



Mwanganu v National Land Commission & 2 others (Environment and Land Case E068 of 2023) [2025] KEELC 7931 (KLR) (17 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE E068 OF 2023
JM ONYANGO, J
NOVEMBER 17, 2025**

BETWEEN

GEORGE KAMANDE MWANGANU PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

HON KINGARA SIMON NG'ANG'A 2ND DEFENDANT

THE DISTRICT LAND REGISTRAR, RUIRU 3RD DEFENDANT

RULING

1. The Plaintiff filed suit against the Defendants claiming that the 1st defendant had registered a caution on his parcel of land known as Ruiru/Ruiru East Block 3/1599 indicating that the land was pending repossession while the 2nd respondent had encroached on the said parcel of land, fenced it off and constructed some structures thereon.
2. The 1st defendant filed a statement of Defence dated 26th January 2025 denying the Plaintiff's claim.
3. In his statement of defence dated 7th May 2025, the 2nd Defendant denied that he had encroached on the Plaintiff's land and stated that the suit property was allocated to his foundation known as the King'ara Foundation through Mwalimu Farm Owners Association. He stated that due process was followed before he fenced and commenced developments on the land.
4. Simultaneously with the Defence, the 2nd Defendant filed a Preliminary Objection contained in the Notice of Preliminary Objection dated 7th May 2025 based on the following grounds:
 - i. That the 2nd Defendant does not have the legal capacity to be sued in his own capacity under the *Trustees (Perpetual Succession) Act* Cap 164, Section 3(3) of the *Trustees (Perpetual Succession) Act* Cap 164 under "Incorporation of Trustees" states that "upon incorporation of a trust, the trustees shall thereupon become a body "corporate by the name described in the certificate



and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name”

- ii. That the import of section 3B of the *Trustees (Perpetual Succession) Act* Cap 164 describes a charitable Trust as a trust formed for the exclusive purpose of the relief of poverty, the advancement of education, religion or human rights and fundamental freedoms, or the protection of environment or any other purpose beneficial to the general public.
 - iii. That further section 12 of the Act provides that “after incorporation of any trustees pursuant to this Act, every donation, gift and disposition of movable or immovable property or any interest therein, theretofore lawfully made (but not having taken effect) or hereafter lawfully made by deed, will otherwise to or in favour of the trust concerned, or the trustees thereof or otherwise for the purposes thereof, shall take effect as if it had been made to, or in favour of the body corporate or otherwise for the same purposes”
 - iv. That as a consequence, the suit herein is incompetent, frivolous, fatally defective and an abuse of the court process and should be struck out with costs to the 2nd Defendant.
5. The court directed that the Preliminary Objection be disposed of by way of written submissions and both parties complied by filing their submissions.

2nd Defendant’s submissions

6. In her submissions dated 15th May 2025 learned counsel for the 2nd defendant has taken issue with the 2nd Defendant’s capacity to be sued in his own name. It is her submission that even though the Plaintiff sued the 2nd defendant for encroaching on the Plaintiff’s land, he has acknowledged that upon investigations, it was discovered that the 2nd Defendant was allocated the suit property for purposes of setting up a Children’s home through his foundation, the Kingara Foundation. She adds that the activities that have commenced on the suit property are by Kingara Foundation.
7. It is her further submission that foundations are registered under the *Trustees (Perpetual Succession) Act* Cap 164 and under section 3 of the said Act, it is the trustees who have constituted themselves for purposes of forming the Trust who become a body corporate and have the power to sue and be sued.
8. Section 12 of the Act further provides that after incorporation of the trustees, any donation gift or disposition of movable or immovable property shall take effect as if it had been made to the body corporate. She therefore submits that since the land was allocated for purposes of setting up a children’s home, the 2nd Defendant has no interest in it and he should not have been sued in his personal capacity.
9. Counsel placed reliance on the *Kipsiwo Community Self Help Group v Attorney General (2013)* where the court held that if the court does not know who the litigants are then it becomes impossible for the court to enforce its own orders. She argued that if the case proceeds as it is and it turns out that the 2nd defendant was not allocated the suit property in his personal capacity, the orders therein will be void ab initio.
10. Counsel further relied on Order 31 Rule 1 of the Civil Procedure Rules which provides that in all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in that property and a third party, the trustee, executor administrator shall represent the persons so interested and it shall not ordinarily be necessary to make them parties to the suit”



