



REPUBLIC OF KENYA



**Africa Muslims Agency Trust Registered Trustees v Nzili Headmaster
Ama Primary School, Kilifi & 4 others (Environment & Land Case
E092 of 2024) [2025] KEELC 257 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E092 OF 2024
FM NJOROGE, J
JANUARY 30, 2025**

BETWEEN

AFRICA MUSLIMS AGENCY TRUST REGISTERED TRUSTEES PLAINTIFF

AND

**KHAMISI R. NZILI HEADMASTER AMA PRIMARY SCHOOL,
KILIFI 1ST DEFENDANT
THE BOARD OF MANAGEMENT AMA PRIMARY SCHOOL,
KILIFI 2ND DEFENDANT
HASSAN A ABDULLATIF THE SUB-COUNTY DIRECTOR OF EDUCATION,
KILIFI 3RD DEFENDANT
THE CABINET SECRETARY MINISTRY OF EDUCATION 4TH DEFENDANT
THE HON ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. This ruling is in respect to a notice of preliminary objection dated 20/9/2024. The objection which was filed by the 5th Defendant, is premised on the following grounds: -
 1. That this honourable court does not have the jurisdiction to hear and determine the application and suit;
 2. That the suit as filed contravenes the express provisions of section 7 of the *Limitation of Actions Act* for having being filed more than 20 years after the title deed was registered in the Plaintiff's name hence cause of action accruing from the said date of registration cannot be raised now however merited it is;



3. That the suit and application are in contravention of section 3(3) of the *Trustees (Perpetual Succession) Act*, cap 164 of the Laws of Kenya.
 4. That the suit is fatally defective for having been verified by a deponent who is a stranger in the law of trusts;
 5. That the application is fatally defective for having been supported by an affidavit sworn by a stranger in the law of trusts calling himself a director.
2. The Honorable Court directed that the Preliminary Objection to be canvassed by way of written submissions.

Defendants' Submissions

3. Citing the definition of a preliminary objection given in the case of Africa Christian Church & Schools Registered Trustees v Macharia & 2 others [2023] KEELC 120 KLR, counsel submitted that the preliminary objection as raised is proper as the grounds concern pure points of law.
4. Counsel submitted that the deponent of the verifying affidavit and supporting affidavit is not a trustee of the Plaintiff thus does not have the locus standi to sign any pleading on behalf of the Plaintiff; that those affidavits should therefore be expunged from the record and the suit, in turn, be dismissed. Counsel added that the suit ought to have been instituted by the trustees of the Plaintiff since the Plaintiff, being unincorporated, lacked capacity to institute the present proceedings. To support this argument, counsel relied on Section 3 (3) of the *Trustees (Perpetual Succession) Act* and the case of Africa Christian Church & Schools Registered Trustees v Macharia & 2 others [supra].
5. Counsel further submitted that the suit is time barred by dint of Section 7 of the *Limitation of Actions Act*, having being filed 26 years after the Plaintiff acquired the suit land. He was guided by the case of Dickson Ngige Ngugi v Consolidated Bank Ltd (formerly Jimba Credit Corporation Limited) & another [2020] eKLR and Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR.

Plaintiff's Submissions

6. On jurisdiction, counsel submitted that the dispute in this matter is on land ownership, hence this court is clothed with the requisite jurisdiction to determine the same, by dint of Article 162 (2) of *the Constitution* of Kenya and Section 13 of the *Environment and Land Court Act*. He relied on the case of *Nguruman Limited v Jan Bonde Nielson (ELC 120 of 2010)* [2014] KEHC 1718 (KLR).
7. Counsel further submitted that the course of action which prompted this suit, arose sometime in August 2024 when the Defendant began preparations to construct classrooms on its property, thus cannot be said that the suit is statute barred. To support this argument, counsel cited the cases of Oraro v Mbaja [2005] 1 KLR 141 and also Karisa & another v Dyeka & others (Malindi ELC E082 of 2019) [2024] KEELC 282 (KLR).
8. It was counsel's further argument that Section 3 (2) and (3) of the *Trustees (Perpetual Succession) Act* stipulated that once trustees who have been appointed for any religious, educational, social, or charitable purpose et al have been incorporated and a certificate of incorporation has been issued, the trustees shall become a body corporate by the name described in the certificate, and shall have the power to sue and be sued in their corporate name. He added that the Defendants having admitted and acknowledged that the Plaintiff is a body corporate with a certificate of incorporation, they were estopped from turning around and arguing that the Plaintiff is not properly before the court, as it was held in the case of Registered Trustees of Maximum Miracle Centre v Andrew Mlewa Mkare [2013]



KEHC 2553 (KLR). Counsel asserted that the description of the Plaintiff as a non-governmental organization does not change the factual position that the Plaintiff is a trust and that alone cannot defeat the suit. He was guided by the provisions of Article 159 (2) (d) of *the Constitution* and Order 1 rule 9 of the Civil Procedure Rules.

9. Counsel further submitted that the issues being raised by the Defendant of the deponent giving contradicting descriptions of himself is a mere typing error which can be cured by an amendment as was held in the case of Charo Lewa Kahindi & 2 Others v Mohamed Omar Bawaly & 3 others (ELC 219 OD 2015) 2017 KEELC 968 (KLR). He added that the Plaintiff produced a board resolution in compliance with Order 4 rule 1 (4) of the Civil Procedure Rules, thus the deponent was duly authorized to swear both the verifying and supporting affidavit. To him, the objection is technical and should not be dismissed pursuant to Article 159 (2) (d) of *the Constitution*.
10. Counsel relied on the cases of Philip Kiptoo Chemwolo & another v Augustine Kubende [1986] eKLR; Kandara Residents Association & another v Ananas Holdings Limited & 4 others; Director of Survey & 3 others (Interested Parties) [2020] eKLR; Fubeco China Fashion v Naiposha Company Limited & 11 others [2014] eKLR; and Obura & Another v Okello Okello (ex-parte applicant) Obura & another (Interested Parties) (ELC Misc Application 53 of 2015) 2024 KEELC 7468 (KLR).

