluni/398 resulted from the provisions of the [Land Adjudication Act](#) and that the Appellants did not file an appeal under Section 29 of the Act.
5. 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.....”
6. The above legal proposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court 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”
7. In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminarily objection as;
 - (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.
8. 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. The 1st Respondent has raised the issue of jurisdiction and limitation. I find that the filed preliminary objection was properly brought before the court.
9. In the case of Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The jurisdiction of the ELC court flows from Article 162 (2)(b) of [the Constitution](#) of Kenya 2010. Section 13 (2) of the ELC Act vests this court with wide powers over any dispute relating to land it provides that;

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
10. The jurisdiction of this court to hear and determine this suit flows from *the Constitution* and the law. The jurisdiction of court is not conferred upon it by parties nor can the court confer upon itself jurisdiction. The Supreme Court in Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 others (2012) eKLR held that;
- “A court’s jurisdiction flows from either *the constitution* of 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.”
11. The Appellants submitted that title No. Machakos/Nguluni/398 originated from land known as Nguluni Adjudication Section Plot No. 398 owned by one Samuel Katisya who died in 1988 being survived by two widows namely. Idah Mbula Katisya and Stella Nzisa Katisya. In 1992 the two widows jointly filed an objection No. 87 of 1992 before the Nguluni Land Adjudication Officer who delivered judgement on the 15th January 1992. That he ordered that the land be apportioned between the two widows with Idah retaining the old number and Stella be given a new number 2303. In the same year Stella sold her portion number 2303 to the 2nd Appellant who took possession and set up a business.
12. That in October 2019 the 1st Respondent filed this suit for eviction where the Appellants applied to be enjoined and were surprised to find out that plot number 2303 had been registered elsewhere and that the entire plot was number 398.
13. I have perused the court record and find that counter claim dated 21st February 2024 seeks the following orders of rectification of the registers, issuance of a fresh title, in the alternative prescriptive rights, general damages and injunctive orders.
14. The Respondents submitted that the process that led to the registration of title number Machakos/Nguluni/398 and title number Machakos/Nguluni/2303 and it was done under the *Land Adjudication Act* and *Land Consolidation Act*. That there was an objection in case number 87 of 1992 lodged by Stella Nzisa the one who sold title number Machakos/Nguluni/2303 and her Co wife which led to the creation of title number Machakos/Nguluni/2303 and the creation of original plot number 398. There was no appeal made to the Minister of Lands under section 29 of the *Land Adjudication Act*.



That the Counter claim introduced a new claim of fraud and adverse possession. The trial magistrate in his ruling striking out the counter claim stated that;

“The issues raised by the Defendants seems to attack the locations of the parcels. These are issues which ought to have been canvassed by the parties shortly after the decision was delivered in 1992.”

Order 2 rule 15 of the Civil Procedure Rules which provides as follows;

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- a) it discloses no reasonable cause of action or defence in law; or
- b) it is scandalous, frivolous or vexatious; or
- c) it may prejudice, embarrass or delay the fair trial of the action; or
- d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

15. Order 2 Rule 15(2) of the Civil Procedure Rules provides that no evidence is admissible on an application under sub rule (1) (a) and therefore, it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence. The court’s power to strike out pleadings therefore, is to be exercised sparingly and cautiously. In the case of *D.T. Dobie & Company (Kenya) Ltd. vs. Muchina* (1982) KLR 1 the court stated that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

16. The main principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. I find that That the Counter claim introduced claims of fraud and adverse possession. The Appellant claim to have purchased the suit land in 1992 and had been in possession for over 27 years. It is not only challenging the location of the suit parcels. The matter would need to go to full trial to determine issues of fraud and adverse possession. I find that the Defendants/ Appellants have raised a prime facie case against the Respondents/Plaintiffs which should go to trial for adjudication. I find there are triable issues in this case and can only be determined once the matter goes to full trial. Judicial precedent has established that the jurisdiction to strike out any pleadings or suit is one to be exercised with utmost caution and sparingly. I find that the appeal is merited and grant the following orders;

1. The Orders issued on 31st July, 2024 by the trial court in Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019 on the 1st Respondent’s Preliminary Objection dated 14th November, 2023 be set aside.
2. The hearing of the said Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019 do proceed before a differently constituted competent court.



3. The costs of this Appeal and of the proceedings on the said the 1st Respondent's Preliminary Objection dated 14th November, 2023 in the said Kangundo Chief Magistrates Environment and Land Court Case No. 173 of 2019 be to the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24TH DAY OF SEPTEMBER 2025.

N.A. MATHEKA

JUDGE

