



**Bokole & 8 others v Kebuchi (Environment and Land Case  
E010 of 2024) [2025] KEELC 5816 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5816 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT AND LAND CASE E010 OF 2024**

**LL NAIKUNI, J**

**JULY 30, 2025**

**IN THE MATTER OF: LAND REFERENCE NO. KWALE/ MARENJE/  
251, KWALE/ MARENJE/ 257 AND KWALE/ MARENJE/ 258**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR A DECLARATION THAT  
THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF THE THREE PLOTS  
MEASURING APPROXIMATELY 51.57 HA OF LAND REFERENCE NO. KWALE/  
MARENJE/ 251, KWALE/ MARENJE/ 257 AND KWALE/ MARENJE/ 258**

**BETWEEN**

**REUBEN NYULE BOKOLE ..... 1<sup>ST</sup> PLAINTIFF  
UCHI KOMBE ..... 2<sup>ND</sup> PLAINTIFF  
PETER BATI BUDALA ..... 3<sup>RD</sup> PLAINTIFF  
MSUMALI KITSAO PEKU ..... 4<sup>TH</sup> PLAINTIFF  
PATRICK MWAMBUMBO ALII ..... 5<sup>TH</sup> PLAINTIFF  
SALIM MUNDALU MWAMBAJI ..... 6<sup>TH</sup> PLAINTIFF  
UMAZI MAGUNDA RUWA ..... 7<sup>TH</sup> PLAINTIFF  
DANIEL CHIVUNDE PILI ..... 8<sup>TH</sup> PLAINTIFF  
NGOWA MASHA NYANJE ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**ANNE MUMBI KEBUCHI ..... DEFENDANT**



## RULING

### I. Introduction

1. Before this Honourable Court for its determination is the Notice of Preliminary objection dated 9<sup>th</sup> October, 2024. It was filed by Anne Mumbi Kebuchi, the Defendant herein challenging the entire Originating summons dated 4<sup>th</sup> September, 2024 filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Plaintiffs herein.

### II. The Notice of Preliminary objection by the Defendant

2. The Defendant brought an objection based on the following two (2) grounds: -
  - a. That the suit offends express and clear provision of Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010 therefore fatally defective.
  - b. That the Defendant prayed that the suit be struck out with costs.

### III. Submissions

3. On 26<sup>th</sup> March, 2025 while the Parties were present in Court, they were directed to have the Notice of Preliminary Objection dated 9<sup>th</sup> October, 2024 be disposed of by way of written submissions.
4. Unfortunately, by the time of penning down this Ruling and despite of a request for an enlargement of time made by parties, the Honourable Court was not able to access any written submissions from neither the Judiciary CTS Portal nor the ELC Registry.
5. Pursuant to that, the Honourable Court has proceeded to deliver its Ruling on its own merit on 30<sup>th</sup> July, 2025 accordingly.

### IV. Analysis and Determination

6. I have considered the Notice of Preliminary Objection by the Defendant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes. To reach an informed, fair and Equitable conclusion, the Honourable Court has crafted the following three (3) issues which fall for determination in the Notice of Preliminary Objection. These are: -
  - a. Whether the Preliminary Objection dated 9<sup>th</sup> October, 2024 meets the laid - down threshold based on Law and Precedents.
  - b. Whether the Notice of Preliminary objection dated.....is merited?
  - c. Who bears the Costs of the Notice of Preliminary objection dated 9<sup>th</sup> October, 2024.

#### **ISSUE No. a). Whether the Preliminary Objection dated 9<sup>th</sup> October, 2024 meets the laid - down threshold based on Law and Precedents.**

7. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter is whether the objection raised pure points of law. In determining this instant Notice of Preliminary Objection, the Court will first consider what amounts to a Preliminary Objection and then Juxtapose the said description herein and come up with a finding on whether what has been raised herein fits the said description.



8. According to the Black Law Dictionary, 11<sup>th</sup> Edition 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.....”

9. Indeed, Courts have various defined Preliminary objection as one that consists of a point 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.

10. The above legal preposition has been made graphically clear in the now famous case of “Mukisa Biscuits – Versus - Westend Distributor Ltd [1969] EA 696”, the court observed that: -

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue.”

