



**Jabu v Mbudzya (Environment and Land Appeal E2 of 2020)
[2024] KEELC 4538 (KLR) (7 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E2 OF 2020**

EK MAKORI, J

JUNE 7, 2024

BETWEEN

MARERA CHIRO JABU APPELLANT

AND

ANGUS NGOKA MBUDZYA RESPONDENT

*(Appeal arising from the decision and orders of the Senior Resident Magistrate
Hon. N.C. Ndalo dated 13th October 2020 in Mariakani ELC No. 15 of 2020)*

RULING

1. The appeal is based on the decision and orders of the Senior Resident Magistrate, Hon. N.C. Ndalo dated 13th October 2020 in Mariakani ELC No. 15 of 2020.
2. In her decision, the Learned Magistrate, having considered the Preliminary Objection raised by the Defendant (Appellant) dated 7th September 2020 significantly, the objection raised issues to the effect that the suit property was within Mwavumbo Group Ranch, which had been declared an Adjudication Section under the provisions of the Land Adjudication Act Cap 284 Laws of Kenya. Since the exercise was ongoing and pursuant to Section 30(1) of the Land Adjudication Act Cap 284 Laws of Kenya, the suit by the Plaintiff (Appellant) regarding ownership could not be brought without the consent of the Land Adjudication Officer, hence the suit was incompetent, bad in law, fatally flawed and defective. The Plaintiff had also yet to acquire Letters of Administration. Those were the two issues the Preliminary Objection hinged on before the Magistrate.
3. After hearing the parties in submissions and the materials placed before her, the Magistrate ruled:

“In this case, the Preliminary Objection raised by the Defendant is based purely on points of law, and I need not belabour. I shall turn to the second issue of whether all the facts pleaded by the other side are correct and that there is no fact that needs to be ascertained.



The Plaintiff asserts that he has sued in his individual capacity and did not require a grant of letters of administration to do so. The defendant submits that paragraph 4 of the complaint clearly states that the plaintiff inherited the land from his late father and grandfather.

...it is so clear from the pleadings as filed by Plaintiff that his occupancy of the land results from him being born and brought up on that land and that after his grandfather and father passed away, he took over the land. The provisions of the Law of Succession Act are very clear as to its application....”

The Plaintiff was required to institute probate proceedings under the Law of Succession Act before filing a suit in relation to the estate of his father. The Plaintiff also lays claim on his right to the land that had been given to the late Mbeyu Mbudzya, who died in 2016, yet no Succession Proceedings have been commenced.

Without labouring further, I find that the Plaintiff lacks locus before this court as the law in respect to which he brings this suit is land that belongs to people who are deceased and the legal process is on how to make that right is defined. The Preliminary Objection succeeds on that limb.

The second limb of the Preliminary Objection fails on the sole reason that nothing was placed before the court to show that the said Mwavumbo Group Ranch is under Adjudication or that the suit land is part of the said Mwavumbo Ranch.”

4. The findings by the Magistrate reflect the Preliminary Objection as raised by the Respondent. This appeal uses a similar argument.
5. The issues I frame from the materials placed before me are whether the Magistrate erred in allowing the Preliminary Objection based on locus standi, the respondent had yet to take out letters of administration to bring up the suit, and hence dismissing the entire suit in limine, and who should bear the costs of this appeal?
6. The role of this Court is to meticulously re-evaluate, re-assess, and re-analyze the extracts on the record. The aim is to determine whether the conclusions reached by the learned Trial Magistrate should stand and provide clear reasons for the decision, either affirming or overturning the Lower Court's Ruling. See Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR, Kiruga v Kiruga & Another [1988] KLR 348 and Peters vs. Sunday Post Ltd [1958] EA 424.
7. The Appellant argues that the land in issue is community land. The Appellant was born, bred, and has resided there since time immemorial (what the Coastal Community refers to in Kiswahili – as tangu jadi) to date and has a right to commence suit as an individual without letters of administration backed by the doctrine of intergenerational equity and customary trust. The decision in Mbui Mukangu v Gerald Mutwiri Mbui [2004] on intergeneration equity and George Mbui Kieba & another v Isaya Theuri M'Rintari & another [2014] eKLR on customary trust are cited.
8. The Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 lays out what to consider for a Preliminary Objection to be achieved – that it must raise uncontested facts and purely points of law. Put it this way – Preliminary Objection rests on the proposition that when raised, its fundamental achievement will have a bearing on disposing of a matter because it raises pure points of law. It also underscores the need for prudent time management as a Court resource by summarily flagging frail and hopeless suits that, if admitted to full trial, will be a waste of judicial time and will not serve the interest of justice. One will not be required to look elsewhere to find an answer as to whether



