



**Kidongoya v Miranit (Environmental and Land Originating Summons
E003 of 2023) [2024] KEELC 5391 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5391 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023**

CG MBOGO, J

JULY 24, 2024

BETWEEN

WILSON METAKAI KIDONGOYA PLAINTIFF

AND

DOMINIC LOPUNO MIRANIT DEFENDANT

RULING

1. The defendant filed the notice of preliminary objection dated 21st May, 2024 challenging the application dated 18th December, 2023 on the following grounds: -
 1. That the pecuniary and monetary jurisdiction of this suit is of the Chief Magistrate and not the High Court because: -
 - a. That the subject properties are Cis/ Mara Naibor/ Ajjik/ 724 measuring 12.65 Ha is valued at Kshs. 9,300,000(nine million three hundred thousand) and Cis/ Mara Naibor/ Ajjik/ 725 measuring 6.88 HA is valued at Kshs. 5,100,000/- (Five Million One Hundred Thousand) making a total of Kshs. 14,400,000/= (Fourteen Million Four Hundred Thousand).
 - b. That this honourable court is not conferred jurisdiction to hear matters below its pecuniary jurisdiction.
 2. That there is a pending matter in the Chief Magistrate Court at Narok ELC E006 of 2024 at the Environment and Land Court and the same offends the Section 6 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides that no court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.



3. That subject to Section 9 (a) of the *Magistrates Act*, a magistrate's court shall in exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* (Cap 12A) and subject to the pecuniary limits under section 7 (1), hear and determine claims relating to (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (ii) compulsory acquisition of land; (iii) land administration and management; (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (v) environment and land generally, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the *Magistrates' Courts Act*.
 4. That in the premises, application dated 18th December, 2023 is an abuse of the process of this honourable court and as such should be dismissed with costs to the plaintiff.
 5. That based on the aforesaid reasons, the jurisdiction of this honourable court has been erroneously invoked.
2. The notice of preliminary objection was canvassed by way of written submissions. The defendant filed his written submissions dated 20th June, 2024 where he raised two issues for determination as listed below: -
 - a. Whether the jurisdiction of this honourable court is erroneously invoked.
 - b. Whether the subject suit offends Section 6 of the *Civil Procedure Rules* through *sub judice*.
 3. On the first issue, the defendant submitted that the case before this court is below the pecuniary value prescribed to it. He submitted that the value of the subject properties is Kshs. 14,477,589/- as per the valuation report presented in court. To buttress on this submission, the defendant relied on the cases of *Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, *Mukisa Biscuit Manufacturing Co. Limited versus West End Distributors Limited* (1969) EA 696 and *Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Limited* [1989] eKLR. The defendant submitted that if the court proceeds to hear a dispute without jurisdiction, the result will be a nullity *ab initio*, and any determination made by such court will be amenable to being set aside.
 4. On the second issue, the defendant submitted that there is a pending matter before the magistrates' court, and which is in conflict with the present case as regards the ownership of parcels of land Cis/ Mara/ Naibor/ Ajijik/ 724 and 725. He submitted that the subject matter is *sub judice*, and offends Section 6 of the *Civil Procedure Act*. Reliance was placed in the case of *Kenya Bankers Association versus Kenya Revenue Authority* [2019] eKLR.
 5. The plaintiff filed his written submissions dated 2nd July, 2024. While relying on the case of *Republic versus Eldoret Water & Sanitation Company Limited Exparte Booker Onyango & 2 Others* [2007] eKLR, the plaintiff submitted that the facts in the originating summons have been disputed, and that all the facts require ascertainment. He submitted that Order 37 Rule 7 of the *Civil Procedure Rules* prescribes how a claim for adverse possession where an applicant claims to have become entitled to be registered as owner of land on account of adverse possession may be instituted. He submitted that the magistrates' court cannot entertain a claim of adverse possession within the suit that had been brought before the lower court. The plaintiff relied on *In the Matter of Interim Independent Electoral Commission* [2011] eKLR and *Mtana Lewa versus Kabindi Ngala Mwangandi* [2015] eKLR.
 6. The plaintiff submitted that Section 38 of the *Limitations of Actions Act* only specifies the High Court and that claims in the nature of adverse possession have traditionally been filed in the High Court and



following the *Environment and Land Court Act*, this court acquired jurisdiction pursuant to Section 13 of the said *Act*. To buttress on this submission, the plaintiff relied on the case of *Reuben versus Mwangangi & 7 Others* (Environment & Land Case E011 of 2023) [2023] KEELC 21899 (KLR).

7. I have considered the preliminary objection and the written submissions filed by the parties. I am of the considered opinion that the issue for determination is whether there is merit in the notice of preliminary objection.
8. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696 to mean: -

Per Law, JA

“So far as I am aware, 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”.

Further Sir Charles Newbold, P stated that: -

“ 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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

9. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct.
10. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd vs 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. It is also this court’s opinion that in determining a preliminary objection, this court considers that the preliminary objection must stem from the pleadings and must raise pure point of law. See the case of *Avtar Singh Bhamra & Another versus Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that: -

“ 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.”

12. In this case, the defendant challenges the jurisdiction of this court to hear and determine the instant suit, and further he contends that there is a similar matter pending before the magistrates’ court which was filed prior to this suit. While applying the principles set out in the authorities cited above, I find that the preliminary objection fails for the following reasons.



13. The defendant maintains that this court does not have jurisdiction to hear the instant case by virtue of the pecuniary jurisdiction owing to the fact that the value of the suit properties are below Kshs. 20,000,000/-. The defendant, in his submissions stated that the same is as per the valuation report filed in court. The plaintiff filed the originating summons dated 18th December, 2023 seeking rights to recover the suit properties by virtue of a claim of adverse possession. The originating summons was filed alongside the notice of motion dated 18th December, 2023, wherein the plaintiff sought injunction orders against any dealings on the suit properties pending the hearing and determination of the suit.
14. Section 38 of the *Limitations of Actions Act* provides as follows: -
 - “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”(with emphasis).
15. From the above provision of the law, it is clear that any claim of adverse possession is to be heard and determined by this court and not the magistrates’ court. Unless and until there is an amendment to the *Limitations of Actions Act*, the jurisdiction to hear and determine claims of adverse possession vests with the Environment and Land Court.
16. Back to the preliminary objection, the principle has always been for the court to limit itself to pure points of law and which must stem from the pleadings. In this case, the notice of preliminary objection was accompanied by documents in support thereof. In other words, the defendant wants this court to comb through evidence in ascertaining whether indeed this court has jurisdiction and whether the matter is *sub judice*.
17. On these grounds alone, the preliminary objection fails. Where the court is invited to look at that which is outside the pleadings, then the purpose of a preliminary objection is thus defeated.
18. Having said the above, I find no merit in the notice of preliminary objection dated 21st May, 2024. The same is hereby dismissed costs to the plaintiff. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 24TH DAY OF JULY, 2024.

HON. MBOGO C.G.

JUDGE

24/07/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

