



REPUBLIC OF KENYA



**Saida & another v Mwafue (Environment and Land Appeal E004 of 2023)
[2024] KEELC 140 (KLR) (Environment and Land) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E004 OF 2023
NA MATHEKA, J
JANUARY 23, 2024**

BETWEEN

SHARIFF MWANAISHA SAIDA 1ST APPELLANT

BENSON MWAKINA 2ND APPELLANT

AND

HELLEN TALU MWAFUE RESPONDENT

JUDGMENT

1. The appellants, appeal to the Environment and Land Court against the whole of the ruling and orders of Hon, T.N. Sinkiyian made on the 5th of October, 2023 on the following grounds, namely;
 1. The trial magistrate erred in law in finding that issues on jurisdiction are not pure grounds of law to be raised by way of a preliminary objection.
 2. The trial magistrate erred in law in not making any findings at all on the issues of jurisdiction raised in the Appellants preliminary objection dated June 26, 2023.
 3. The trial magistrate erred in law in finding that issues on sub-judice are not pure grounds of law to make a suit scandalous and incurable defective under the [Civil Procedure Rules](#) and the [Civil Procedure Act](#).
 4. Indeed, the trial magistrate erred in law in finding that *sub judice* cannot be raised by way of a Preliminary Objection as a pure point of law.
 5. The trial magistrate erred in law in finding that issues of lapse of service of summons under Order 5 Rule 2 of the [Civil Procedure Rules](#) are procedural and factual issues and not point of law to be raised by way of a preliminary objection.



6. The Trial Magistrate erred in law in basing her findings on the Judicial Review judgment made on May 4, 2022 in ascertaining and disallowing lapse of service of summons under Order 5 Rule 2 of *Civil Procedure Rules 2010* when the issues in the said Judicial Review had no correlation at all on services of summons or lack of it at all.
 7. The trial magistrate erred in law in importing matters relating to the previous judicial officer conduct in dealing with a past application (the JR) into the preliminary objection before her thereby arriving at the erroneous conclusions/ findings.
 8. The trial magistrate misdirected herself in mixing non related issues to a clear application on a point of law pending before her for determination as a result making grievous errors in law.
 9. All in all, the trial magistrate erred in law in making findings not supported by law.
2. The Appellant prays for orders that;
- a. That the Appellant's Appeal be allowed.
 - b. That the Ruling and orders of the Honourable Magistrate T.N. Sinkiyian made on 5th of October, 2023 be set aside and the Court allow the Appellants' Preliminary Objection dated June 26, 2023 and filed in Court on June 27, 2023.
 - c. That the Respondent bear the cost of this Appeal.
3. This court has considered the appeal and the submissions therein. The appellants raised a Notice of Preliminary Objection dated June 26, 2023 against the respondent's suit and sought court to dismiss it on the following grounds:
- a. This court has no jurisdiction to hear and determine this suit.
 - b. The plaintiff's suit as filed is legally, fatally and incurably defective for the reasons that the same is not supported by any statement, witness and/or documents as is the requirement in law for other reasons to be adduced at the hearing of this preliminary objection.
 - c. The plaintiff's suit has lapse by dint of operation of law for not having served summons to enter appearance on the defendants more than 2 years from the time and date of issuance.
4. The same was argued by way of written submissions and on October 5, 2023 the Trial Magistrate ruled on the said preliminary objection. She held that the issues raised required a mini trial and that a preliminary point of law cannot be raised if any fact pleaded has to be ascertained or if what is sought is the exercise of judicial discretion. The trial court held that the issue on lapse of service of summons is a procedural aspect of substantive effect that goes to the right to be heard on affidavits of *viva voce* evidence and as such cannot be resolved as a preliminary objection. The court was of the view that the issue of *sub judice* as raised was best raised under an application supported by affidavit which would demonstrate to court the multiplicity of suits. The court dismissed the preliminary objection with costs to the respondent on the ground that the same was raised on contested factual issues.
5. What constitutes a preliminary objection was well established in *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited* (1969) EA 696, where Law J.A held on page 700 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 implications 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

