



REPUBLIC OF KENYA



Mangale & 2 others (In their own capacity and on behalf of all trustees of Masjid Daarul Arqam, Daarul Istiqama, Daarul Ghurabah and Daarul Tauhidif all) v Jefa & 2 others (Enviromental and Land Originating Summons E15 of 2023) [2024] KEELC 6489 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6489 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E15 OF 2023
LL NAIKUNI, J
SEPTEMBER 25, 2024**

BETWEEN

**RUWA MANGALE 1ST APPLICANT
SUBIRA SAID KANWA 2ND APPLICANT
MWINYIHAJI HAMISI MWAKUNYUA 3RD APPLICANT
IN THEIR OWN CAPACITY AND ON BEHALF OF ALL TRUSTEES OF
MASJID DAARUL ARQAM, DAARUL ISTIQAMA, DAARUL GHURABAH
AND DAARUL TAUHIDIF ALL**

AND

**MOSE ALI JEFA 1ST RESPONDENT
MWASHAME SAID TUNU 2ND RESPONDENT
FATUMA TUNU SAID 3RD RESPONDENT**

RULING

1. This Honourable Court was tasked on hearing and making a determination of a Notice of Preliminary objection dated 17th May 2024 raised by the 1st, 2nd & 3rd Respondents herein against the entire suit instituted by the Plaintiffs. The objection was based on the following grounds:
 - a. That the provision of Section 29 of the Waqf Act No.8 provides that any matter or dispute relating to a Waqf shall in the first instance be referred to a Kadhi's Court hence this Honourable Court lacks the requisite jurisdiction to handle the instant matter as a court of first instance.



- b. That the provision of Section 62 of the [Civil Procedure Act](#) requires two or more persons having an interest in the ‘charitable trust of a religious nature’ to obtain consent in writing of the attorney general before instituting a suit whether contentious or not in the High Court which the applicants are yet to obtain the same.
 - c. The matter be struck out with costs for being lodged before the wrong forum contrary to Sections 29 and 13 of the [Wakf Act](#) 2022.
2. On 13th June, 2024 in the presence of the parties, the Honourable Court directed that the objection as matter of precedence through written submissions thereof. Subsequently, by the time of penning down this Ruling, the Honorable Court was only able to access the submissions by the Applicants. Pursuant to that, the Honourable Court reserved a date – 25th September, 2024 - for the delivering of its Ruling on own its merit thereof.

A. The Written Submissions by the Applicant.

3. Whilst opposing the Preliminary Objection, the Applicants through their Learned Counsel the law firm of Messrs. Said Mgupu & Company Advocates filed their written submissions dated 26th July 2024. Mr. Mgupu Advocate commenced by stating that the submissions herein related to the filed Preliminary Objection dated 17th May, 2024 raised by the Respondents herein on the grounds as clearly enumerated herein above.
4. The Learned Counsel segmented his arguments under several sub – headings. Firstly, whether the Court lacked jurisdiction to handle the dispute as it related to Wakf and which ought to be dealt by the Kadhi’s Court in accordance with the provisions of Section 29 of the [Wakf Act](#). On this issue, the Learned Counsel argued that Jurisdiction was a crucial issue that could not be ignored by any Court or Tribunal. To support his argument he relied on the decision of “[Owners of Motor Vessel “Lillian “S” v Caltex Oil \(K\) Limited](#) [1989] KLR.
5. The Learned Counsel submitted that Section 13 (2)(d) of the [ELC Act](#) sets out the jurisdiction of this court to include the land administration and management of any instrument granting any enforceable interest in land. It was argued that this court has unlimited original jurisdiction in matters relating to the environment and the use and occupation of, and title to land as provided for in Article 162 (2) (b) and its jurisdiction expounded in Section 13 of the [ELC Act](#). It was submitted that the prayers sought herein related to a trust deed which is an instrument granting enforceable rights hence within the jurisdiction of this court.
6. In addition, counsel submitted that neither Article 170 (5) of the [Constitution](#) nor Section 5 of the Kadhi’s Court Act confers the court with jurisdiction over matters waqf, which is essentially a trust. Counsel argued that Section 29 of the [Waqf Act](#) is unconstitutional for vesting jurisdiction to the Kadhi’s court to hear matters touching on Waqf yet it's not provided for in the parent act, Kadhi’s Court Act. It was also argued that Article 2 (4) of the [Constitution](#) provides that any law that is inconsistent with the [Constitution](#) is void to the extent of the inconsistency and any acts or omissions in contravention of the [Constitution](#) are invalid.
7. Counsel contended that this court can determine a constitutional issue (whether Section 29 of the Waqf Commission Act is contrary to the Constitution and as such null and void) that arises in the course of proceedings. Counsel relied on the case of: “[National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others](#) (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) (3 February 2023) (Judgment), where the Court of Appeal was of the view that such a constitutional question can be determined by the court provided that the ‘germane’ issue in question and apparent



in the parties pleadings, related to a matter that was preserved for determination by that court. It was argued that Rule 23 of the *Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules*, 2006 (replaced by Mutunga rules) provides that where a constitutional issue arises in the course of civil proceedings the court may deal with the matter as a preliminary point. See the case of “*John Githongo & 2 Others v Harun Mwau & 4 others* [2012] eKLR”. Further counsel submitted that Section 62 of the *Civil Procedure Act*, on matters of charitable trusts of a religious matter, there must be consent sought from the Attorney General. It was further argued that the applicant must acquire consent from the Attorney General by virtue of the *Trustee Act* and Order 37 Rule 1 of the *Civil Procedure Rules*.

