



**David & 5 others v Muswii (Civil Appeal 525 of 2019)
[2026] KECA 375 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KECA 375 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 525 OF 2019
W KARANJA, K M'INOTI & LA ACHODE, JJA
FEBRUARY 27, 2026**

BETWEEN

**FRANCIS WAITA DAVID 1ST APPELLANT
FRANK MANTHI MUTISYA 2ND APPELLANT
MWANZI DAVID 3RD APPELLANT
DAVID MUTISYA 4TH APPELLANT
MUSYOKA MUTISYA 5TH APPELLANT
MORRIS MUTISYA 6TH APPELLANT**

AND

SAMMY MUTUA MUSWII RESPONDENT

*(Appeal from the judgment and decree of the Environment & Land Court
at Makueni (Mbogo, J.) dated 12th July 2019 in ELCC No. 76 of 2018)*

JUDGMENT

1. This appeal arises from the ruling and order of the Environment and Land Court (ELC) at Makueni (Mbogo, J.) dated 12th July 2019. By that ruling, the ELC dismissed with costs a preliminary objection raised by the appellants to the respondent's suit in which he was seeking a permanent injunction to restrain them from trespassing into the parcels of land known as Makueni/Unoa/2483 and Makueni/Unoa/2526 (the suit properties).
2. The preliminary objection was based on the appellants' contention that the respondent's suit was fatally defective, having been founded on the provisions of the repealed Registered *Land Act*, Cap 300; that a report by the District Land Registrar dated 6th December 2014 determining a disputed boundary was not done in accordance with the relevant law; and that the suit did not comply with the provisions



of the [Land Registration Act](#), 2012. The ELC found that the preliminary objection did not raise a pure point of law because the appellants' averments were disputed and denied by the respondent and that in the circumstances, the best course of action was to determine the suit after hearing evidence.

3. The brief background to the appeal is as follows. At the material time the respondent was the registered owner of the suit properties, while the respondents were in occupation of an adjacent parcel of land known as Makueni/Unoa/207 over which they claimed beneficial interest. By a plaint dated 6th July 2018 and amended on 23rd October 2018, the respondent instituted a suit against the respondents for a permanent injunction to restrain them from trespassing into the suit properties, mesne profits, costs and interest. He pleaded that on or about 21st and 22nd May 2018, the respondents unlawfully trespassed into the suit properties, hived off and fenced portions thereof, and unlawfully occupied the same.
4. The respondent further pleaded that on 19th November 2013, the District Land Registrar, pursuant to section 21(2) of the Registered [Land Act](#), determined the boundary between the suit properties and the land occupied by the appellants, in the presence of all the parties.
5. The appellants filed a joint defence dated 22nd November 2018 in which they denied the respondent's averments in the plaint. Specifically, they pleaded that the boundary as determined by the District Land Registrar was illegal because it was determined pursuant to a non-existent law. They added that the boundary was determined in violation of natural justice and technological and scientific principles of boundary identification and that upon lodging a complaint, the District Land Registrar ordered a repeat of the exercise, which was never done. The appellants also pleaded that the respondent's suit was premature and non-compliant with the provisions of the [Land Act](#), 2012 and the [Land Registration Act](#), 2012.
6. On 13th December 2018, the appellants filed a notice of preliminary objection to the respondent's suit, worded as follows:

“The defendants (appellants) seek to have the suit be dismissed with costs on the following grounds of law: -

- i. The suit is a non-starter and bad in law as the same is pleaded and founded on the Registered [Land Act](#) Cap 300 to apply to a cause of action that arose in May 2018 long after the Act was repealed and in particular the provisions of section 21(2) did not find any life upon repealing of the Act;
 - ii. That the boundary dispute determination report by the District Land Registrar dated 6th December 2014 was not done in accordance with the then existing laws governing the substance and procedure in determination of boundary disputes and therefore does not comply with the provisions of sections 18 and 19 of the [Land Registration Act](#), 2012; and
 - iii. That the suit herein is premature as the same does not comply with the provisions of section 18(2) of the [Land Registration Act](#), 2012.”
7. That was the objection that was heard and dismissed by the ELC, leading to the present appeal. In their memorandum of appeal, the appellants listed four grounds of appeal, framed as follows:
 - i. The Honourable Judge erred in law by finding that the pleadings by the respondent failed to disclose cause of action against the appellants (sic);
 - ii. The Honourable Judge erred in law by finding that the suit was in court had jurisdiction to hear and determine the suit as pleaded (sic);



