



Mohamed & 3 others v Mbarak & 3 others (Environment & Land Petition E016 of 2024) [2025] KEELC 614 (KLR) (19 February 2025) (Ruling)

Neutral citation: [2025] KEELC 614 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E016 OF 2024
SM KIBUNJA, J
FEBRUARY 19, 2025**

BETWEEN

**MEHSIN MBARAK MOHAMED 1ST PETITIONER
GASIM MBARAK MOHAMED 2ND PETITIONER
HUSSEIN MBARAK MOHAMED 3RD PETITIONER
ABEID MBARAK MOHAMED 4TH PETITIONER**

AND

**ADNAN SAID MBARAK 1ST RESPONDENT
ANWAR SAID MBARAK 2ND RESPONDENT
TAWHIDA SAID MBARAK 3RD RESPONDENT
PRINCIPAL KADHI, MOMBASA 4TH RESPONDENT**

RULING

Notice of Preliminary Objection Dated 10th July

1. The 1st to 3rd respondents filed the notice of preliminary objection dated 10th July 2024 , against the petition raising the following eight (8) grounds:
 1. The suit be struck out with costs for being lodged before the wrong forum contrary to Rule 86 of the Kadhis' Courts (Procedure and Practice) Rules and Section 50(2) of the [Law of Succession Act](#); as an appeal from Kadhi's Court in the Succession Cause does not lie to the Environment and Land Court but to the High Court Family Division.
 2. This Honourable Court lacks jurisdiction over this matter as it is purely a succession dispute thus it ought to be filed before the Family Division.



3. The suit herein does not meet the threshold of a Petition as it seeks to enforce rights that should be enforced through the relief of Judicial Review under Order 53 Rule 1 and 2 of the Civil Procedure Rules, 2010 hence offends the doctrine of exhaustion.
 4. A Judgement of Court can only be challenged via an Appeal or Judicial Review.
 5. The jurisdiction of Courts to entertain matters challenging the decisions of judicial officers and/or bodies on Judicial Review is restricted merely to the decision-making process and not the decision itself which is what the Petitioners are seeking in the instant Petition.
 6. The Petition is trying to emasculate a judicial body. the 4th Respondent from performing its duties.
 7. A judicial body, the 4th Respondent cannot be sued as a party in Petitions.
 8. This suit herein is bad in law and untenable and an abuse of the due process of this Honourable Court as the Plaintiffs have no locus standi to institute the present suit and by reason thereof it should be struck out with costs.
2. That pursuant to the directions issued on 23rd July 2024, the learned counsel for the 1st to 3rd respondents and petitioners filed their submissions dated the 12th August 2024 and 15th November 2024 respectively, which the court has considered.
 3. The following are the issues for the determinations by the court:
 - a. Whether the grounds on the preliminary objection raises any pure points of law that if upheld could determine the petition.
 - b. Who bears the costs?
 4. After careful consideration of the grounds on notice of preliminary objection, the submissions by the learned counsel, the authorities cited the court has come to the following determinations:
 - a. In the case of Mukisa Biscuit Manufacturing Co Ltd versus West End Distributors Ltd [1969] EA 696 the court stated as follows on preliminary objections:

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

Further in the case of Oraro versus Mbaja (2005) 1KLR 141, the court held that:

“ Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

The learned counsel for the petitioners has submitted that the petitioners are seeking for declarations on ownership of land, which is a factual question, which cannot be dismissed at this preliminary stage.
 - b. It is trite that preliminary objection must expressly or implicitly arise from the uncontested pleadings filed by the parties. In the case of George Waweru Njuguna versus Pauline Chesang



Gitau Kamuyu (2017) eKLR, the court made the following observation while dismissing a preliminary objection;

“I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff's claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant's preliminary objection has no basis”

Further in the case of Unilever Tea Kenya Limited versus Andrew Cheruiyot Rotich & 3 Others (2020) eKLR, the court held;

“I have considered the objection, rival submissions, and the pleadings already on record. From a procedural perspective, I think the 1st – 4th defendants made a tactical blunder in the manner they raised the objection. They have not filed a defence to the suit yet. The usual procedure when one is raising a point of law that may conclude a suit before trial is to file a defence first. In that defence, the point that forms the basis of the intended preliminary objection is raised. The intimation of intention to raise the point as a preliminary objection is expressed in the same defence. When the notice to raise the objection comes in later stage, it is not a surprise. The approach is good because it removes the element of surprise. It also serves to contextualize the objection within the defence.”

