



REPUBLIC OF KENYA



**Muriithi v Njoroge & another (Environment & Land Case E135 of 2022)
[2024] KEELC 6096 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6096 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E135 OF 2022**

**JG KEMEI, J
SEPTEMBER 24, 2024**

BETWEEN

PAUL MUCHIRI MURIITHI PLAINTIFF

AND

WALTER KINYANJUI NJOROGE 1ST DEFENDANT

LAND REGISTRAR, RUIRU 2ND DEFENDANT

RULING

1. Before Court is the 1st Defendants' Preliminary Objection dated 26/4/2023 against the Plaintiff's Notice of Motion Application dated 14/11/2022 on grounds THAT;
 - a. The 1st Defendant is not the registered owner of the suit property and cannot be sued in relation to it.
 - b. The entire proceedings are incurably defective, are an abuse of this Honorable Court's process and should be struck out with costs.
2. Opposing the objection, the Plaintiff Paul Muchiri Muriithi filed his Replying Affidavit dated 18/7/2023. He deposes that the Preliminary Objection is unmerited, frivolous and misguided. That no suit shall be defeated for the reason of misjoinder or non-joinder of parties. Further that the 1st Defendant is in occupation and control of Ruiru/Ruiru East Block 2/5172 having been gifted to him by his late mother. That the 1st Defendant's participation in the suit is necessary to enable the Court effectually and completely adjudicate on the issues herein.
3. Despite parties having elected to canvass the Preliminary Objection by way of written submissions, the 1st Defendant failed to comply. The firm of Caroline Mwangi & Associates filed submissions dated 18/7/2023 on behalf of the Plaintiff. The Court has read and considered the said submissions.



4. The *Black's Law Dictionary, 10th Edition* defines a Preliminary Objection as; -

“... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”
5. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“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.”
6. At page 701 Sir Charles Newbold, P added:

“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 ...”
7. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit. See the case of *David Karobia Kiiru Vs. Charles Nderitu Gitoi & Another* [2008]eKLR.
8. Additionally, in the case of *Avtar Singh Bhamra & Another Vs. Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, 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.”
9. Applying the above tests, the 1st Defendant contends that she is not the registered owner of the suit property. Para. 6 of the Complaint dated 14/11/2022 alludes to the fraudulent registration of the suit in the name of the late Teresia Ndinu Njoroge, the 1st Defendant's mother. That the said Teresia Njoroge later gifted the suit land to the 1st Defendant. Ownership of land or otherwise is a matter of fact to be proven by way of evidence. The averments of ownership of the suit land or otherwise do not comprise a pure point of law as envisioned in the case of Mukisa (supra). I say so because for the Court to inquire into the question of ownership, it will have to delve into contentious issues of facts thus ousting the objection from being a pure point of law.
10. The second test is that a successful Preliminary Objection is argued on the assumption that all the facts pleaded by the rival party are correct. In this case, in para 5 of his Statement of Defence dated 26/4/2023 the 1st Defendant expressly denies the averments in para 6 of the complaint. Thus there is no evidence that the 1st Defendant has admitted the allegations of ownership levelled against him and therefore the second limb is not satisfied.



11. Finally, the averments on ownership by the Defendants cannot be summarily determined at this preliminary stage. Even if the 1st Defendant's argument that he has been wrongly sued is to stand, (which is not the case) misjoinder of a party in a case is not on its own, a pure point of law to merit a successful Preliminary Objection. See Order 1 Rule 9 of the [Civil Procedure Rules](#) provides ;

“9. Misjoinder and non-joinder [Order 1, rule 9]

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

12. The upshot of the forgoing is that the Preliminary Objection is unmerited. It is hereby dismissed with costs to the Plaintiff.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Caroline Mwangi for Plaintiff/Applicant

Ms. Sultani HB Mr. Gaita for 1st Defendant/Respondent

2nd Defendant/Respondent - Absent

Court Assistants – Phyllis/Oliver