Analysis and determination

8. I have keenly assessed the filed Preliminary objection, the submissions and the authorities by the parties, the relevant provision of the Constitution of Kenya, 2010 and the statutes. For the court to reach a fair, reasonable and Equitable decision, it has framed three (3) issues for its consideration. These are:
 - a. Whether the Preliminary objection meets the laid - down threshold.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who will bear the Costs of the objection.

IssueNo. a). Whether the Preliminary objection meets the laid - down threshold.

9. Under this Sub heading, I will rely on a few cases including the case of “Court of Appeal in *Attorney General & another v Andrew Maina Gitbinji & another* [2016] eKLR”, laid out the principles to be considered when determining the merits of a Preliminary Objection. The court held that:-

“in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969]EA 696.At page 700 Pr. D-F Law JA as he then was had this to say:-

“...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.”

Sir Charles Newbold, P.; on the other hand at pg.701 paragraph B-C added the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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 test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

10. The court has applied the principles set out by the Appellant court to determine whether the defendant’s preliminary objection has upheld the threshold for a preliminary objection, which must stem from the pleadings and should be based on pure points of law with no facts to be ascertained. In



this case, the respondent has objected to the jurisdiction of this court to determine any matter relating to a Waqf within the meaning of Section 29 of the [Waqf Act 2022](#) . The issue of whether or not this court has jurisdiction to determine this suit is a pure point of law that can be determined without ascertaining facts from elsewhere.

11. In their originating summons dated 16th October 2023, the applicants pray for interalia declaratory orders that the deed executed on 22nd July 2016 is a valid and enforceable charitable trust deed and that the applicants are the first trustees. The applicants argued that the applicants are the appointed administrators and trustees of 4 different parcels of land donated by one Tunu Said Mwashame. He donated the said parcels with the express condition that mosques would be built on the parcel of land with applicants as the first trustees. It was further contended that the said parcels of land would not form part of his estate, which have since housed four mosques which well-wishers constructed. The applicants further averred that the respondents are the wife and children of TUNE SAID MWASHAME and have instituted a suit at the Kadhi's court seeking leave to proceed with succession proceedings regarding his estate without a death certificate. This court has been urged to make a determination on the ownership of the suit property and to restrain the respondents for further dealing with the suit properties.

12. From the provision of Section 29 of the [Waqf Commissioners Act](#), state:-

“any matter or dispute relating to a waqf shall in the first instance be referred to a Kadhi's court”

While Section 2 defines a trustee as a person who individually or jointly with another control any property subject to a Wakf. A Wakf has been defined to mean a religious, charitable or benevolent endowment or dedication of any property under Muslim law.

IssueNo. b). Whether the parties are entitled to the reliefs sought.

13. Based on the facts in the matter, I have perused the supporting affidavit and I do note there is a document dated 22nd July 2016 headed 'Maandishi ya kuthibitisha wakfu wa misikiti minne' and signed by one Tunu Said Mwashame; which the applicants maintain that it should be held by the court as a valid and enforceable trust to create ownership over the said parcels of land. In such a case for the court to determine whether or not the same is valid at this point would be outside the mandate of the spirit of preliminary objection. The preliminary objection is inviting the court to find that it has no jurisdiction to determine a waqf, in pleadings that are calling on the court to find that a waqf has been created over the suit properties.

14. In the case of "[Oraro v Mbaja](#) (2005) 1 KLR 141, the court held:

“I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that 'where a court needs to investigate facts, a matter cannot be raised as a preliminary objection'. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”



15. Therefore, this court is of the view one of the main disputes before it for determination is whether or not a Wakf was created over the suit properties. For that reason, to make a determination that it has no jurisdiction to hear and determine the suit would be preempting the issues at hand. The Respondent's preliminary objection does not meet the requisite threshold as it calls the court to exercise its discretion. It is trite law, that matters discretionary are outside the purview of preliminary objections and cannot be said to be pure point of law.

IssueNo. c). Who will bear the costs of the Objection.

16. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action or proceedings in any litigation. Section 27 of the Civil Procedure Act, Cap. 21 holds that costs follow the event. By event it means the outcome of the legal action thereof.
17. In the instant case, taking that the objection by the Preliminary objection has been dismissed, the Applicants are entitled to costs to be borne by the Respondents whatsoever.

Conclusion & Disposition

18. It is at this juncture that the court finds:
- a. That the Notice of Preliminary Objection dated 17th May 2024 by the Respondents be and is hereby dismissed with costs to the applicants.
 - b. That for expediency sake this suit to be heard on 4th February, 2025. There be a mention on 29th October, 2024 for purposes of conducting a Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - c. That Costs of the Preliminary Objection to be awarded to the Applicants.

It is so ordered accordingly

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED THIS 25TH DAY OF SEPTEMBER 2024

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HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT & LAND COURT AT
MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus, the Court Assistant.
- b. Mr. Mgupu Advocate for the Applicants.
- c. Mr. Salim Khamisi Advocate for the Respondents.