- iii. The Honourable Judge erred in law by finding that suit founded wholly on repealed statute is not a point of law; and
 - iv. The Honourable Judge erred in law in concluding that the appellants' preliminary objection did not pass the test of the principles set out in the case of *Mukisa Biscuits Manufacturing Co Ltd. v. West End Distributors* [1969] EA 969.”
8. In support of the appeal the appellants relied on written submissions dated 24th August 2020 and contended that the ELC erred by failing to dismiss a suit which was founded on a repealed statute. They argued that once repealed, a statute ceases to exist and cannot be the basis of a suit. It was also contended that a court derives its jurisdiction from *the Constitution* or statute and that once a statute donating jurisdiction is repealed, the court ceases to have jurisdiction and must down its tools. In support of the submission, the appellants relied on a number of decisions, among them the decision of the Supreme Court in *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & Others* [2012] eKLR and the decision of the Court in *Owners and masters of the Motor Vessel “Joey” v. Owners and Masters of the Motor Tugs “Barbara” and “Steve B”* [2008] EA 367.
 9. It was further submitted that the Registered *Land Act*, on which the respondent's suit was based, was repealed by the *Land Registration Act*, 2012, which came into force on 12th May 2012. The appellants contended that the transitional provisions of the *Land Registration Act* applied only to acts done before the repeal of the Registered *Land Act* rather than those arising after the repeal as was the case with the respondent's suit. They urged that a boundary dispute arising after 12th May 2012 must be determined in accordance with the *Land Registration Act*, rather than the repealed Act and that the respondent's cause of action arose on 19th November 2013 long after the *Land Registration Act* had come into operation.
 10. It was the appellants' further submission that their preliminary objection was properly raised because the respondent's suit was founded on a repealed statute, which was a question of law that did not require adducing of any evidence. They cited *Mukisa Biscuits Manufacturing Co Ltd. v. West End Distributors* (supra), in support of their argument.
 11. The appellants also faulted the ELC for failing to consider and determine the issue of pleadings, which they argued are what determines jurisdiction. It was submitted that the court should have considered the pleadings to determine whether the respondent's suit disclosed a cause of action against the appellants.
 12. Lastly, the appellants submitted that the determination of the boundary was in violation of the rules of natural justice, including lack of adequate notice, fair hearing and impartiality.
 13. The respondent opposed the appeal vide written submission dated 27th October, 2020. He contended that a preliminary objection cannot be raised if any facts have to be established or if what is sought is exercise of judicial discretion.
 14. The respondent submitted that although the boundary dispute summons that were issued to the parties by the District Land Registrar was headed “Registered *Land Act*”, it was a valid summons which was used at the time pursuant to section 108 as read with section 110 of the Registration of *Land Act*. It was contended that such subsidiary legislation was saved by section 24 of the *Interpretation and General Provisions Act* upon repeal of the Registered *Land Act*. He added that the report on determination of the boundary by the District Land Registrar was expressly clear that it was made pursuant to 18 and 19 of the *Land Registration Act* and further that the reference to section 21(2) of the Registered *Land Act* in the plaint was a typographical error, which did not vitiate the report.



15. Lastly, the respondent submitted that his cause of action was in trespass and that the District Land Registrar’s report was only evidence to show that the boundary dispute had been resolved. In the respondent’s view, the appellants had to wait for the trial to raise an objection to the report as and when it was produced. The respondent urged the Court to dismiss the appeal with costs.
16. We have carefully considered this appeal, the pleadings, the ruling of the ELC, the grounds of appeal, the submissions of the parties and the authorities that were cited. The kernel of the appeal is really whether what was before the ELC was a proper preliminary objection as understood in law, or whether it raised mixed issues of law and fact, which are best resolved by the court after hearing evidence and submissions.
17. It is common ground between the parties that the decision in *Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors* (supra) succinctly addresses what constitutes a preliminary objection. In that decision, the predecessor of this Court (Law, JA) held that:

“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.”
18. Sir Charles Newbold, P., concurred in the following terms:

“A preliminary objection is in the nature of what used to be called 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.” (Emphasis added).
19. The Court cautioned against the practice of improperly raising points by way of preliminary objection, whilst such points ought to be argued in the normal manner. The Court noted that such improperly raised “preliminary objections” achieved nothing but only increased costs and confused the issues.
20. The Supreme Court reiterated the same caution in *Independent Electoral & Boundaries Commission v. Jane Cheperenger & 2 Others* [2015] KESC 2 (KLR):

“[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law...

(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



21. The decision of the same Court in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, [2015] eKLR is to the same effect.

“Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

22. Turning to this appeal, we are completely baffled by the appellants’ so called “preliminary objection.” A reading of the amended plaint and defence leaves no doubt that the respondent’s cause of action is in trespass, that is why he is seeking a permanent injunction to restrain the appellants from entering or remaining in the suit properties and mesne profits, namely compensation from a person in wrongful occupation of another’s land.

23. The Oxford Dictionary of Law, Oxford University Press, 5th Ed. 2003 defines a cause of action as:

“The facts that entitle a person to sue. The cause of action may be a wrongful act, such as trespass;
or the harm resulting from a wrongful act, as in the tort of negligence.”

24. Similarly, in *Muhammad Hafiz v. Muhammad Zakariya* [1922] 49 I.A. 9, the Privy Council defined a cause of action as follows:-

“...the cause of action is that which gives occasion for and forms the foundation of the suit...”

25. We have no doubt in our minds that it is the pleadings, rather than the parties’ submissions or assertions from the bar, that disclose or identify a cause of action. A perusal of the plaint in this appeal is sufficient to indicate beyond contest that the respondent’s cause of action is in trespass.

26. For reasons best known to themselves, the appellants appear to have conflated the respondent’s cause of action with the evidence that he intends to rely on to prove his case. How the appellants arrived at the conclusion that the District Land Registrar’s report on the disputed boundary is the cause of action in this case must rank as one of the enduring mysteries of modern legal practice. As far as we can surmise, the District Land Registrar’s report is among the evidence that the respondent will be adducing to prove its case on trespass. If the appellants have a problem with that report, they are supposed to challenge its legality, admissibility or probative value at the hearing of the suit. But they cannot do, as they have purported to do in this case, raise a preliminary objection against evidence!

27. The arguments put forward by the appellants such as whether the District Land Registrar’s report was prepared on the basis of a repealed statute; whether it was prepared under the repealed Registered [Land Act](#) or under the [Land Registration Act](#); whether the transitional provisions of the [Land Registration Act](#) applied in this case; whether the subsidiary legislation under the repealed Act applied in this case; whether the appellants’ right to natural justice was violated in the preparation of the report; whether they were afforded reasonable notice; whether the District Land Registrar lacked impartiality; and whether the report was prepared in accordance with the [Land Registration Act](#) are all matters of mixed facts and law, which cannot be determined in a preliminary objection.

28. The moment the court is called upon in a preliminary objection to determine issues of mixed facts and law, the matter before the Court cannot be described as a preliminary objection. Contested issues cannot form the basis of a preliminary objection, properly so called. In *The Attorney General of the United Republic of Tanzania v. African Network for Animal Welfare*, Appeal No. 3 of 2011 the East



African Court of Justice adopted the following approach to preliminary objections, which we agree with

"All the other so-called preliminary points were not at all preliminary points of law. Each and everyone of them involved the clash of facts, the production of evidence, and the assessment of testimony. Any such issue (depicting those features) cannot and should not be treated as a preliminary point. Rather, it becomes a matter of substantive adjudication of the litigation on its merits – with evidence adduced, facts shifted, testimony weighed, witnesses called, examined and cross-examined; and a finding of fact then made by the court."

29. 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.
30. 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.
31. From the foregoing, we find that this appeal is absolutely bereft of merit and the same is hereby dismissed in its entirety, with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

K. A. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

