

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC NO. E009 OF 2023

PETER MULI KIOKO1ST PLAINTIFF

-VERSUS-

DANIEL MWOLOLO MUEMA1ST
DEFENDANT

AGNES KALONDU MUASA2ND
DEFENDANT

THE LAND REGISTRAR, MAKUENI3RD
DEFENDANT

RULING

1. The Plaintiff filed the suit herein vide the plaint dated 28th February, 2023 seeking the following orders against the Defendants: -

- a) **That land Title Numbers UKIA/UTAATI/1841 and UKIA/UTAATI/1842 be annulled and revoked.**
- b) **An order of permanent injunction compelling the 1st and 2nd Defendants to desist in any manner from interfering with the Plaintiffs proprietary rights to the suit property.**
- c) **An order compelling the 3rd Defendant to reinstate Title Numbers UKIA/UTAATI/837 and UKIA/UTAATI/464 to their original state.**
- d) **Any other order as this Honourable Court may deem fit and just.**
- e) **Costs of this suit be awarded to the Plaintiff.**

2. Subsequent to the filing of the suit, the 2nd Defendant filed a Statement of Defence and Counterclaim dated 13th October, 2025 and a notice of preliminary objection of even date. The preliminary objection is based on the following grounds: -

- a) **THAT the Honourable Court lacks jurisdiction to hear and determine the suit based on probate and administration on an estate of a deceased person.**
 - b) **THAT the Plaintiff lacks *locus standi* to bring the suit.**
 - c) **THAT the suit is bad in law.**
 - d) **THAT the suit discloses no reasonable cause of action against the 2nd Defendant.**
3. On the basis of the foregoing, the 2nd Defendant urged the court to strike out the suit with costs.
 4. The preliminary objection was canvassed by way of written submissions. However, only the 2nd Defendant's submissions were on the record at the time of writing this ruling.
 5. Counsel for the 2nd Defendant contended that the particulars of fraud raised under paragraph 14 of the Plaint are purely in the nature of a succession dispute, the titles to the land having passed to the 2nd Defendant by orders of a succession court. Counsel submitted that it is only the probate court that can revoke the titles issued.
 6. Counsel further submitted that the jurisdiction of this court is restricted by Article 162 (2) (b) of the Constitution and Section 13 (1) and (2) of the Environment and Land Court Act. Counsel urged the court to strike out the Plaint with costs to the 2nd Defendant.
 7. The sole issue for determination is whether the 2nd Defendant's preliminary objection herein is merited.
 8. The law on preliminary objections is settled. A preliminary objection must be on a pure point of law. Justice Law coined an apt description of what constitutes a preliminary objection in **Mukisa Biscuit Manufacturing Co. Ltd v West**

End Distributors Ltd [1969] EA 696 (at page 700) wherein the learned judge held as follows: -

“In so far as I am 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.”

9. In the same case, Sir Charles Newbold, P. held as follows: -

“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 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.”

10. In **Oraro v Mbaja [2005] eKLR**, J.B. Ojwang J. described it as follows: -

“I think the principle is abundantly clear. “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. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

11. The 2nd Defendant has sought that the suit herein be struck out on the basis that the title of the suit property was issued to her by the probate court through the process of transmission of the estate of the Kioko Mutwotwii Mbithi (deceased). The 2nd Defendant maintains that it is only the probate court that has power to revoke the said title.

12. The Plaintiff has based his claim against the 2nd Defendant's title to the suit property on grounds of fraud and use of forged documents.

13. The jurisdiction of this court is defined under Section 13 (2) of the Environment and Land Court Act in the following terms: -

In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) Relating To compulsory acquisition of land;

(c) Relating to land administration and management;

(d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) Any other dispute relating to environment and land.

14. It is not in dispute that the dispute herein pertains to private land that was previously registered in the name of one Kioko Mutwotwii Mbithi (deceased) and later on registered in the name of the 2nd Defendant through the process of transmission.

15. The title of a registered owner of land can be challenged on grounds of fraud as per the provisions of Section 26(1) of the Land Registration Act, 2012 which sets out as follows: -

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

16. Under paragraph 14(b) of the Plea, the Plaintiff outlines that the Defendants concealed material facts to the area chief that he has a beneficial interest in the suit property. In the case of **Kamau & another (Legal Representative of the Estate of Francis Kamau Wainaina - Deceased) v Mwangi (Civil Appeal E441 of 2023) [2026] KECA 99 (KLR)**, the Court of Appeal observed as follows: -

“A probate court’s mandate is administration and distribution of estates; it does not, as a general rule, determine contested questions of title or trust over land except to the extent necessary to facilitate distribution where rights are undisputed. In this case, the respondent’s very complaint was that the allocation in the succession process did not reflect her lawful beneficial entitlement under customary trust. That is precisely the kind of dispute that required adjudication by the Environment and Land Court.”

17. From the above, it is clear that this court is vested with the jurisdiction to hear and determine the dispute herein concerning the occupation and title of the suit

property. Regardless of the fact that the 2nd Defendant was registered as proprietor thereof pursuant to an order of transmission from the probate court, the Plaintiff will be mounting his claim as to the validity of his interest in the suit property as per his occupation.

18. In the case of **David & 5 others v Muswii (Civil Appeal 525 of 2019)** **[2026] KECA 375 (KLR)**, the Court of Appeal aptly held as follows: -

“We think that if there ever was a case where the caution by the courts against frivolous preliminary objections should have been heeded, it is in this case. It is a classic case of attempting to use a preliminary objection as a sword to avoid resolution of the dispute through a proper hearing and on merits.

Nor do we not think that there is any merit or substance in the appellants’ submission that the ELC erred in holding that it had jurisdiction to hear and determine the respondent’s suit. A simple look at Article 162(2) (b) of the Constitution and section 13 of the Environment and Land Court Act, 2011 leaves no dispute that the ELC has jurisdiction to hear and determine cases of trespass to land.”

19. Quite evidently, the preliminary objection herein is devoid of merit and has been improperly raised. It is hereby dismissed with costs.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS
THIS 12TH DAY OF MARCH, 2026.**

IN THE PRESENCE OF:

Plaintiff in person.

Ms. Omari for Mr. Mulyungi for 2nd Defendant.
Court assistants – Musyoki and Nyaanga

ORIGINAL