



**Kaugi v Muchangi (Miscellaneous Civil Application E021 of 2022)  
[2024] KEELC 177 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 177 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
MISCELLANEOUS CIVIL APPLICATION E021 OF 2022  
A KANIARU, J  
JANUARY 23, 2024**

**BETWEEN**

**ROY ANTHONY MUGO KAUGI ..... APPLICANT**

**AND**

**JACOB MUCHANGI ..... RESPONDENT**

**RULING**

1. This is the determination of a Preliminary Objection dated 02.12.2022 and filed on 11.01.2023. The party bringing it is the Respondent - Jacob Muchangi. He is objecting to an application filed by the Applicant – Roy Anthony Mugo Kaugi - dated 19.08.2022 and is seeking to have the application struck out on the grounds that;
  - a. This courts lacks jurisdiction to hear this application and the intended appeal.
  - b. An appeal similar to the one sought to be filed is pending before the High Court *vide* HCCA No. 34 of 2022 in which both parties herein are Respondents.
  - c. The Applicant has no reasonable appeal having sold his interest to Dr Cyrus Njiru the Appellant in HCCA No. 34 of 2022.
2. The preliminary objection was canvassed through written submissions. The Respondent’s submissions were filed on September 15, 2023. According to the Respondent, this court lacks jurisdiction as the suit before the trial court was not a claim for land and the decree sought to be appealed against is a money decree. That the Respondents claim against the Applicant in the lower court was a monetary claim for breach of contract and that the trial court, after hearing the matter, found that the applicant was in breach of the agreement dated 28/2/2018. It decreed that general damages of Kshs. 2,000,000/= be paid. That consequently, the decree sought to be appealed against is a money decree. That section 13(4) of the *Environment and Land Court Act* provides that the Environment and Land Court shall exercise jurisdiction over the decisions of subordinate courts or



local tribunals in respect of matters falling within the jurisdiction of the court. That the Applicant has no cause of action over land parcel No. Gatari/Githimu/3110 since he sold it to a Dr Cyrus Njiru. He cites the case of *Samuel Kamau Macharia & anor v Kenya Commercial Bank Ltd & 2 others* (2012) eKLR to support his position.

3. The Applicant on the other hand filed submissions equally on 15.09.2023. He submitted that the court has jurisdiction to hear the application and the intended appeal as the subject matter of the dispute between the parties before the trial court was land parcel No. Gatari/githimu/3110. Therefore this court pursuant to section 13(1)(2)&(4) of the *Environment and Land Court Act* has the jurisdiction to determine the application and the intended appeal.
4. I have considered the preliminary objection and the rival submissions. The issue for determination is whether the preliminary objection meets the fundamental threshold for raising it and whether the same is merited.
5. The court in the case of *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (Interested Parties)* [2021] eKLR held the following;

“The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, 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 fact has to be ascertained or if what is sought is the exercise of judicial discretion. Emphasis mine.

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. 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.”

6. From the above, it is clear that for a preliminary objection to succeed, it ought to satisfy the following requirements: Firstly, it should raise a pure point of law; secondly, it should be argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
7. The Respondent in this case takes issue with the Applicants Notice of Motion dated 19.08.2022 which motion is seeking for extension of time to file an appeal and for leave to file the Appeal out of time. He is of the view that this court lacks jurisdiction to entertain the said application on the grounds that the suit the Applicant is seeking to file an appeal against is not an environment or land issue. The Applicant is of the contrary view. The jurisdiction of a court to hear matters is critical point of law that goes to the root of any suit. However, as has already been stated, one of the preconditions for a valid preliminary objection is based on the assumption that the facts pleaded are correct and unopposed by the rival party which is not the case herein. This ground of objection also as has been presented by the Respondent calls upon the Court to inquire into the facts of the lower court case to establish whether the cause of action therein was in the nature of a land dispute or not which goes beyond the purpose of a preliminary objection. I may venture to add that it is the nature of action filed in the lower court, not the decree arising from judgement, that determines whether the court can entertain an appeal or not.



8. Additionally, the Respondent raises other grounds in the preliminary objection that there is a similar appeal as the one being sought to be filed herein pending before the High Court and that the Applicant has no reasonable appeal having sold his interest to another party. With all due respect, these all require the Court to inquire into evidence to ascertain or demonstrate. As stated above, a preliminary objection cannot be raised and sustained if any fact has to be ascertained. Whenever the court retires to ascertain facts, no objection can be sustained.
9. The upshot of the foregoing is that I find that preliminary objection raised herein does not meet the fundamental threshold of a preliminary objection and I hereby dismiss it. Costs to be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23<sup>RD</sup> DAY OF JANUARY, 2024.**

**A.K. KANIARU**

**JUDGE**

In the presence of Kimani for Kathungu for applicant and in the absence of Kinyua Kiama for respondent.

Court assistant: Leadys

Interpretation: English/Kiswahili