The respondents herein are yet to file their pleadings in the form of replies to the petition. The decisions in the above two decisions are in my view apt in relations to preliminary objections raised in suits where both parties need to first present their pleadings to determine whether there are contestations or those based on facts that would need proof. Where the grounds on the preliminary objections raises such legal questions like whether the court has jurisdiction, which arises from the facts already presented, which the other party by implication of filing the preliminary objection has not challenged, then there is nothing stopping such a party from raising it or for the court to proceed to determine that question.

- c. Grounds 1, 2, and 5 on the notice of preliminary objection raises the issue of whether or not the court has jurisdiction to hear and determine the petition. In the case of Owners of the Motor Vessel “Lillian S” versus Caltex Oil (Kenya) Ltd. (1989) the court held that:

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..... Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

To determine whether this court has jurisdiction to hear and decide this petition, we have to look at the main issue raised in the petition. The petitioners' main prayer is that they be declared as the bona fide joint owners of Mombasa/Block XIII/226 and beneficial owners of Mombasa/Block XIII/218. The question of ownership or title to land squarely falls within



this court's jurisdiction as provided in section 13 of the Environment and [Land Act](#) and Article 162 (2) (b) of [the Constitution](#). While that is undisputed, the respondents have questioned the manner the petitioners have presented their claim and the jurisdiction of the court to entertain it. These are questions of law and do not require evidence to be determined. In the case of Moses Mwicigi and 14 others versus Independent Electoral and Boundaries Commission and 5 others, Supreme Court Petition No 1 of 2015 the Court held that:

“This court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is closely intertwined with the substance of a case that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent.”

The court reminds itself that this matter is not an appeal from the Kadhi's court, and that it cannot make declarations on the suit properties when there is a subsisting judgment, which has not been successfully challenged in the appropriate appellate court.

- d. The court is of the considered view that the petitioners should have either filed an appeal against the Kadhi's court judgment, instead of preferring a petition against it, or commenced their claim through a normal suit as dictated by the doctrine of exhaustion. The filing of a normal suit could only have been possible once there is a favourable outcome of an appeal over the Kadhi court's decision before the High court. Judicial review remedies as suggested by the respondents could only be appropriate against the court orders, but limited to the process the court in arriving at the impugned decision, and not against the merits of the decision itself.
- e. While the court does not intend to assume the jurisdiction of the High Court, which it should not, the law remains that the Kadhi court is without jurisdiction to make any declarations on ownership of land under shariah law, but it has the powers to distribute the uncontested property of a deceased person. In re Estate of Prisca Ong'ayo Nande (Deceased) [2020] KEHC 6553 (KLR) the High Court in the held as follows:

“I note that the administrator has vehemently contested the alleged sales of land to the applicant, arguing that they should look up to one of the sons of the deceased for recompense. To him the applicant was not a creditor of the estate, warranting being listed as persons beneficially entitled to a share in the estate. Was the applicant a bona fide purchaser of property from the deceased to warrant being treated as a creditor of the estate, who ought to be catered for from the estate? Documents were placed on record, to demonstrate that there were agreements of sale and that money changed hands. However, I have no jurisdiction to make a finding one way or the other, with regard to whether the alleged sales were valid and resulted in the applicant acquiring a stake in the estate. That is a matter which revolves around title to land. Under Articles 162(2) and 165(5) of [the Constitution](#), I have no jurisdiction over that question. The parties are better of placing the issue before another forum for determination of the question. I shall not pronounce as to whether the applicant was a bona fide creditor of the estate, entitled to be allocated shares in the estate, he shall have to prove his entitlement to the property he claims he bought from the deceased by commencing suits against the estate at the appropriate forum.....



My understanding of these provisions, in the context of the matter before me, is that any disputes or questions or issues that require court intervention, which revolve around sale, registration and transfer of land, fall within the jurisdiction of the Environment and Land Court. The *Land Registration Act* and the *Land Act*, therefore, confer jurisdiction in the Environment and Land Court with regard to all the processes that are subject to the two statutes, and, therefore, any reference in the two statutes to court is meant to refer to the Environment and Land Court and any subordinate court that has been conferred with jurisdiction over the processes the subject of the two statutes. All this adds emphasis to the fact that I have no jurisdiction whatsoever to address the matter that the applicant has placed before me.”

From the foregoing conclusions, the preliminary objection on the ground of jurisdiction succeeds.

- f. Ordinarily, the costs follow the event unless otherwise ordered by the court for good cause. That as the respondents are successful in their preliminary objection, they are entitled to the costs.
5. Based on the above determinations, the court finds and orders as follows:
- a. The 1st to 3rd respondents’ notice of preliminary objection on the ground of jurisdiction is upheld.
 - b. That flowing from (a) above, the petitioners’ claim through the petition dated 2nd July 2024 is hereby struck out.
 - c. The petitioners to bear the costs.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF FEBRUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Petitioners : Mr Maulidi

Respondents

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Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

