



REPUBLIC OF KENYA



**Mukabi (Suing on His Own Behalf and on Behalf of Gekara Clan) v Mbugi & 26 others
(Environment & Land Case 24 of 2016) [2024] KEELC 3600 (KLR) (23 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3600 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 24 OF 2016**

**A KANIARU, J
APRIL 23, 2024**

BETWEEN

**JOSPHAT NJERU NTHIGA MUKABI (SUING ON HIS OWN BEHALF AND ON
BEHALF OF GEKARA CLAN) PLAINTIFF**

AND

JONATHAN NJERU MBUGI 1ST DEFENDANT
ADJUDICATION OFFICER 2ND DEFENDANT
NYAGA NJAGI 3RD DEFENDANT
DAVID GITONGA NDUNDU 4TH DEFENDANT
JOHN NGARI SHAIRI 5TH DEFENDANT
AGNES MUTURI NJERU 6TH DEFENDANT
NGUNGI KING'ETHU 7TH DEFENDANT
SAMUEL NJERU ITA 8TH DEFENDANT
ANGELO NGARI NYAGA 9TH DEFENDANT
SAMWEL NJERU NGUNGI 10TH DEFENDANT
JANE MBANDI IRERI 11TH DEFENDANT
MARY MUTHONI KAGIO 12TH DEFENDANT
NJERU NJAGI MAKONGE 13TH DEFENDANT
BENSON NJERU NYAGA 14TH DEFENDANT
DANIEL NJOKI NYAGA 15TH DEFENDANT
KAMAU NAOMI NYAMBURA 16TH DEFENDANT



JOSEPH NJERU MUTEKI	17 TH DEFENDANT
KENNEDY KINYUA NYAGA	18 TH DEFENDANT
SAMSON KARIRA MWANGI	19 TH DEFENDANT
ELIAS NJERU NJOKA	20 TH DEFENDANT
MICHAEL KIBUCHA KAMANGA	21 ST DEFENDANT
SAMUEL NYAGA NGIRIGACA	22 ND DEFENDANT
AMOS MWANIKI NYAGA	23 RD DEFENDANT
SIMON MURIUKI MURIA	24 TH DEFENDANT
JOSPHAT NYAGA MUKEMBO	25 TH DEFENDANT
MBEERE SOUTH SUB COUNTY	26 TH DEFENDANT
THE ATTORNEY GENERAL	27 TH DEFENDANT

RULING

1. This ruling is on a preliminary objection dated 21/6/2023 and filed on 22/6/2023. The objection was filed by the 26th and 27th defendants and it is to the effect that the suit as filed offends the mandatory provisions of Order 53 of the Civil Procedure Rules, 2010 as the plaintiffs are seeking orders, particularly prayers 1A and 2 in the plaint, that should be sought by way of Judicial Review.
2. The objection was canvassed through written submissions. The 26th and 27th submissions are dated 21/6/2023. It was submitted that the plaintiff is essentially seeking judicial review orders of *certiorari* and *mandamus* which are meant to quash the decision of the Land Registrar, register some defendants as owners of the suit parcels of land, and also compel the Land Registrar to reinstate Appeal No. 113 of 1999 for hearing and determination. It was submitted that this should have been done by way of judicial review but the plaintiff has come by way of plaint instead.
3. The case of Cyril J. Haroo & another vs Uchumi Services Limited & 3 others [2014] eKLR was proffered as a useful guide on the issue. It was also pointed out that the 2nd defendant – Mbeere South District Land Adjudication Officer – has been left out in the amended plaint, which means that one of the prayers – specifically the prayer meant to serve the purpose of an order of *mandamus* – is incapable of being granted.
4. The court was urged to dismiss the suit.
5. The 1st, 3rd to 25th defendants also filed submissions. They submitted that the suit is time –barred and that the plaintiff was a stranger to the appeal that he now wants reinstated. The reliefs sought by the plaintiff are also said to be untenable. By and large the submissions filed by these parties are in support of the 26th and 27th defendant position.
6. The plaintiff's submissions was filed on 12/1/2024.

It was submitted that the plaintiff in this case did not have *locus standi* to challenge the proceedings by way of judicial review and also that the issues he has raised cannot be addressed by way of judicial review. It is also submitted that at the time of ministers appeal, which is at the centre of the suit herein, was being, withdrawn, the respondent in the appeal – Rugano Nthiga - was already deceased.



7. I have considered the objection as filed, rival submissions, and the suit as filed. In *Muiruri vs. Kimemia* [2002] 2KLR 677, the court held, *inter alia*, that a preliminary objection is usually in the nature of what used to be a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It was pointed out that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The position taken in *Muiruri's case* (*supra*) echoed the words of Sir Charles Newbold P. in the locus classicus case of *Mukhisa Biscuit Co. Limited vs. West End Distributors Ltd* [1969] EA 696.

The learned Judge expressed himself thus:

“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.”

8. The law is thus clear: A preliminary objection should be based on facts that are not in dispute. An objection loses its validity in law when the facts on which it is based require probing or interrogation by the court to establish their truthfulness. In the matter at hand, all the material facts are disputed. What should have been done in my view was to raise the same points at the trial or during submissions after trial.
9. Our courts have in fact lamented in the past against the practice of raising preliminary objections in situations where such objections are clearly inappropriate. This is for instance the position that one finds in the case of *Eunice Karimi Kibunja vs. Mwirigi M' Ringera Kibunja*; C.A No. 103 of 1996, Nyeri, [1996] eKLR where the court of appeal expressed itself thus:

“The issue before the court clearly required a full hearing and we reiterate that the practice of raising points, which should be argued in the normal manner, by way of a preliminary objection does nothing but unnecessary increase cost and, on occasion, confuse issues. A preliminary objection cannot be raised if any fact has to be ascertained.”

10. Further, in *Peter Ngugi Kabiri vs. Esther Wangari Gitinji & Another*: [2015] eKLR and also in *Kutima Investments Limited vs. Muthoni Kihara & Another*: [2015] eKLR the Court of Appeal categorically emphasized that it is a fundamental right of the parties to be heard on merits.
11. I find it useful to add that the main prayers sought in the suit- which prayer is very crucial in granting or declining to grant other prayers- is a declaratory one. Order 3 rule 9 of *Civil Procedure Rules, 2010*, states as follows;

“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.”

Further, in the case of *Nicholas Njeru vs. Attorney General & 8 Others* [2013]eKLR, an argument or objection similar to the one raised in this case was rejected and the court while doing so observed as follows:

“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 Judges observations 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.”

11. It appears to me that suits in which declaratory orders are sought enjoy a special place as regards their hearing on merits. It is manifest that objections seeking to end them preliminarily are in law discouraged.
12. The upshot, in light of all the foregoing, is that the merits of the preliminary objection herein have not been demonstrated. I therefore hereby dismiss the objection but I make no orders as to costs.

RULING ON PRELIMINARY OBJECTION DATED 21ST JANUARY, 2023 AND FILED ON 22ND JUNE, 2023 DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF APRIL, 2024

A. KANIARU

JUDGE

ELC, EMBU

In the presence of;

Plaintiff: Present

Defendants: Present

Ngare Njeru for 1st, 3rd to 25th defendants

Rose Njeru for Plaintiff

Kiongo for 26th and 27th defendants

Court clerk: Ms. Wambui

Interpretation: English /Kiswahili