11. Additionally, this legal position has been echoed time and again by the courts: see for example, “Oraro – Versus - Mbaja [2007] KLR 141”. The same statement was affirmed in the case of “Nitin Properties Limited – Versus - Jagjit S. Kalsi & another Court of Appeal No. 132 of 1989[1995-1998] 2EA 257” where the Court held that:-

“A preliminary Objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any facts has to be ascertained or if what is sought is the exercise of Judicial discretion.”

12. Similarly in the case of “United Insurance Company LTD – Versus - Scholastica A Odera Kisumu HCC Appeal No. 6 of 2005(2005) LLR 7396”, the Court held that;

“A preliminary Objection must be based on a point of law which is clear and beyond any doubt and Preliminary Objection which is based on facts which are disputed cannot be used to determine the whole matter as the facts must be precise and clear to enable the Court to say the facts are contested or disputed .”

13. Therefore from the above holdings of the Courts, it is clear that a preliminary Objection must be raised on a pure point of law and no fact should be ascertained from elsewhere. See also the case of “In the matter of Siaya Resident Magistrate Court Kisumu HCCMisc. App No. 247 of 2003” where the Court held that;

“A Preliminary Objection cannot be raised if any facts has to be ascertained.”

14. I have further relied on the decision of “Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR” as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- (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.
15. Taking into account the above findings and holdings of various Courts on what amounts to a preliminary Objection, the Court now turns to the grounds raised by the Defendant herein. These are that the suit offends express and clear provision of Order 37 Rule 7(2) of the Civil Procedure Rules, 2010 and therefore it fatally defective. In this case, I am satisfied that the objection raises pure points of law in that the preliminary objection. Since an issue going to the jurisdiction of this Court has been raised that issue must be dealt with in limine.
- ISSUE No. b). Whether the Notice of Preliminary objection dated 9<sup>th</sup> October, 2024 is merited.
16. Under this Sub - title the Court shall examine whether the Notice of Preliminary objection is merited. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law.
17. The Law under the provision of Order 37 Rule 7 of the Civil Procedure Rules, 2010 provides as follows:
1. An application under section 38 of Limitations of Actions Act shall be made by originating summons.
  2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. (Emphasis added).
  3. The Court shall direct on whom and in what manner the summons shall be served.
18. On the first ground, the originating summons is brought pursuant to Section 38 (supra) regarding registration of title to land or easement acquired under the act. Clearly, the cited section meant to refer to Order 37 of the Civil Procedure Rules, 2010.
19. The originating summons is filed pursuant to the provision of Order 37 Rules (1) and (2) (supra) which reads:-
- “The application under Section 38 of the Limitation of Actions Act shall be made by originating summons.
- “The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed (Emphasis added).
20. In this particular case, the Plaintiffs/Applicants attached a verifying affidavit dated 4<sup>th</sup> September, 2024 instead of a supporting affidavit as it would be expected attaching a certified extract of the title to the land in question.
21. On her part, the Defendant deposed under Paragraphs 5 of her Replying Affidavit: -
- “That I am the registered owner of three plots known as Kwale/ Marenje/ 251 (measuring approximately 23.5 Ha), Kwale/ Marenje/ 257 (measuring approximately 11.52 Ha) and Kwale/ Marenje/ 258 (measuring approximately 17.0 Ha)(hereinafter referred to as the “suit properties”) which I acquired after succeeding the estate of my late husband, Charles Ngare Kebuchi through Nairobi High Court Succession Cause No. 2675 of 2015. I annex



hereto Title Deeds of Kwale/ Marenje/ 251, Kwale/ Marenje/ 257 and Kwale/ Marenje/ 258 collectively marked “AMK – 1”.

22. Both the Plaintiff and the Defendants referred to the suit land Kwale/Marenje/251, Kwale/ Marenje/257 and Kwale/ Marenje/258 in their respective pleadings. So, has the suit attained the threshold in Order 37(1) and (2) (supra). The term “Title” referred to under the said legal provisions, is defined in the Black’s Law Dictionary, 10<sup>th</sup> Edition at page 1712 infra;

“Legal evidence of a person’s ownership rights in property, an instrument (such as a deed) that constitutes such evidence.”