Analysis And Determination

11. The Preliminary Objection herein seeks to oust the suit herein on the basis that this court lacks the jurisdiction to hear and determine the suit; that the suit is statute barred and that the Plaintiff has no locus standi.
12. I have thus framed the following salient issues for determination: -
 - i. Whether the Preliminary Objection dated 20/9/2024 meets the fundamental threshold of a preliminary objection;
 - ii. Whether this honourable court has jurisdiction to hear and determine the suit;
 - iii. Whether the suit is statute barred;
 - iv. Whether the Plaintiff has locus standi.
13. The case of Mukisa Biscuits v West End Distributors Ltd (1969) E.A 696 defined a preliminary objection as follows:

"A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as 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 ..."

14. Justice Newbold in the said suit argues that

"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 had to be ascertained or if what is sought is the exercise of judicial discretion."



15. It therefore follows that a preliminary objection is one that consists of a pure point of law and which is raised on assumption that all facts pleaded are correct and further that if demonstrated it can dispose of a matter.
16. The Defendants have based their Objection on firstly, the ground that this court lacks jurisdiction to hear and determine the Plaintiff's suit. No doubt, the issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. This is because in any litigation, jurisdiction is central and a court of law cannot validly take any step without it. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools. (See the Supreme Court's decision in the Matter of Interim Independent Electoral Commission [2011] eKLR).
17. However, while the Defendant raised the objection on jurisdiction, they did not submit on the same. It is therefore safe to conclude that they abandoned that ground. Nonetheless, I have perused the Plaintiff herein, one of the reliefs sought therein being a declaration that the Plaintiff is the registered owner of the suit property, falls within the jurisdiction of this court, by dint of Section 13 (2) of the Environment and Land Court Act which reads: -
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”
18. The Defendants also raised the issue of limitation. They contended that the suit was filed 26 years after the course of action accrued hence it was time barred under Section 7 of the Limitation of Actions Act. That section provides: -
- "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."
19. I have considered both arguments regarding this issue. I am not satisfied that this ground is merited. I say so because as already stated, a preliminary objection 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. This ground of objection as raised does not meet the threshold since it is clear that the date when the cause of action accrued is disputed and has to be ascertained. This ground therefore fails.



20. The Defendants also challenged the validity of the suit on grounds that the Plaintiff has no capacity or locus standi to bring the cause. The court in the case of *Alfred Njau and Others v City Council of Nairobi* (1982) KAR 229, defined the word locus standi as follows; -

"The term locus standi means a right to appear in Court and conversely to say that a person has no locus standi means that he has no right to appear or be heard in such and such proceedings".

21. The issue of locus standi therefore raises a point of law and is one capable of disposing of the suit without determining it on its merit. If a party lacks capacity to appear before the court, then the court lacks jurisdiction to entertain such a party or even the pleadings filed by the said party.

22. It is clear that locus standi has been expanded in recent times in constitutional matters such that it is hard to disqualify a claimant from presenting a claim on the basis of locus. This is seen in *Mumo Matemu Vs Trusted Society of Human Rights Alliance & Others* [2013] eKLR where the court held as follows:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process...."

23. Rules on locus standi apply mores strictly in ordinary civil cases.

24. As per the Plaint, the Plaintiff is Africa Muslims Agency Trust Registered Trustees described as a non-governmental organization. The Plaintiff however explained that the said definition was erroneous and that it is a duly incorporated trust registered under the *Trustees (Perpetual Succession) Act*. It has attached to his list of documents a certificate of incorporation of the Plaintiff. The certificate lists some three trustees.

25. The Defendants argued that the suit was filed in violation of the provisions set out in Section 3 (3) of the *Trustees (Perpetual Succession) Act* which provide as follows: -

"The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation." (emphasis)

26. Important to note is that Sub-section 1 thereon provides that "any person or body of persons who have lawfully constituted themselves for the purpose of forming a trust may apply to the Principal Registrar for a certificate of incorporation."

27. From the captured provisions, I firstly observe that a plain reading of Section 3 (1) provides that the registration of a trustee is not couched in mandatory terms. Secondly, once a trustee is registered, it is issued with a certificate of incorporation as evidence of its registration. It is upon its registration that the trustee attains capacity to act in the manner set out in Section 3 (3) of the Act.



28. In the present case, it is evident that the Plaintiff is an incorporated registered trust unlike it was in the case of *Africa Christian Church & Schools Registered Trustees v Macharia & 2 others* [supra], where the Plaintiff was evidently an unincorporated trust.
29. Section 3 (3) of the *Trustees (Perpetual Succession) Act* above is clear that once issued with a certificate of incorporation, the trustees become a body corporate by the name described in the certificate, with perpetual succession and a common seal, and power to sue and be sued in their corporate name. In the circumstances, I do find that the Plaintiff has locus standi. Consequently, it matters not that the deponent of the supporting affidavit calls himself a “director”; in any event he also calls himself a trustee in the verifying affidavit and I think that is sufficient. The objection regarding the Plaintiff’s capacity to institute and sustain the suit equally fails.
30. The outcome is that the preliminary objection dated 20/9/2024 lacks merit and it is hereby dismissed. The parties shall file their respective trial bundles, the plaintiff within 21 days and the defendants within 42 days from the date of this ruling. The timelines run concurrently. The suit will be listed for a mention on 24/3/2025 for issuance of a hearing date.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY, 2025.

MWANGI NJOROGE

JUDGE, ELC MALINDI

