



**Muumbo & another (C/o Muigai Kemei & Associates Advocates) v
Mwingi View Point Lodge Limited & 8 others (Environment & Land
Case 10 of 2023) [2024] KEELC 6921 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 10 OF 2023**

**JA MOGENI, J
OCTOBER 22, 2024**

BETWEEN

**ALEX MUNYASYA MUUMBO 1ST PLAINTIFF
CAROLYNE KALUNDE MUUMBO 2ND PLAINTIFF
C/O MUIGAI KEMEI & ASSOCIATES ADVOCATES**

AND

**MWINGI VIEW POINT LODGE LIMITED 1ST DEFENDANT
BEN MUNYASYA 2ND DEFENDANT
BILLY MBUVI MUUMBO 3RD DEFENDANT
MAUREEN RWACHI GERVAS 4TH DEFENDANT
TRUSTEES OF GETRUDES GARDEN HOSPITAL 5TH DEFENDANT
ADAN MAALIM MURSAL 6TH DEFENDANT
THE REGISTRAR OF COMPANIES 7TH DEFENDANT
THE REGISTRAR OF LANDS NAIROBI DISTRICT 8TH DEFENDANT
THE HON ATTORNEY GENERAL 9TH DEFENDANT**

RULING

1. This ruling determines two preliminary objections dated 27/02/2024 and the other dated 7/03/2024. The first preliminary objection was filed by 2nd and 3rd defendants and the second preliminary objection was filed by the 6th defendant. The preliminary objection was in response to the application dated 5/12/2023 by the plaintiffs seeking to have this suit heard on priority basis.



2. The Preliminary Objection dated 27/02/2024 objected to the hearing of the suit stating that the suit violated Sections 51 and 54 of the Succession Act as read together with paragraphs 10 and 14 of the Fifth Schedule of the Act and rules 7 and 12 of the Probate and Administration Rules. The Applicants stated that the applicants lacked *locus standi* to bring the matter before the court for the estate of the late Timothy Mwandu Muumbo.
3. It is their contention that the suit involves a company which is a legal entity and thus the plaintiffs have not complied with the requirements of sections 238, 239 and 240 of the Company's Act and thus they lack *locus standi*. At the same time this being a matter involving companies, this court being an Environment Court lacks the jurisdiction to entertain the application as per section 3 of the Companies Act.
4. That the application and suit are void ab initio and should be struck out.
5. The second preliminary objection was filed by the 6th defendant who stated that the plaintiffs are not directors of Mwingi View Point Lodge Limited nor Mwingi View Point Company Limited and have thus no locus to institute the present suit. Further that this court lacks jurisdiction to hear and determine this matter.
6. In response to the preliminary objection the plaintiffs filed a reply to the preliminary objection of the 6th defendant sworn by the 2nd plaintiff on behalf of the 1st defendant sworn on 5/06/2024. Carolyne Kalunde Muumbo averred that the Companies Act lacks relevance in this matter since the companies under reference are non-existent or improperly on record. She has attached searches marked as CKM 1-3 which show that the letter of the Registrar of Companies dated 4/03/2019 stated that Mwingi View Point Lodge Limited would be deregistered after 60 days from the date of the said letter. Thus her averment that the 1st defendant ceased to exist.
7. It is her averment that the plaintiffs are bona fide beneficiaries of the estate of the late Timothy Mwandu Muumbo and they are objectors in the succession cause No 1673 of 2015 where it is indicated that the 6th Defendant benefited from a transaction relating to land. Therefore, the plaintiffs aver that the 6th defendant's preliminary objection to be dismissed.
8. The Preliminary Objections and Notice of Motion Applications were canvassed by way of written submissions which the Court has carefully read and considered.

Analysis and Determination

9. The Black's Law Dictionary defines a preliminary objection as "...an objection that, if upheld, would render further proceedings before the tribunal unnecessary". It goes on to list an objection to the court's jurisdiction as an example of a preliminary objection. In the now famous case of *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* (1969) EA 696, the court defined a preliminary objection as follows: -“ ...

“...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.”



10. In *Mwalungu Mwambui Nyayo & 201 others v Total Oil Products (East Africa) Limited & another* (2021) eKLR, the court held that: -

“The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. 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 has to be ascertained or if what is sought in 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”

11. I will at the same time refer and rely on the decision in the case of *Attorney General & another v Andrew Mwaura Githinji & another* [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what is tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law, which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.”

12. It is therefore from the above that a preliminary objection is a motion asking the judge not to entertain the matter or take into account the validity of the claims raised in the suit. By inference, a preliminary objection can only be raised purely on a point of law and not to question the truthfulness of a fact in a case because then it would be a breach of rules of procedure and ought not be entertained by courts of law.

13. In the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court quoted with approval Law J.A in *Mukisa Biscuits Manufacturing Case* (*supra*), where the learned Judge observed 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. To ascertain whether a point is pure law, the Supreme Court in *Aviation & Allied Workers Union Kenya* (*supra*) held that;

“the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record”.



