

**IN THE COURT OF APPEAL  
AT MOMBASA**

**(CORAM: GATEMBU, MURGOR & OCHIENG,**

**JJ.A.) CIVIL APPEAL NO. E007 OF 2023**

**BETWEEN**

**MASHASHI KITANO.....1<sup>ST</sup> APPELLANT  
FIRDOSH JAMAL &  
ASSOCIATES ADVOCATES.....2<sup>ND</sup> APPELLANT**

**AND**

**AMINA OBO ATHMAN &  
MOHAMED  
BWANA OBO ATHMAN.....1<sup>ST</sup>  
RESPONDENT THE LAND REGISTRAR,  
LAMU COUNTY.....2<sup>ND</sup>  
RESPONDENT THE HONOURABLE  
ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Environment  
and Land Court of Kenya at Malindi (M.A. Odeny, J.)  
dated 20<sup>th</sup> January 2023*

***in***

***ELC Cause No. 24 of 2021 (OS)***

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**JUDGMENT OF THE COURT**

1. This appeal arises from a ruling delivered by the Environment and Land Court at Malindi (ELC) (**M. A. Odeny, J.**) on 20<sup>th</sup> January 2023 dismissing the appellants' preliminary objection to the 1<sup>st</sup> and 2<sup>nd</sup> respondents' suit. In doing so, the learned Judge held that the issues raised by the respondents in the suit "are weighty issues which cannot be dealt with by way of a preliminary objection" and

that more evidence “is required to be adduced during the hearing to

establish the allegations raised by both parties.”  
Consequently, the Judge declined to uphold the preliminary objection and to dismiss the suit.

2. The sole question in this appeal therefore is whether the learned Judge erred in declining to dismiss the 1<sup>st</sup> and 2<sup>nd</sup> respondents' suit based on the preliminary objection.
3. At the heart of the dispute is a property known as Title Number Lamu/Block IV/15 (the property) which was registered in 1978 in favour of the 1<sup>st</sup> appellant, Mashashi Kitano, a Japanese national pursuant to a Transfer from one Shariff Ali Chuma. According to Amina Obo Athman and Mohamed Bwana Obo Athman, the 1<sup>st</sup> and 2<sup>nd</sup> respondents (the Athmans), Mashashi Kitano (Mashashi) stayed briefly in Lamu in 1988 and then left Kenya for his country Japan leaving the property, and the title deed, under the care of their father Bwana Obo Athman Lali who is since deceased. That after the death of their father, they continued to look after the property.
4. According to the Athmans, based on information that Mashashi had died in Japan in 1999, they moved to court under the Law of Succession Act and were granted leave on

10<sup>th</sup> June 2010 to apply for letters of administration in

respect of the estate of Mashashi on the basis that he was presumed dead. It is their case that a grant of letters of administration in respect of the estate of Mashashi was issued to them by the court and subsequently confirmed on 8<sup>th</sup> December 2014 and the property transferred to them by transmission and a title deed issued in their favour on 19<sup>th</sup> January 2017.

5. It is also their case that in 2019 they “got wind” that the 2<sup>nd</sup> appellant, the law firm of Firdosh Jamal & Associates Advocates purportedly acting for Mashashi and claiming that he was alive, lodged a Caution against the title to the property and also wrote a demand letter to the Land Registrar to hold the “Deed File and Green Card” in respect of the property in the strong room to prevent “alleged fraud” by the Athmans.
6. Based on the foregoing, the Athmans instituted suit before the ELC, being ELC Suit No. 21 of 2021 (O.S) against the Land Registrar, Lamu County and the Attorney General as defendants and naming the 2<sup>nd</sup> appellant as an interested party.
7. In the O.S, they sought determination of questions, *inter alia*,  
whether Mashashi left Kenya in 1988, never returned

and

was presumed dead; whether they (Athmans) were duly granted leave under the Law of Succession Act to apply for letters of administration for the estate of Mashashi; whether the title issued to them is legal and valid under the law; whether the law firm of the 2<sup>nd</sup> appellant “are imposters imposing themselves and purporting to represent” Mashashi; whether the application by the 2<sup>nd</sup> appellant to place a restriction or caution on the property is valid.

