



**Kagunyi & another v Mwathi (Sued as the Legal Representative of
Gatumu Kiricho – Deceased) & 6 others (Environment & Land Case
E030 of 2022) [2024] KEELC 882 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E030 OF 2022
A KANIARU, J
JANUARY 18, 2024**

BETWEEN

MARY WANGUI KAGUNYI 1ST PLAINTIFF

**MARTHA NYAMBURA KAGUNYI (SUING AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF SAMUEL KAGUNYI RICHARD
MUKUNU - DECEASED) 2ND PLAINTIFF**

AND

**EUSTACE KARIUKI MWATHI (SUED AS THE LEGAL REPRESENTATIVE OF
GATUMU KIRICHO – DECEASED) 1ST DEFENDANT**

**THE LAND ADJUDICATION & SETTLEMENT OFFICER MBEERE SOUTH
SUB COUNTY 2ND DEFENDANT**

THE DIRECTOR LAND ADJUDICATION & SETTLEMENT . 3RD DEFENDANT

THE CHIEF LAND REGISTRAR 4TH DEFENDANT

THE LAND REGISTRAR MBEERE SOUTH SUB-COUNTY ... 5TH DEFENDANT

CABINET SECRETARY FOR LANDS 6TH DEFENDANT

THE ATTORNEY GENERAL 7TH DEFENDANT

RULING

1. This ruling is on a Preliminary Objection dated 15.12.2022 and filed on 19.12.2022. The objection has been brought by the 2nd to 7th Defendants on the grounds that;



1. That this suit offends the mandatory provisions of Order 53 of the [Civil Procedure Rules 2010](#) as the plaintiffs are seeking orders specifically order (c) in the plaint that should have been sought through an application for Judicial Review
2. That the plaintiffs are seeking an order to quash a decision that was made on 10.08.2020 which is well past the 6 – month time period within which one is allowed to seek such an order as stipulated under Order 53 Rule 2 of the [Civil Procedure Rules 2010](#).
2. In the suit, the plaintiff has contested the decision by the Minister of Lands issued on 01.07.2019 allowing an appeal that is said to have been filed six years after the last decision in previous Objection cases concerning the suit land. The decision was first challenged through a Judicial Review application which quashed the decision of the minister on 28.05.2020 and ordered that the Ministers Appeal be heard afresh. That the Minister’s Appeal was heard afresh and on 10.10.2020 the Minister for lands upheld the same decision that had been challenged. That is what prompted the filing of this suit. The Minister is said to have exceeded his jurisdiction by making a decision that was whimsical, based on irrelevant considerations, hinged on matters and/or evidence that did not arise and other factors not tendered during the hearing.
3. That the 2nd to 7th Defendants actions were allegedly not judicious and justiciable and they denied the estate of the 2nd Plaintiff - Samuel Kagunyi Richard Mukumu - who is deceased, its proprietary rights over the suit parcel of land Mbeere/Kirima/240. They say the land belonged to the deceased. The plaintiff’s suit ultimately sought declaratory orders to have the decision of the 6th defendant made on 10. 10. 2020 quashed and also for 1st and 2nd Plaintiff’s to be registered as the proprietors of the suit land Mbeere/Kirima/240 to hold the same in trust for themselves and the heirs of the estate of the deceased. In the alternative, they sought to have the name of the deceased reinstated in the register of the suit parcel of land.
4. The suit was opposed by the 1st Defendant by way of statement of defence and equally by the 2nd to 7th defendants by way of another statement of defence. The 2nd to 7th defendant then filed the preliminary objection now under consideration. The suit was said to be fatally defective for having been filed by way of plaint as opposed to through judicial review proceedings.
5. The preliminary objection was canvassed through written submissions. The 2nd to 7th Defendant’s submissions were filed on 22.06.2023. The 1st Defendant did not file submissions. It was submitted that the suit herein was instituted by way of plaint whereas it sought judicial review orders of Certiorari. That the suit as filed offends the provisions of Order 53 Rule 1 of the [Civil Procedure Rules](#) which provides for the procedure in which Judicial Review proceedings should be instituted. That the failure to comply with procedural requirements is so grave as to oust the jurisdiction of the court as was stated in the case of Cyril J. [Haroo & Another v Uchumi Services Ltd & 3 others](#) (2014) eKLR where it was observed that all suits shall be instituted in such a manner as may be prescribed by the rules. Further that for the court to have the requisite jurisdiction to handle a suit, that suit must be filed in accordance with the rules.
6. It was submitted further that the suit was time barred as it was brought after the 6-month statutory period within which applications for certiorari must be brought in judicial review. That also in this matter, the impugned decision by the Minister was delivered on 10.08.2020. The plaint was filed on 02.11.2022 which is more than one year’s period between the delivery of the decision and the filing of the suit. They cited the cases of [Republic v Council of Legal Education & Another ex parte Sabiha Kassamia & Anor](#) (2018) eKLR JR APP No. 703 of 2017 where the court dismissed an application



by an Exparte applicant to file a judicial review matter since the application was time barred by statute. They urged that the suit be dismissed.