15. Therefore, a preliminary objection must be raised on the assumption that all facts pleaded by the adverse party are correct. It must not raise substantive issues from the pleadings which must be determined by court upon perusal of evidence. No preliminary objection can be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
16. For the instant case, there are two preliminary objections filed raising what I consider to be two critical objections in respect of this suit. Upon reading the two preliminary objections and well as the submissions of the parties herein, the court is satisfied that the following issues as framed shall adequately deal with the objections raised to wit:-
- a. Whether this court has jurisdiction to entertain the suit
 - b. Whether the Plaintiffs/Applicants have the legal capacity namely *locus standi* to institute, maintain and prosecute this suit
17. It is the contention of the applicants that the plaintiffs are not directors in the 1st defendant company and also lack the requisite resolution from the company to file the suit. The two issues raised go to the Jurisdiction of this Court to hear and determine the matter and even before the Court can make a determination as to whether the Preliminary Objections are merited and whether the Plaintiffs/Applicants are entitled to the orders sought, the Court must first make a determination of the said issues, which goes to its Jurisdiction, since without jurisdiction the Court must then down its tools.
18. On the first issue, I will refer to the now famous case of *Owners of the Motor Vessel 'Lillian' (S) v Caltex Oil (Kenya) Ltd* [1989] KLR 1, where the Court held that;-
- “Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”
19. Article 162(2)(b) of the *Constitution* of Kenya vests this Court with jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. This is expounded in Section 13 of the *Environment and Land Court Act*, which stipulates as follows:
- “ 13. Jurisdiction of the Court
1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
 - i. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. relating to compulsory acquisition of land;
 - iii. relating to land administration and management;



- iv. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - v. any other dispute relating to environment and land.
3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.
 4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.”
20. Therefore, in determining whether a particular case is a dispute about land and is properly before the Environment and Land Court or not, the court shall apply the pre-dominant purpose test as persuasively stated in the case of Suzanne Butler & 4 others v Redhill Investments & another (2017) eKLR, where the court held that:
- “When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”
21. the Constitution itself is clear that matters relating to land can only be determined before this court, as is further informed by Section 13 of the ELC Act. Going by the Plaintiff, the Plaintiffs are children of the late Timothy Mwandu Muumbo who is said to have been the main shareholder of the 1st defendant and whose shares form part of the estate of the Late Timothy Mwandu Muumbo, who appear to have owned the suit property LR No 209/327/7 and LR 36/11/115 which were according to the plaintiffs fraudulently transferred to the 5th and 6th defendants.
 22. The plaintiffs deny the existence of the 1st defendant which allegedly took over the suit properties. They also aver that they have filed an objection in succession suit number 1623 of 2015 and obtained preservation orders of the estate of the late Timothy Mwandu Muumbo vide a court order by Lady Justice Muigai dated 13/0/01/2017 which however was disobeyed by the 3rd defendant who transferred the LR 36/11/115 to the 6th defendant on 20/04/2018.
 23. It is my observation that the dispute herein revolves around the ownership and transfer of the land suit properties which were owned by the late Timothy Mwandu Muumbo. The dispute does not relate to 1st defendant as a company in and of itself or indeed any aspect of company law. Even where



the shareholding of the company has been raised, the only concern is the Late Timothy Mwandia Muumbo's shares as the shareholder and the interest of the beneficiaries in relation to the share of the land he owns.

24. The issues raised by the Plaintiffs cannot be severed to be heard by the High Court and the ELC Court. The reliefs sought by the Plaintiffs are centred around ownership of the suit properties as well as transfer of the same to parties who are not beneficiaries of the estate of the late Timothy Mwandia Muumbo. These reliefs are of such a nature that they can only be issued and/or obtained from this court, and this court is guided by *Paul Nderi Warui & 24 others v Chrysogon Wang'ondy Ndubiu & 3 others* (2021) eKLR where it was held that: -

“ 10. As indicated in paragraph 1 of the ruling, the Plaintiffs are seeking various reliefs in relation to the parcels of land which are said to have been irregularly and fraudulently alienated by the 1st and 2nd Defendants. The mere fact that the properties were initially owned by the company does not necessarily remove the case from the preview of Section 13 of the *Environment and Land Court Act* and make it a commercial dispute. The law recognizes that even limited companies are capable of holding land which can be the subject of legal disputes. The court is of the opinion that a suit claiming a declaration that the sale and transfer of the various suit properties was illegal and an order for cancellation of the 3rd Defendant's title squarely falls within Section 13 (2)(e) of the *Environment and Land Court Act* as “any other dispute” relating to land.”

25. Ultimately, it is clear that the dispute revolves around land. Therefore, in line with the predominant purpose test, this court is clothed with the requisite jurisdiction to hear and determine it.

