



**Njagi (Suing as the Legal Representative of the Estate of Henry Njagi Njogu) v Mwathi (Sued as the Legal Representative of Gatumu Kiricho – Deceased) & 5 others (Environment & Land Case E026 of 2022) [2024] KEELC 1415 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 1415 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E026 OF 2022  
A KANIARU, J  
JANUARY 18, 2024**

**BETWEEN**

**JOSEPH MATE NJAGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF HENRY NJAGI NJOGU) ..... PLAINTIFF**

**AND**

**EUSTACE KARIUKI MWATHI (SUED AS THE LEGAL REPRESENTATIVE OF GATUMU KIRICHO – DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING ..... 2<sup>ND</sup> DEFENDANT**

**THE CHIEF REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR MBEERE SOUTH SUB-COUNTY ... 4<sup>TH</sup> DEFENDANT**

**DIRECTOR LAND ADJUDICATION & SETTLEMENT ..... 5<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is on a Preliminary Objection dated 09.12.2022 filed in court on the same date. The party bringing it is the 6<sup>th</sup> Defendant – The Hon. Attorney General - on the grounds that;
  1. That the suit herein offends Order 53 Rule 1(1) and Order 53 Rule 1(2) of the [Civil Procedure Rules](#).
  2. That the suit herein contravenes Order 53 Rule 2 of the [Civil Procedure Rules](#).
2. In the suit, the plaintiff contested the decision by the Minister of Lands allowing an appeal that is said to have been filed thirteen years after the decision in other Objection cases concerning the suit land. The



Minister is said to have based his decision on irrelevant considerations and he also totally disregarded facts, evidence and the law. He ignored overwhelming evidence that the suit land, being Land Parcel Mbeere/kirima/554, belonged to the plaintiff's deceased father. The 3<sup>rd</sup> & 4<sup>th</sup> Defendants are also said to have unlawfully cancelled the name of the plaintiff's deceased father from the register of the suit parcel of land and inserted the name of someone else while purportedly acting on the decision of the 2<sup>nd</sup> Defendant. The plaintiff asserted that the fraudulent and unlawful actions of the Defendants deprived his father's estate of proprietary rights over the suit land. The plaintiff ultimately sought declaratory orders to have the decision of the 2<sup>nd</sup> defendant made on 10. 12. 2018 nullified and also for him to be declared absolute owner of land parcel No.Mbeere/kirima/554.

3. The suit was opposed by the 1<sup>st</sup> Defendant by way of defence and by the 2<sup>nd</sup> to 6<sup>th</sup> defendants by way of statement of defence and a preliminary objection. They denied the plaintiff's allegations. The suit was also said to be fatally defective for having been filed by way of plaint instead of judicial review proceedings.
4. The preliminary objection was canvassed through written submissions. The 2<sup>nd</sup> to 6<sup>th</sup> Defendant's submissions were filed on 18.05.2023. They submitted that the suit herein was instituted by way of plaint whereas it sought judicial review orders of Certiorari. That the suit offended the provisions of Order 53 Rule 1 of the Civil Procedure Rules which provides that the proper way to institute judicial review proceedings was by filing a Chamber Summons application seeking leave. That the said application was to be accompanied by a statutory statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, accompanied by an affidavit verifying the facts relied upon. That the suit was improperly before the court and that the same should be dismissed. They further submitted that this court does not have the jurisdiction to entertain the plaintiff's plaint as the orders sought therein can only be granted in judicial review proceedings.
5. They cited the cases of Cyril J. Haroo & Another v Uchumi Services Ltd & 3 others (2014) eKLR which observed that all suits shall be instituted in such a manner as may be prescribed by the rules and that for the court to have the requisite jurisdiction to handle a suit, that suit must be filed in accordance with the rules. They further cited the cases of Republic v Council of Legal Education & Another ex parte Sabiha Kassamia & Anor JR APP No. 703 of 2017, Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989), joseph Muthee Kamau & Anor v David Mwangi Gichure & Anor (2013) Eklr, Samuel Kamau Macharia & Anor v Kenya Commercial Bank Ltd & 2 others (2012) Eklr, Application No. 2 of 2011 to support their position.
6. The plaintiff's submissions were filed on 19.06.2023. 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 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.
7. 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.



8. The 1<sup>st</sup> Defendants filed submissions on 02.11.2023. He submitted that upon exhausting the appeal process under the [Land Adjudication Act](#), the only avenue available is judicial review which confines itself to the decision making process. That in the instant case, the fact that the plaintiff is challenging the merits of the decision of the Minister is in itself in contravention of the law.
9. I have considered the preliminary objection and the rival submissions. I have also had a look into the suit generally. My understanding of the law is as captured and quoted by the plaintiff while citing the case of [Nicholas Njeru Vs Attorney General and 8 others](#) (2013) eKLR. In the suit, it was argued that the plaintiff could only approach the suit by way of judicial review. The High court agreed with this position but on appeal, the appellate court had the following to say;

“we agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However, we do not entirely agree with the learned judge’s observation that the court had no jurisdiction to grant a declaratory order. We know of no limit to the powers of the court to grant a declaratory order except, such limit as may in its discretion impose upon itself”
10. The learned judges were taking cue from the old English case of *PYX Granite co. Ltd Vs Ministry of Housing and Local Government* (1958) QB554 where a similar position had been taken. Further, Order 3 rule 9 of [Civil procedure Rules](#), 2010, has the following to say concerning a suit from which a declaratory judgment is to issue;

“No suit shall be open to objection on the ground that a merely declaratory 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”
11. The suit before the court (see prayer (b) in the plaint) seeks a declaratory order and it’s clear that the other reliefs sought depend on the outcome of that prayer. My take is that this court cannot refuse to entertain the suit simply because the plaintiff could have approached the court in some other way. Perhaps I would be persuaded otherwise if a declaratory prayer had not been sought.
12. Further, I perceive that if the objection raised by the 6<sup>th</sup> defendant is taken to its logical conclusion, the court can be said to have no jurisdiction since the only way it can entertain the suit is by way of judicial review. It is even clearly submitted that the court has no jurisdiction. But there is a contradiction of sorts as the defence filed by 6<sup>th</sup> defendant (see paragraph 19 thereof) is actually an express admission of the court’s jurisdiction.
13. Additionally, it is useful to point out that a preliminary objection can only competently be raised if the facts are admitted by the other side or are actually incontrovertible. In the case at hand, all the material aspect of the plaintiffs case are actually controverted. This essentially means that the court would require evidence to prove or dis-prove the facts. In a scenariao like that a preliminary objection cannot suitably or competently be raised.
14. The upshot, in light of the foregoing is that the objection before me is for dismissal. I hereby dismiss it but I make no order as to costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS DAY OF 18<sup>TH</sup> DAY OF JANUARY, 2024.**

In the presence of;

Plaintiff – present



Defendants – present

Court Assistant - Leadys

**A.K. KANIARU**

**JUDGE**

**18/01/2024**

