



**Kithu & 8 others v Kithu & 2 others (Land Case E050 of 2024)
[2025] KEELC 5305 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE E050 OF 2024
SM KIBUNJA, J
JULY 16, 2025**

BETWEEN

MUSYOKI KITHU & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS PLAINTIFF

AND

PAUL KITHU 1ST DEFENDANT

DAVID KITHU 2ND DEFENDANT

ALICE KACHII 3RD DEFENDANT

RULING

Defendant’s Preliminary Objection Dated 10th July 2024

1. The defendant filed the preliminary objection dated 10th July 2024 to the plaintiffs suit raising two grounds that:
 - a. The court lacks jurisdiction to hear and determine the suit; and
 - b. That the suit is sub judice.
2. The court on 5th December 2024 and 4th March 2025 directed the parties to file and exchange submissions on the preliminary objection within the given timelines. Subsequently, the learned counsel for the defendants and plaintiffs filed their submissions dated the 18th March 2025 and 10th June 2025 respectively, which the court has considered.
3. The issues for the court’s determinations on the preliminary objection are as follows:
 - a. Whether the preliminary objections raises any pure point of law that if upheld could determine the suit.



- b. Whether the court has jurisdiction in this suit.
 - c. Whether the suit is sub judice.
 - d. Who pays the costs?
4. The court has carefully considered the grounds on the preliminary objection, submissions by the two learned counsel, the superior courts decisions cited, the pleadings filed and come to the following findings:
- a. The learned counsel for the defendants inter alia submitted that the suit property subject matter in the suit is situated within Kilifi County, and therefore the suit ought to have been filed before ELC Malindi, which is the court with territorial jurisdiction, as provided for by sections 12(a) and 15 of the *Civil Procedure Act* chapter 21 of Laws of Kenya. The counsel further submitted that the filing of the suit within the court with territorial jurisdiction is in line with the provision of section 4(3) of the *Environment and Land Court Act*, 2011 that requires the court to “ensure reasonable and equitable access to its service in every county.” The counsel relied on the following cases; The *Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd* [1989] KLR 1, *Phoenix of E. A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service* [2019] Civil Appeal No. 244 of 2010 and *Boniface Waweru Mbiyu versus Mary Njeri & Another* Nairobi HC Misc. Appl. No. 639 of 2005. The counsel in his submissions indicated that the ruling in the Probate and Administration matter was delivered on the 17th December 2024, and there being no other suit pending that would trigger an application under section 6 of the *Civil Procedure Act*, abandoned the ground of sub judice.
 - b. The learned counsel for the plaintiffs countered the defendants submissions by submitting that the preliminary objection does not raise a pure point of law as required by the oft quoted case of *Mukhisa Biscuits Manufacturing Company Limited versus West End Distributors Limited* [1969] E. A. 696, as it would require evidence to be called and considered to determine whether all the parties resides within Kilifi County. That Mariakani though in Kilifi County is closer to this court than ELC Malindi and the court should be guided by the decision in the case of *Mary Musuki Mudachi & Another versus Antony Muteke Mudachi & 2 Others; Elijah K. Kimanzi & 6 Others (interested parties)* [2021] eKLR, where the court held it had jurisdiction in the suit with the suit property situated at Mariakani, but transferred the suit to ELC Malindi instead of dismissing it. The counsel also cited the case of *Felistas Wanjeri Waweru versus Prime Auto Solutions Limited* (Miscellaneous Civil Application E053 of 2023) [2024] KEHC 1971 (KLR) (29 February 2024) (Ruling), where the court elected to transfer the suit instead of dismissing it, and the case of *Tipper versus Rosborg* (Civil Case E002 of 2022) [2022] KEHC 16811 (KLR) (20 December 2022) (Ruling), where the court inter alia found that; “...leveraging technology for purposes of access to justice. The specific physical territorial court loses its hold. Today the use of technology has broken the hold of land and brick and mortar so to speak, and even filing of cases, is not necessarily done at the court house but through electronic filing. A party need not attend court physically and or have their suit heard from wherever they are on the globe...” and sought for the suit to be transferred to ELC Malindi for hearing and determination.
 - c. The court has perused the pleadings filed by both the plaintiffs and defendants and noted as follows:
 - i. That at paragraphs (1) and (2) of the plaint dated 30th May 2024 the plaintiffs have averred that the defendants and themselves reside and work for gain in Mombasa County.



- ii. That vide paragraphs (2) and (3) of the statement of defence dated the 10th July 2024, the defendants admitted the description of the plaintiffs as set out in paragraph (1) of the plaint but denied the description of the defendants at paragraph (2) thereof.

This inevitably means evidence would need to be tendered and considered for the court to make a finding on whether the defendants resides at Mariakani, Kilifi County or Mombasa County. That however, it is not disputed that the suit property is indeed situated within Mariakani, Kilifi County, and by operations of section 12(a) of the [Civil Procedure Act](#), the suit ought to have been filed before the nearest court with jurisdiction in that County, that is ELC Malindi.

- d. In the case of [Phoenix of E. A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service](#) [*supra*], the Court of Appeal held that:

“Jurisdiction is primordial in every suit. it has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied.”

This is being a decision of the Court superior to this Court, the decision is binding. I understand it to mean for example, that a suit that by the [Constitution](#) and statute should be filed before this Court cannot be remedied if filed before any of the other superior courts of equal status or the courts/tribunals subordinate to this Court. However, where like in this case the suit is filed as it is before ELC Mombasa instead of ELC Malindi, the situation is different and the suit may be remedied as both courts have jurisdiction to hear and determine it. But, as the suit property is situated within the territorial jurisdiction of ELC Malindi, and so as to comply with the provisions of section 12(a) and 15 of the [Civil Procedure Act](#), it is only fair and just it be transferred to that court for hearing and determinations, instead of dismissing as sought in the application, or striking it out.

- e. That under section 27 of [Civil Procedure Act](#), costs follow the events unless where for good reasons the court directs otherwise. In this instance, and having taken note of the relationship between the parties and the nature of the dispute, I am of the view that justice will be better served by an order that the costs in the preliminary objection to abide the outcome of the suit.

5. In view of the determinations set out above, the court finds and order as follows:

- a. That the ground on the preliminary objection is not a pure point of law and it is rejected.
- b. However, as the suit property is situated at Mariakani, Kilifi County, and it being apparent the defendants prefers for the dispute to be heard before the court with jurisdiction in that County, and the plaintiffs having expressed their agreement through submissions, the suit is hereby transferred to ELC Malindi for hearing and determination.
- c. The costs in the preliminary objection to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16TH DAY OF JULY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.



In The Presence Of:

Plaintiffs : M/s Anial

Defendants : Mr Abeid

Shitemi-court Assistant.