26. On the second issue, in both preliminary objections the applicants contend that the Plaintiffs have no *locus standi* or capacity to institute this suit. That due to the lack of the said capacity, the suit is incompetent and should be struck out. In the case of *Law Society of Kenya v Commissioner of Lands & others*, Nakuru High Court Civil Case No 464 of 2000, the Court held that; -

“ *locus standi* signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”.

27. Also in the case of *Alfred Njau and others v City Council of Nairobi* (1982) KAR 229, the Court also held that;-

“ the term *locus standi* means a right to appear in Court and conversely to say that a person has no *locus standi* means that he has no right to appear or be heard in such and such proceedings”.

28. It is therefore evident that *locus standi* is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no *locus standi*, then it means he/she cannot be heard even on whether or not he has a case worth listening to. It is further evident that if this Court was to find that the plaintiffs have no *locus standi*, then they cannot be heard



and that point alone may dispose of the suit. In the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu High Court Civil Case 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 resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone”.

29. Having now considered the objections raised by the 2nd, 3rd and 6th Defendants/Respondents, the Court finds that lack of *locus standi* can dispose of the matter preliminarily without having to resort to ascertaining of facts. The preliminary objection raised by the applicants fits the description of a preliminary objection as stated in the *Mukisa Biscuit case (supra)*.
30. Now, whereas it is correct that the issue of *locus standi* is a Preliminary Objection rightly raised, in this instant suit, the applicants have averred that the plaintiffs having filed this suit have no *locus standi* to bring this instant suit to court on behalf of the Estate of the Late Timothy Mwandu Muumbo. Further that the suit concerns a company which is a legal entity and the plaintiffs have not complied with the requisite rules of representation of a company.
31. It is however this court’s observation that the plaintiffs are claiming beneficial interest over the suit and that the 3rd and 6th defendants/applicants are claiming a purchaser’s interest in the same suit property. That means therefore that the issue as to whether or not the plaintiffs have any proprietary interest over the suit property has to be ascertained through evidence. The Court would be required to interrogate evidence produced before it and ascertain the facts in order to come into that conclusion. See the case of [Presbyterian Foundation & another v East Africa Partnership Ltd & another](#)[2012]eKLR

“The fourth issue is that the 2nd Plaintiff has no proprietary interests in the subject properties and is hence not entitled to the orders under Order 40 of the Civil Procedure Rules. That may be so. However, that determination can only be made at the hearing of the application as it goes to the merit of the application itself. Since I cannot make any conclusive findings with respect to the 2nd Plaintiff’s position vis-à-vis the 1st plaintiff, I cannot say that the 1st Plaintiff’s suit is non-existent. It is further submitted that since the Church has registered officials and the 1st defendant has directors, a suit on their behalf can only be brought by the said agents. That submission is largely correct since a suit which is brought without the blessing of the said entities is a non-starter. Whereas the Church is not a party to this suit and therefore the issue of its filing suit does not arise, with respect to the 1st plaintiff, whether or not it sanctioned the filing of the suit is a matter of evidence. If the suit was filed without the 1st plaintiff’s authorization, that would be something else. However, that is not an issue that, properly speaking, can be the subject of a preliminary objection.

Had this objection been raised by way of a formal application supported by an affidavit, that would have been a different story since the plaintiff would have had an opportunity to explain the discrepancies raised whose failure would have possibly led to a finding in favour of the defendants. In the result it is my view and I so hold that the issues raised in the notice of preliminary objection dated 28th June 2012 do not meet the threshold for Preliminary Objections. The same are accordingly dismissed with costs to the Plaintiffs.”

32. Taking into account the above findings of the court, this Court finds that since the plaintiffs’ suit is based on beneficial interest over the suit property, making a determination as to whether or not they hold such interest over the suit property at this stage will be draconian as the Plaintiffs’ suit would have



been determined via a Preliminary Objection and it would mean that the Court would not have had an opportunity to ventilate on the issues that would have been raised by the Plaintiffs.

33. This court also holds the position that the instant issue while it goes to the Jurisdiction of this Court, certain facts must be ascertained and therefore the issue at hand cannot be determined via a Preliminary Objection, as the Court will have to take evidence to determine the same. See the case of *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited* [2017] eKLR, where the Court held that: -

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application. Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

34. Consequently, the Court finds and holds that at this juncture, it would be imprudent to dismiss the Plaintiffs’ suit and or application as the suit ought to be heard and facts ascertained to arrive at a just determination.

Disposal Orders

35. The upshot of the foregoing is that the two preliminary objections by the 2nd and 3rd defendants and 6th defendants dated 27/02/2024 and 7/03/2024 are not merited and are dismissed entirely with costs being in the cause. Indeed, this finding disposes the application by the plaintiffs dated 5/12/2023
36. The parties are referred to the Deputy Registrar for Pre- trial conference on 28/10/2024

It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF OCTOBER 2024.

MOGENI J

JUDGE

In the virtual presence of: -

Mary Muigai for Plaintiffs

Ms. Dave for 5th Defendant

No appearance for 1st – 4th defendant, 7th 8th, and 9th defendants

Caroline Sagina - Court Assistant