6. The appellant submitted that the trial court had no jurisdiction to hear and determine the suit as the subject matter which is Land Parcel No. Sagalla/Kishamba B/1 measuring 10,864 ha registered in the name of Kishamba ‘B’ Group Ranch on March 25, 1982 was subject to two court cases pending before the Mombasa ELC as ELC No. 116 of 2015 and ELC No. 74 of 2019. That the parties herein are still parties in the said suits before the superior court, which is a fact known to both parties herein. Further counsel to the appellants submitted that on July 29, 2022, Naikuni J in ELC No. 74 of 2019 issued injunctive orders prohibiting any dealings whatsoever on the suit property. Counsel argued that since the ELC has conduct over the suit property any order issued by the trial court was null and void and maintained that this court has no jurisdiction to proceed with this suit. The respondents submitted that the ground upon which the appellants based their lack of jurisdiction was that of *sub judice* which require the court to interrogate from the evidence and pleadings before it to make a finding that the suit is subjudice or not. The respondent submitted that once the court steps into analyzing facts to give it verdict the same stops being a preliminary objection and ought to fail.
7. I have analysed the submissions made by both parties and I would like to point out that, *sub judice* applies when the other suit or suits are pending before a court of similar jurisdiction. Section 6 of the [Civil Procedure Act](#) provides that;

" No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they are any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed."
8. In the present case, the appellant submitted that the subordinate court lacked jurisdiction to hear and determine the suit as the suit property was subject to Mombasa ELC No. 116 of 2015 and ELC No. 74 of 2019 which are pending before this honourable court. The respondent contended that the appellants are calling the court to interrogate the pleadings of Mombasa ELC No. 116 of 2015 and ELC No. 74 of 2019 which are not before this court, hence stepping out of what is a preliminary objection. I do note that the respondent does not directly comment on the actual existence of Mombasa ELC No. 116 of 2015 and ELC No. 74 of 2019 as alleged by the respondents.
9. I do note with concern that the respondent, is being evasive on the issue as to whether there are two similar cases which have been filed before this court. From the Court Order issued on July 29, 2022 in Mombasa ELC No. 74 of 2019, it is clear that Naikuni J ordered the Land Registrar Taita Taveta to register an inhibition against Land Parcel Sagalla/Kishamba ‘B’/1 under Section 68 (1) and (2) and 69 (1) of the [Land Registration Act](#). The respondent in her plaint claims approximately 2 acres situated within the Kishamba B Group Ranch, which is subject to litigation before this honourable court.
10. Further to that, this court is well aware that on June 6, 2023, Naikuni J who presides over the Mombasa ELC No. 116 of 2015 and ELC No. 74 of 2019; directed that ELC No. 116 of 2015 be consolidated with ELC No. 74 of 2019, with the latter being the lead file. The court is also well aware that both firms of advocates herein have conduct over both suits, which are since consolidated, and are therefore well aware of the existence of all material facts pertaining to the suits before this superior court. This has been confirmed by the respondent’s submissions, where she does not deny the existence of similar cases but insists that the said pleadings are not before the court and even if they were the court would be ascertaining facts.



11. Section 3A of the *Civil Procedure Act* empowers this court with the inherent powers to make orders necessary for the ends of justice. It provides:

“ Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

12. This court will use its inherent powers to ensure that its judicial time is not wasted nor its process abused when parties file a multiplicity of suits. The court is well aware that the subject matter of this suit Land Parcel Sagalla/Kishamba ‘B’/1 is expansive in size and has ignited litigation over the years. It is therefore prudent and saves judicial time to have any litigation pertaining the said parcel and its registered owner Kishamba B Group Ranch be heard and determined by one court for uniformity of orders and directions.

13. The respondent is not forthcoming on the issue as to whether there are similar cases filed before the superior court, while counsel on record are well aware of the same in my view amounts to an abuse of the judicial process and a waste of the judicial precious time. The court will exercise its inherent powers enshrined in Section 3A of the *Civil Procedure Act* to find and uphold the appellants’ Notice of Preliminary Objection dated June 26, 2023 on the ground that the subordinate court had no jurisdiction to hear and determine the suit while the subject matter is subject to litigation before this superior court. Consequently, I direct that the ruling dated October 5, 2023 be set aside and the respondent’s plaint dated March 28, 2021 be struck out with costs to the appellants.

It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL THIS 23RD DAY OF JANUARY 2024.

N.A. MATHEKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