a Preliminary Objection is sustainable or not but look at the pleadings and discover that the suit is a none starter - see Ogola J. in *DJC v BKL* (Civil Suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling):

“The Supreme Court in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others* cited the leading decision on Preliminary Objections, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696, where the Court held as follows:

“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 the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is like 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 Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
9. The points of law the Magistrate dealt with were concerned with lack of locus standi - failure by the Appellant to obtain necessary letters of administration to commence suit on land he alleges belonged to his forefathers passed to his father and him and the issue that the land in dispute was under adjudication and consent was necessary from the Land Adjudication Officer, pursuant to Section 30 of the *Land Adjudication Act* to commence the suit beforehand. The Magistrate found that the issue falling under the Adjudication Act had not been set out clearly and dismissed that limb but upheld the Preliminary Objection and dismissed the Appellant’s entire suit for lack of letters of administration.
10. According to the pleadings, the plaintiff claims 5 acres of land because he has lived on it since birth; the land is unregistered, and his grandparents and father lived there until their death. According to him, customary trust should be invoked in his favour.
11. Several authorities from this Court have addressed the issue of inter-generational equity and customary trust since the decision *Mbui Mukangu v Gerald Mutwiri Mbui* [2004], where the Court held:

“For one to establish a claim in Customary trust, one had to prove that they are in actual physical possession or occupation of the parcel of land.”
12. In *Isaack Kieba M’Inanga v Isaaya M’Lintari & another* [2018] eKLR, the Supreme Court set out the principles to be considered in a case of customary trust. These are:
 - a. The land was before registration, family, clan, or group land.
 - b. The claimant belongs to such family, clan, or group



- c. The relationship of the claimant to such family, clan, or group is not so remote or tenuous as to make his/her claim idle or adventurous.
 - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
 - e. The claim is directed against the registered proprietor who is a member of the family, clan, or group.
13. Looking at the defense, the objection raised was under Section 30 of the *Land Adjudication Act*; the Land Adjudication Officer had not consented to have the matter commenced in Court. The Magistrate dismissed this limb for lack of material substance.
 14. On the limb dealing with Letters of Administration, the Appellant claims this is an intergenerational issue. Letters of Administration were not necessary. Customary trust should come to his aid. I have cited above the authorities that support the Appellant on this point. The parties have been to several Alternative Justice Systems (AJS). All that evidence by the parties needs to be provided in a hearing on whether there is an intergenerational equity issue - customary trust - and that all the parties have been staying on the piece of land since time immemorial (tangu jadi) for the said doctrines to apply. Each of the parties then is entitled to air the piece of evidence that may be available before a decision is made. The issue of whether the matter is under Adjudication will also be addressed, in which case, if proven, the parties will need to be referred to the Adjudication Forum appropriately. Those will be trial issues, which can be dealt with after the Trial Court has undertaken proper Case Management. In my view, those are not issues to be wished away summarily in a Preliminary Objection. They are issues of law – but contested. That is where the Magistrate erred. Mukisa Biscuits principles were not achieved to sustain a Preliminary Objection.
 15. The appeal is hereby upheld. The order dismissing the appellants' case in the Lower Court is set aside with costs. The orders are replaced with a finding that the suit will proceed to full trial at the Mariakani Law Courts.

DATED, SIGNED, AND DELIVERED AT MALINDI ON THIS 7TH DAY OF JUNE 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Otieno for the Respondent

Court Assistant: Happy

In the Absence of:

Mr. Kagwima the Appellant