8. That is the suit which the appellants sought to stop in its tracks and to have it dismissed through their Notice of Preliminary Objection dated 12<sup>th</sup> January 2022 the subject of the impugned ruling. The grounds of preliminary objection were that the Athmans failed to disclose that Mashashi was alive and had presented himself “physically, facially and virtually at the Caution hearing held on 16<sup>th</sup> December 2021”and that his existence had been confirmed; that there were in fact no succession proceedings for grant of letters of administration for the estate of Mashashi; that the Athmans did not have *locus standi* and the transfer of the property by transmission in their favour is a nullity; and that they failed to exhaust

other statutory mechanisms before filing the O.S

as the matter was before the Land Registrar where a hearing was held on 16<sup>th</sup> December 2021.

9. Having heard submissions from the parties on the preliminary objection, the learned Judge, as already stated, held that the issues raised by the parties are weighty and not matters that could be determined on basis of a preliminary objection. The appellants have faulted the decision of the learned Judge dismissing the preliminary objection on twelve grounds set out in their memorandum of appeal. Those grounds were expounded in the appellants' written submissions dated 20<sup>th</sup> December 2023 which were highlighted before us by learned counsel **Miss Odongo. Mr. Alfred Omwanicha** learned counsel for the Athmans in opposing the appeal relied on written submissions dated 15<sup>th</sup> February 2024.
10. We have duly considered the appeal and the submissions.

Although counsel addressed us at length on the facts and the law relative to the question of „rebuttable presumption of death" and on the question of exhaustion of alternative remedies, the issue as already indicated, is whether the matters raised in the suit before the ELC are matters that could be disposed of based on a preliminary

objection and

whether the learned Judge erred in declining to uphold the objection.

11. In **Attorney General & Another vs. Andrew Maina Githinji & Another [2016] KECA 817 (KLR)**

Waki, JA stated

that:

***“There can be no argument that a preliminary objection to court proceedings must be on a pure point of law. That principle was established, at least in East Africa, as long ago as 1969 in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 which has since been the locus classicus in the region. The epochal pronouncements in that case were by Law JA, thus:***

***„So far as I'm aware, 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 the contract giving rise to the suit to refer the dispute to arbitration.”***

***And by Sir Charles Newbold JA, thus:***

***“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 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”***

12. Nambuye, JA in the same case having captured the principles applicable in determining preliminary objection as set out in the case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Limited [1969) EA 696**” went on to say:

***“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”***

13. In the present case, the learned Judge was evidently alive to those principles. Clearly, whether Mashashi is alive is contested. There were also claims that the succession proceedings claimed by Athmans to have resulted in Mashashi being presumed dead and the property being transmitted to them were non-existent and a fraud. As the learned Judge correctly stated in the impugned ruling:

***“More evidence is required to be adduced during the hearing to establish the allegations raised by both parties. These issues also lean towards criminality if what he stated that [Mashashi] is still alive and might have been presumed dead illegally.”***

14. As to the contention that the Athmans should have exhausted the remedies by awaiting determination by the Land Registrar regarding the removal of the

restriction/caution against the title, the matters and the issues before the ELC are evidently broader than the mere question of removal of the caution.

15. All in all, we discern no misdirection by the learned Judge in dismissing the preliminary objection that would justify our interference with her decision. The matter should proceed for hearing on merits to conclusion before the ELC. The appeal fails and is hereby dismissed. Each party to meet its own costs of the appeal.

16. Following the untimely death of the Hon. Mr. Justice Fred Ochieng, JA prior to delivery of this judgment, and the remaining members of the Court being unanimous, this decision is delivered in accordance with Rule 34(4) of the Court of Appeal Rules.

**Dated and delivered at Mombasa this 21<sup>st</sup> day of November 2025.**

**S. GATEMBU KAIRU, FCI Arb, C.Arb.**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**