



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**ELCLA E001 OF 2024**

**JOHN NG'ANG'A KURIA..... APPELLANT**  
**VERSUS**  
**GRACE MUTHONI KAMBO .....RESPONDENT**

**JUDGMENT**

(1) In the memorandum of appeal dated 12-1-2024, the Appellant seeks one single order as follows.

“This appeal be allowed and the preliminary objection dated 9-5-2013 be allowed with an order striking out the Respondent’s **Murang’a MCELC Case No. E072 of 2022** with costs.”

The three grounds of appeal are as follows.

The learned trial magistrate erred in law and fact by-

- (i) **dismissing the Appellant’s preliminary objection dated 9-5-2023 which preliminary objection was meritorious on points of law,**
- (ii) **his failure to note that he had no jurisdiction and/or power to reverse the judgment and/or decision of a High Court Judge as per the orders made on 22-6-2022 and the subsequent certificate of confirmation of grant dated 9-2-2023 in Murang’a High Court Succession Cause No. 118 of 2017,**
- (iii) **his failure to note that Murang’a ELC case No. E072 OF 2022 would be res judicata in so far as L.R. No. Loc.4/Kiranga/876 is concerned in view of the judgment and certificate of Confirmation of Grant dated 9-2-2023 in Murang’a High Court Succession Cause No. 18 of 2017.**

(2) The facts of the case are as follows. The Respondent filed a sit in the CM’s Court seeking a declaration that **L.R. No. Loc.4/Kiranga/876** is held in trust by the Appellant’s family for the Dependants of one Waweru Gitu alias Waweru Nuna and secondly the said trust be determined and that one acre of the said land be registered in the name of the Respondent to

hold in trust for the descendants of Grace Kambo. The Appellant filed a defence in which he averred that

the trial Court had no jurisdiction in the matter because the High Court had already distributed the suit land in Murang'a High Court Succession Cause No.18 of 2017. The Appellant raised a preliminary objection dated 9-5-2023 in which he raised two(2) issues.

**(a) The trial court has no jurisdiction to reverse the judgment of a High Court as per the orders dated 22-6-2022 and the subsequent certificate of Confirmation of Grant dated 9-2-2023 in Murang'a High Court Succession Cause No. 18 of 2018.**

**(b) That the suit as filed offends the mandatory provision of Order 1 rule 8 of the Civil Procedure Rules.**

(3) Upon considering the preliminary objection, the learned trial magistrate in a ruling dated 22-11-2023 dismissed it for two reasons. Firstly, the Appellant had not indicated the law that the Respondent had offended and secondly it was not raised on a pure point of law and evidence was required to be adduced as the facts in question were contested. It is this ruling that precipitated this appeal.

(4) Counsel for the parties filed written submissions dated 12-5-2025 and 11-7-2025 respectively. I have not seen any clear-cut issues identified by either side from the written submissions. That being the case, I will treat the three grounds of appeal as the issues for determination. Having carefully considered the entire appeal including the record, the grounds, the written submissions as well as the law cited therein, I make the following findings on the three grounds.

(5) On the first ground, I find that the learned trial magistrate did not err. The preliminary objection was not on pure points of law. It was contested whether the suit land was to be shared between the two wives of Waweru Gitau namely Wangari Waweru and Damaris Wangari Waweru or not. While the Respondent contended that the land was to be shared between the two households, the Appellant's case was that it was only for one household. This was an issue for trial before the learned magistrate because it was not obvious from the pleadings on record. Secondly on this issue, the Appellant did not adduce any evidence to

prove that the issue of the trust had been determined by the Probate and Administration cause. Had such evidence been filed and admitted, then the preliminary point would probably have been valid. As was held

in the case of Oraro vs. Mbaya [2005] IKLR,

**“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 process 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection.”**

- (6) As for the second ground of appeal, there is nothing in the 23 page record of appeal filed by the Appellant to show the decision of the **High Court Succession Cause No. 118 of 2017**. Such material ought to have been filed. It was not the duty of this Court or trial court to go looking for such records. It was the duty of the Appellant to plead and file all this material before raising the preliminary objection.
- (7) Finally on the third ground of appeal, without the Appellant filing the decision of High Court, there is no way of knowing what was contained therein and whether it is *res judicata* what is sought in this suit. It is doubtful if the High Court could have decided on the issue of a customary trust which is an overriding interest under **Section 28(b)** of the **Land Registration Act** and which is outside the jurisdiction of the High Court by virtue of **Article 162(2) (b)** of the Constitution and **Section 13** of the **Environment and Land Court Act**. Confronted with all the above inadequacies, the trial magistrate was right in dismissing the preliminary objection which was not well anchored on uncontested material on record.
- (8) For the above stated reasons, I **dismiss** the appeal dated 12-1-2024 with costs to the Respondent.

**It is so ordered.**

**Dated, signed and Delivered virtually at Murang'a this 18<sup>th</sup> day of November, 2025.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of: -**

**Court Assistant – Mwangi Njonjo**

**Appellant’s Counsel – Mr Mwangi Ben holding brief**

**Respondent’s Counsel – Mr Nga’ang’a**