



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 133 OF 2017

PETER OMWENGA MWEBI..... PLAINTIFF

VERSUS

SULUBU ZIRO NGOLE

JOHN NJOKA..... DEFENDANTS

RULING

1. By a Preliminary Objection dated and filed herein on 31st January 2018, the Defendant states as follows:-

“TAKE NOTICE that the Defendants shall, at the hearing raise a Preliminary Objection on the grounds, inter alia:-

1. That the registered owner of all that parcel known as Plot No. Kilifi/Mtwapa/1544 whose boundaries are sought to be affected died on 7th August 2011 and no Letters of Administration have since been taken.

2. That the Orders sought herein goes to the root of Title to Kilifi/Mtwapa /1544, yet the Defendant have no locus to answer to the allegations affecting the Title.

2. The essence of a Preliminary Objection was given by Sir Charles Newbold P in *Mukhisa Biscuits Manufacturing Company Ltd –vs- West End Distributors(1969) EA 696* as follows:-

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication 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 a contract giving rise to the suit to refer the dispute to arbitration.”

3. The Learned Judge went on to hold at page 701 of the decision as follows:-

“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 facts are to be ascertained or if what is sought is the exercise of judicial discretion.

I have in this regard considered the Preliminary objection as raised before me. What the Defendants appear to me to be saying is the fact that there is another parcel of land adjacent to the one the Plaintiff is claiming which parcel is registered in the name of a third party who is yet to be enjoined in these proceedings. It is accordingly their fear that the orders made in this suit are likely to affect the adjacent portion of land.

5. However legitimate those concerns may be, I do not with respect think that the same can become the substance of a Preliminary Objection. For a start, there is no clear point of law which is raised by the objection as framed. It is clear to me that before the Court can accept the objection, it would still be compelled to carry out an inquiry as to the factual position of the ownership of the said adjacent parcel of land and if indeed the orders issued herein would adversely affect it.

6. Whatever the case, I am not satisfied that the sort of objection raised herein may dispose of the suit as framed between the parties. Accordingly, I find no merit on the same. The Preliminary Objection is hence struck out.

7. As the Plaintiff did not file any submissions and/or response to the objection, I make no order as to costs.

Dated, signed and delivered at Malindi this 14th day of December, 2018.

J.O. OLOLA

JUDGE