11. She referred to the letter dated 29th December 2020 mentioned in the 2nd Defendant's Replying affidavit which outlines the purpose of allocation as being for purposes of setting up a Children's Home. The said letter is addressed to the Manager, King'ara Foundation.
12. She concludes that in so far the suit is not filed against the Plaintiff in his capacity as an official of King'ara Foundation, the same cannot succeed as it has no legs to stand on and therefore it should be dismissed.

Plaintiff's Submissions

13. On his part learned counsel for the Plaintiff filed his submissions dated 16th July 2025. The Plaintiff appears not to have been served with the 2nd Defendant's Defence as he states that the 2nd Defendant has failed to file his Defence. He refers to the 2nd Defendant's Replying Affidavit sworn on 14th March 2025 in which he admitted that he was allocated the suit property to set up a Children's Home. He refers to paragraphs 8 and 9 of the Replying Affidavit where the 2nd Respondent admits to being in occupation of the suit land and states that the only reason he took occupation of it is because he believed it was public land which he could use to further his duties to the people of his constituency.
14. He submits that it is on the basis of the Plaintiff's admission that he entered into a consent to compromise the application for injunction.
15. He points out that although the Preliminary Objection raises a point of law, it is not based on the pleadings. However, this argument has been rendered moot as the 2nd Defendant filed the P.O together his Defence.
16. Counsel has submitted that a Preliminary Objection cannot be raised if it is based on disputed facts or facts that require to be ascertained by way of evidence. He points out that it is not clear whether King'ara Foundation exists as an entity. Further it is not clear whether the Foundation assuming it exists, is registered and whether it has trustees registered under the *Trustees (Perpetual Succession) Act* Cap 164.
17. The fact that all the foregoing facts have to be ascertained by way of evidence removes it from the purview of a proper Preliminary Objection.
18. Counsel relied on the cases of *Nzele David Nzomo v Moses Namanyi Anyangu* 2009 eKLR and *Oraro v Mbaja* (2005) eKLR for the proposition that if the objection requires to be proved through the filing of an affidavit or other evidence, then it does not qualify to be called a preliminary Objection.

Analysis And Determination

19. Having considered the Preliminary Objection and rival submissions, the sole issue for determination is whether the Preliminary Objection should be upheld.
20. I will start by defining a Preliminary Objection. In the case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 the Court of Appeal observed that:

“... 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 a contract giving rise to the suit to refer the dispute to arbitration”.



In the same case Sir Charles Newbold, P. stated:

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

21. There is no doubt that the question as to whether a party has capacity to sue or be sued is a point of law. However, in this matter, the 2nd Defendant seems to suggest that the Plaintiff lacks the capacity to sue as the suit property was allocated for purposes of establishing a Children’s Home.
22. In order to find out whether the suit property was allocated to the 2nd Defendant in his personal capacity or to the Kingara Foundation as alleged,, it would be necessary to look at the correspondence exchanged between the parties and the allotting authority. It would also be necessary to establish if the Kingara Foundation which is alleged to have been allocated the suit property is registered and if so , whether it has trustees registered in accordance with section 3 of the *Trustees (Perpetual Succession) Act* Cap 164. All this information is not apparent from the pleadings and it would have to be ascertained from other relevant documents.
23. That being the case, the preliminary objection is not well founded as it requires additional evidence to be adduced to confirm if indeed the suit property was allocated to the Plaintiff.
24. Additionally, in order to apply the provisions of the *Trustees (Perpetual Succession) Act* Cap 164, it would be necessary to call evidence to confirm whether Kingara Foundation is registered as a charitable trust under the said Act.
25. For these reasons it is my finding the Preliminary Objection is not sustainable and the same is therefore dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 17TH DAY OF NOVEMBER 2025.

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J. M ONYANGO

JUDGE

In the presence of

Ms Wanjiru for Ms Wangui Kuria for the 2nd Defendant

No Appearance for the Plaintiff

Court Assistant: Hinga