7. The plaintiff's submissions were filed on 23.10.2023. They sought to defend their position on the grounds that the provisions of Order 53 of the Civil Procedure Rules are procedural rather than substantive provisions of law. They said that they were not seeking the prerogative orders of certiorari, mandamus or prohibition but rather declaratory orders on the ownership of the suit land and further that they had brought the suit in exercise of their constitutional right to own property. They further submitted that the decision of the Minister could be challenged either through Judicial Review or a declaratory suit as in this case and that there is no statute barring them from approaching this court through a declaratory suit. They were also of the position that the preliminary objection did not meet the fundamental threshold. This is because, they say, it was not based on pure points of law as the facts in the case were disputed and could only be ascertained by evidence. They urged that the preliminary objection be dismissed.
8. To support their position, they cited the cases of Nicholus Njeru v Attorney General & 8 others (2013) eKLR, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA, Independent Electoral 7 boundaries Commission v Jane Cheperenger & 2 others (2015) eKLR.
9. I have considered the Preliminary Objection and the rival submissions and the arguments of the parties. 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 v 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”.

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 questions or issues of law only. To discern such questions or issues 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.

10. It therefore follows that for a ground to suffice as a preliminary objection, then it ought to be one that raises a pure point of law as in the Mukhisa case (*supra*). The preliminary objection should also be one that if argued is capable of disposing off the suit.

In the case of Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

11. The 2nd to 7th Defendants in their preliminary objection raised two grounds of objection, which in my view can be determined as one issue. The grounds are that the suit filed herein offends the provisions of Order 53 of the civil Procedure Rules and that the suit seeks to quash a decision that was made more than 6 months ago, which is against the stipulated provisions of Order 53 Rule 2 of the Civil Procedure Rules.



12. The suit herein was filed by way of plaint seeking to have the decision by the minister of land quashed and further that the plaintiffs be declared the absolute owners of the land. From the pleadings filed and which facts are not disputed by either party, there were objection proceedings filed by Gatumu Kiricho against Samuel Kagunyi Richard the Plaintiff's father who were both claiming title to the suit land Mbeere/Kirima/240. It appears that the objection was dismissed and Gatumu Kiricho filed an appeal to the Minister, which appeal was allowed as against the Plaintiff's father thus declaring the 1st Defendant – Gatumu Kiricho - to be the owner of the suit land. That is what triggered the filing of this suit.
13. The Defendants in this suit are challenging the manner in which this suit was filed, as according to them, the plaintiff ought to have approached the court by way of judicial review. The plaintiff on the other hand contends that the suit is properly before the court and the orders sought can be granted by way of plaint.
14. My understanding of law is as stated in the case of *Nicholus Njeru v AG and other* (2013) eKLR where the court of Appeal observed this:

“(23) we agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the pored of persons exercising public authority. However we do not entirely agree with the learned judges observation that the court had no jurisdiction to grant a declaratory order. We know of no limit to these powers of the court to grant a declaratory order except such limit as it may in its discretion impose upon itself”.
15. Further, it is also necessary to consider the import of order 3 rule 9 of *Civil procedure rules* which provides as follows:

“No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not”.
16. My understanding of the matter before me is that the court is being invited (see prayer (c) in the plaint) to make a declaratory order. All other prayers are consequential reliefs or remedies to be granted or refused depending on the outcome or determination of the declaratory prayer. It is not an inexorable rule of law that a declaratory suit can not be entertained by the court simply because a litigant has failed to exercise other options available in law.
17. I also think that the preliminary objection as filed is not based on uncontested or incontrovertible facts. The response filed by the 2nd to 7th defendants vide a defence filed on 19.12.2022 consists mainly of denials. No material aspect of the plaintiff's suit is admitted or uncontroverted. That being the position, it would have been a more prudent move by the 2nd to 7th defendant to raise the issues during the trial of the action instead of raising them as a preliminary objection.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS DAY OF 18TH DAY OF JANUARY, 2024.

Delivered in the presence of;

Akotsi for Okwaro for 1st Plaintiff,

Mutua for kiongo for 2nd – 7th Defendant,

Court Assistant - Leadys



A.K. KANIARU

JUDGE

18/01/2024

