



**Mwanthi (Suing as the Legal Representative of the Estate of Annah Wanthua Mwanthi) v Muoki & 2 others (Environment & Land Case E007 of 2024) [2025] KEMC 91 (KLR) (14 April 2025) (Ruling)**

Neutral citation: [2025] KEMC 91 (KLR)

**REPUBLIC OF KENYA  
IN THE MAKINDU LAW COURTS  
ENVIRONMENT & LAND CASE E007 OF 2024  
YA SHIKANDA, SPM  
APRIL 14, 2025**

**BETWEEN**

**DAVID KILONZI MWANTHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANNAH WANTHUA MWANTHI) ..... PLAINTIFF**

**AND**

**CHARLES MAKAU MUOKI ..... 1<sup>ST</sup> DEFENDANT**

**NELSON GITHUKU ..... 2<sup>ND</sup> DEFENDANT**

**ENG MUTISO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a determination on a preliminary objection raised by the defendants herein. The notice of the preliminary objection is dated 11/4/2024 but was filed on the same day together with an affidavit in support of the Preliminary objection. The objection is premised on the following grounds:
  1. The Plaintiff's suit is Res Judicata and offends the provisions of section 7 of the [Civil Procedure Act](#);
  2. The instant cause of action is otherwise Sub-judice and offends the provisions of section 6 of the [Civil Procedure Act](#);
  3. The cause of action is hopelessly caught up with latches and offends the provisions of sections 7 and 10(3) and (4) of the [Limitation of Actions Act](#);
  4. The suit offends the mandatory provisions of section 18 (i)(a) and 19(i) of the [Land Registration Act](#);



5. The cause of action offends the mandatory provisions of sections 8, 15 and 26 of the [Land Consolidation Act](#) as read with section 30 of the [Land Adjudication Act](#).

### **Response By The Plaintiff**

2. The Plaintiff did not file a written response to the Preliminary objection.

### **Main Issues For Determination**

3. In my opinion, the main issues for determination are as follows:
  - i. Whether the preliminary objection was properly raised;
  - ii. Whether the preliminary objection should be upheld.

### **Submissions By The Defendants**

4. The defendants filed written submissions in support of the Preliminary objection. The defendants submitted that it was not in doubt that the Preliminary objection raised a pure point of law and stemmed from the pleadings filed. That the court does not need to look for facts elsewhere to make a conclusive decision. The defendants further submitted that the plaintiff herein filed a suit at the Environment and Land court at Makueni against the 1<sup>st</sup> defendant herein and the suit was dismissed for want of jurisdiction. That the plaintiff also filed a suit against the 1<sup>st</sup> defendant at the Machakos Family court. The defendants submitted that the suit at Machakos was in respect of the suit property herein and that it was heard and dismissed.
5. The defendants relied on section 7 of the [Civil Procedure Act](#) and submitted that the issues canvassed in the plaint have already been addressed in other courts of competent jurisdiction and or similar suits are pending in other courts of competent jurisdiction over the same subject matter. That the suit is an abuse of the court process and an act of forum shopping with a view to obtaining a favourable outcome. The defendants cited several authorities but did not bother to attach copies thereof or even provide links to the authorities. I must deprecate the habit of Advocates citing authorities without providing copies thereof. Parties cannot expect the court to scavenge for the authorities cited. That is not for the court to do, particularly where a party purports to rely on the authorities. It would also appear that the defendants mixed up issues in the submissions. At some point, I was unable to follow what the defendants were stating. In a nutshell, the submissions were quite underwhelming.

### **Submissions By The Plaintiff**

6. The plaintiff submitted that the defendants have not demonstrated how the claim is Res Judicata. That no documents have been lodged in this court showing the Plaintiff filed and or litigated against the Defendants herein or that the issues sought to be adjudicated are the same as those in a previous suit if any. The plaintiff submitted that all the defendants have provided are case numbers without naming the parties therein or explaining to this court the connection between those case numbers and the claim currently before this Honourable court. That this can only be because any attempt to so do would be directing this court to look at (disputed) facts which then negates the preliminary objection.
7. The plaintiff further submitted that the cause of action in this matter arose in the month of January 2024 when the Defendants trespassed on the Plaintiff's land and started constructing thereon without the permission and or consent of the Plaintiff. That the Plaintiff brought the claim before this court on 2nd February 2024 and it is unconscionable that the Defendants can suggest laches on the part of the Plaintiff. It was submitted on behalf of the plaintiff that the Defendants have not submitted to this



court how the Plaintiff's suit and or claim is in contravention and or estopped by Section 10(3) and (4) of the Limitations of Actions Act. That the Defendants are further yet to explain to this court how the Plaintiff's suit offends Provisions of Sections 18(i)(a) and 19(i) of the Land Registration Act nor have they directed this court to the offence against Sections 8, 15 and 26 of the Land Consolidation Act by the Plaintiff's suit. The plaintiff urged the court to dismiss the Preliminary objection.