23. It has emerged from the material availed to this court that the Defendant’s title to the suit land is under great challenge herein. In the case of “Munyu Maina – Versus - Hiram Gathiha Maina (2013) eKLR”, the Court of Appeal stated: -

“When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership...”

24. In the foregone, title is linked to proprietorship of the property in question. Under the provision of Section 3 ( a ) of the *Land Registration Act*, No. 3 of 2012 the term “Proprietor” means: -

“In relation to land or lease, the person named in the register as the proprietor.”

25. However, it is instructive to note that the *Land Registration Act*, No. 3 of 2012 does not define the term “Title”. This court is aware of Article 159(2)(d) of *the Constitution* of Kenya, 2010 on undue regard to procedural technicalities. Section 19(1) of the *Environment and Land Court Act*, 2015 (2011) also speak to the said Constitutional provision. In the case of “Kanwal Sagit Singh Dhiman – Versus - Kashavji Jivraji Shah (2015) eKLR”, the Court of Appeal applied the decision in “Mbogo and another – Versus - Shah (1968)EA 93” and observed that:-

“...The courts exist for the purposes of dispensing justice, and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests...”

26. Moreover, in the case of “Philip Chemwolo and another – Versus - Augustine Kubende (1982-88) KAR 103”, the Court of Appeal held:-

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.” (Emphasis supplied).

27. It is imperative to note that land in Kenya is very emotive and sensitive. Land is a source of livelihood. Striking out suits preliminarily is a draconian measure, which should be allowed only as last resort and when the suit is so hopeless and cannot be salvaged, even by an amendment. Courts have held that where there is a semblance of cause of action, parties should be allowed their day in court. In the case of “D.T. Dobie & Company (Kenya) Limited – Versus - Muchina [1982] KLR 1”, the Court held as follows: -

“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 of. 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.”

28. Similarly, in the case of “Peter Ngugi Kibiri – Versus - Esther Wangari [2015] eKLR” the Court of Appeal stated as follows: -

“Practical and substantive justice dictate that it is prudent that the dispute between the parties be resolved and determined through full hearing on the merits”

29. In the final analysis, it is abundantly clear from the entire pleadings herein that the Plaintiffs’ failure to comply with the provision of Order 37 Rule 7(2) of the Civil Procedure Rules, 2010 is curable through the Defendant’s Replying Affidavit and possible amendment of the originating summons further to the provision of Article 159 (2) (d) of *the Constitution* of Kenya, 2010 and Sections 3 and 13 of the Environment & *Land Act*, No. 19 of 2011 (See the case of: “Kanwal and Chemwolo cases (supra)”. Whereas I note the case of: “Kweyu Wambura and Watuko cases (supra)”, the same are distinguishable in the circumstances. On that score, the second issue is resolved thereby.

30. Thus, the Preliminary objection dated 9<sup>th</sup> October, 2024 and filed on the same day is devoid of merit and I proceed to disallow the same.

#### **ISSUE No. c). Who bears the Costs of the Notice of Preliminary objection dated 9<sup>th</sup> October, 2024**

31. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR” and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR”, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR”, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

32. In the present case, there shall be no orders as to costs.

#### **V. Conclusion and Disposition.**

33. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus objection, the Court arrives at the following decision and make below orders:-

- a. That the Notice of Preliminary objection by the Defendant dated 9<sup>th</sup> October, 2024 be and is hereby disallowed conditionally.
- b. That the Plaintiffs are hereby directed “ suo moto’ to file and serve a properly constituted Originating summons within the next seven (7) days of this ruling failure to which the suit shall automatically stand stuck out with costs of the suit and the Preliminary Objection dated 9<sup>th</sup> October, 2024 awarded to the Defendant.
- c. That there shall be a mention of this matter on 24<sup>th</sup> September, 2025 to ascertain compliance, the progress made and further direction thereof.
- d. That there shall be no orders as to costs.



It is so ordered accordingly.

**RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT KWALE THIS 30<sup>TH</sup> DAY OF JULY 2025.**

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**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT  
AT  
KWALE**

Ruling delivered in the presence of:

Mr. Disi, the Court Assistant;

Mr. Taabu Advocate for the Plaintiffs; and

Mr. Malombo Robinson Advocates for the Defendant.

