



**Mbaga (Suing as the Administrator of the Estate of Ruth Tauber  
- Deceased) v Chudasama & 5 others (Environment & Land Case  
E070 of 2022) [2024] KEELC 1498 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1498 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E070 OF 2022  
NA MATHEKA, J  
MARCH 19, 2024**

**BETWEEN**

**CECILIA LUVUNO MBAGA (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF RUTH TAUBER - DECEASED) ..... PLAINTIFF**

**AND**

**FAHRMOHAMED MOEZALI GULAMHUSSEINEEN CHUDASAMA .... 1<sup>ST</sup>  
DEFENDANT**

**SIEGRIED ENGLHARDT ..... 2<sup>ND</sup> DEFENDANT**

**SUNIL NARENDRA ..... 3<sup>RD</sup> DEFENDANT**

**FAHREEN CHUDASAMA ..... 4<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR – MOMBASA ..... 5<sup>TH</sup> DEFENDANT**

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

**RULING**

1. The 1st, 3rd and 4th Defendants raised a preliminary objection on the following grounds;
  1. The suit is time barred by virtue of Section 7 of *Limitation of Actions Act* as the suit was instituted in 2022 which is more than 12 years from the date on which the right of action accrued.
  2. The said suit offends the provisions of Order 25 Rule 4 of the Civil Procedure rules as it has been brought before payment of the costs in Mombasa ELC. No. 251 of 2012 (Mwaganda Bosco Columba-suing as the appointed Attorney of Ruth Tauber (deceased) -vs- Mohamed Gulam) whose cause of action is substantially the same as this suit but was discontinued by



the Plaintiff herein upon the Honourable court granting the orders dated 6<sup>th</sup> July 2022 which emanated from the Notice of Withdrawal dated 27<sup>th</sup> June 2022.

3. The Plaintiff lacks authority to institute this suit as the Limited Grant of Letters of administration Ad litem dated 8<sup>th</sup> July 2021 that the Plaintiff alleges authorizes her to institute this suit as the Administrator of the Estate of Ruth Tauber is limited to proceedings in Mombasa ELC. No. 251 of 2012 (Mwaganda Bosco Columba suing the appointed Attorney of Ruth Tauber (deceased) vs Mohamed Gulam which was withdrawn.
4. Invariably, the present suit was a nullity at inception, and it is in the interest of justice that it be dismissed with costs.
2. Counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant in their submissions dated 7/2/2024 submitted that the suit was instituted by plaint on 27/6/2022 while the cause of action as per the said plaint arose sometime in 2008 when the plaintiff found out that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant had trespassed on the suit property and were operating a fish factory plant. They contend that section 7 of the *Limitation of Actions Act* prohibits actions for recovery of land after 12 years from the date when the cause of action accrued which in this case also limits the plaintiff from prosecuting this suit.
3. While relying on *Judith Cherono Mosonik (Suing as the administrator of the Estate of Andrew Kiprotich Chepkwony (Deceased) vs Dickson Kipkemboi Kipkemboi Kiplagat Changwony & Another* (2019) eKLR, counsel submitted that in Mombasa ELC No. 251 of 2012 (Mwaganda Bosco Columba-suing as the appointed attorney of Ruth Tauber (deceased) vs Mohamed Gulam) the petitioner had not paid the costs totaling to Kshs 1,088,794.56 according to a party and party bill of costs dated 14/8/2023. They submitted that although the plaintiff in the above-mentioned case was Mwaganda Bosco who was suing as the appointed attorney of Ruth Tauber and the plaintiff in this suit is Cecilia Luvuno suing as administrator, the cause of action in both suit is substantially the same. Finally, counsel submitted that the plaintiff does have a limited grant of representation Ad-litem and that the Ad-litem grant filed in court was for the aforementioned suit only.
4. Counsel for the plaintiff submitted that the cause of action is not the same as the afore mentioned previous suit. They contend that the cause of action in the previous suit was for adverse possession. Furthermore, counsel submitted that the court has powers to stay the suit according to Order 25 rule 4 of the civil procedure rules to allow for taxation to proceed. They then stated that the taxation of the previous filed matter was slated for 6<sup>th</sup> March, 2024 which was 13 days before this Ruling date. Finally, counsel submitted that withdrawal of the previous suit does not render the Ad-litem that was granted for the same obsolete. Counsel submits that the plaintiff still possesses power to safeguard the interests of the estate of the deceased as this suit is a replica of the previously instituted suit.
5. Having read the notice of preliminary objection, the submissions thereto and the pleadings, the court finds the first issue for determination is whether the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant have satisfied the requirements for a preliminary objection? The locus classicus on preliminary objections is *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 where their Lordships observed thus;

---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication 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 a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.



6. In the same case Sir Charles Newbold, P. stated;

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 improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

7. In the case of *Republic vs Eldoret Water & Sanitation Company Ltd Ex parte Booker Onyango & 2 Others* (2007) eKLR, the Court stated that an Objector cannot introduce any factual dispute or controversy and must stick to pure points of law.

8. As is stated above, there have to be no facts ascertained. These pure points must arise from the pleadings as was observed in *Avtar Singh Bhamra & Another vs Oriental Commercial Bank* HCC No 53 of 2004, where the court held as follows:

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

9. The plaintiff in paragraph 7 of the plaint dated 27/6/2022 alleges that she discovered the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant operating a fish factory on the suit property, however in the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant’s statement of defence dated 20/9/2022, they aver at paragraph 5 that they are strangers meaning they have denied that they were not on the suit property sometime in 2008 operating a fish factory. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant are thus disputing the allegations of the plaintiffs and this cannot thus be a pure point of law.

10. On the matter of pending taxation in Mombasa ELC No. 251 of 2012 (Mwaganda Bosco Columba-suing as the appointed attorney of Ruth Tauber (deceased) vs Mohamed Gulam it is not disputed by the plaintiff however, the said Order 25 rule 4 provides that this court can stay proceedings until the said taxation is concluded. However, I decline to stay the proceedings as it has not been proven by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant that the cause of action in the said suit is substantially the same as the instant suit.

11. On the issue of the plaintiff having locus, I agree with the submissions of counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant. I find that the plaintiff lacks locus to institute this suit. The Limited grant attached to the plaintiff’s list of documents only applies to the previous suit. The wording used in the limited grant can be interpreted as to mean that the plaintiff would replace Mwaganda Bosco in the previous suit and would proceed to prosecute the same. It is on this ground that the suit is struck out with costs in favour of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant to be paid by the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**N.A. MATHEKA**

**JUDGE**