### **Analysis And Determination**

8. I have carefully considered the preliminary objection. The question of what constitutes a preliminary objection was well answered in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd* [1969] E.A. 696 where at page 700 D – E Law J.A. stated: -

“So far as I am aware, Preliminary objection consists of a pure point of Law which has been pleaded, or which arises by clear implication out of the 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.”

9. At page 701 Sir Charles Newbold, P. said: -

“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”. (Emphasis supplied)

10. Similarly, in the authority of *Oraro v Mbaja* [2005] KEHC 3182 (KLR), the court had this to say:

“A ‘preliminary objection’, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message.”

11. To begin with, the 1<sup>st</sup> defendant filed an affidavit in support of the Preliminary objection. In the affidavit, the 1<sup>st</sup> defendant purported to “testify” to the facts of the case. The supporting affidavit was akin to his defence to the plaintiff's claim. A preliminary objection is on a pure point of law. It can neither be supported by an affidavit nor responded to by way of an affidavit. I will thus totally disregard the affidavit in support of the Preliminary objection. I have perused the notice of Preliminary objection. The 1<sup>st</sup> and 2<sup>nd</sup> grounds of the preliminary objection are based on sections 7 and 6 respectively, of the Civil Procedure Act. The defendants argue that the suit herein is Res judicata and at the same time Sub-judice.

12. From the defendants' submissions on this point, it is obvious that evidence will have to be adduced for the court to determine whether or not the suit is res judicata or sub-judice. This is not a fact that can be ascertained from the pleadings. It is worth noting that the defendants have not even filed their statement of defence. It would appear that the defendants expected the court to rely on their affidavit in support of the Preliminary objection. Issues of Res judicata and sub-judice cannot be determined



by way of a Preliminary objection. They are points of law but not PURE points of law capable of determination by way of a Preliminary objection.

13. The defendants have also relied on sections 7 and 10(3) and (4) of the *Limitation of Actions Act*. Section 7 thereof relates to limitation of an action to recover land. The plaint does not indicate when the cause of action arose. It is not clear whether the omission was by design or default. From the plaint, it cannot be ascertained whether the claim is statute barred. The defendants have not demonstrated how the suit offends section 10(3) and (4) of the *Limitation of Actions Act*. From the pleadings on record, I cannot determine whether the suit offends the provisions of law aforesaid. The defendants alleged that the suit offends the provisions of sections 18(i) (a) and 19(i) of the *Land Registration Act*. The said provisions do not exist in the Act. I fail to understand what the defendants were up to. Assuming that the defendants meant sections 18 and 19 of the *Land Registration Act*, the objection would not make any sense at all. No wonder no mention of the provisions was made in the defendants' submissions.
14. The Preliminary objection is also grounded on sections 8, 15 and 26 of the *Land Consolidation Act* as read with section 30 of the *Land Adjudication Act*. I have perused the provisions. I am unable to connect the provisions to the Preliminary objection. The defendants avoided to submit on the provisions. It is not the duty of the court to think for the defendants or figure out what they meant. The defendants cannot just quote provisions of law and expect the court to argue the objection on their behalf. I find that the Preliminary objection is not based on any pure point of law capable of being raised as a preliminary objection. On that ground alone, the preliminary objection must of necessity fail.

### **Disposition**

15. The upshot of the above considerations is that the preliminary objection is devoid of merit. I proceed to dismiss it with costs to the plaintiff. I further direct that the plaintiff amends his plaint by indicating when the cause of action arose. The amended plaint to be filed and served within seven (7) days from today. In the same breath, the defendants are directed to file a defence to the amended plaint within fourteen (14) from the date of service of the amended plaint against them.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 14<sup>TH</sup> DAY OF APRIL, 2025.**

**Y.A SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**

**HON Y.A. SHIKANDA**

