



Ali v Mbilu & 3 others (Environmental and Land Originating Summons E001 of 2023) [2024] KEELC 13935 (KLR) (20 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023
LL NAIKUNI, J
DECEMBER 20, 2024**

BETWEEN

ALI AWADH ALI APPLICANT

AND

ELIUD SIMON MBILU 1ST RESPONDENT

COUNTY LAND REGISTRAR, MOMBASA 2ND RESPONDENT

HONOURABLE ATTORNEY GENERAL 3RD RESPONDENT

KENYA COMMERCIAL BANK (NOW KCB BANK KENYA LTD) 4TH RESPONDENT

RULING

I. Introduction

1. The Ruling of this Honourable Court regards it having been moved by the Co- Administrator – Estate of Eliud Simon herein. The Applicant herein raised an objection through filing a Notice of Preliminary Objection dated 9th January, 2024.

II. The Applicant’s case

2. The Preliminary was premised on the following ground: -

The estate of Eliud Simon Mbilu shall raise a preliminary objection to the institution and competence of the subject suit in respect of the 1st Respondent on the grounds that the suit is a nonstarter, incompetent and bad in law and ought be struck off as the person sued as the 1st Respondent is deceased having passed on in 2017 and therefore no suit can be sustained as against such a deceased person in his own name.



III. Submissions

3. On 22nd May, 2024, when this matter came up for directions, the parties were guided by Honorable Court whereby they agreed to have the said Preliminary objection dated 9th January, 2024 be canvassed by way of written submissions. Unfortunately, by the time of penning down the Ruling, the Court had not as yet accessed the submissions from any of the parties. Pursuant to that, directions and strict timelines were given by the Court to that effect the Court reserved its ruling date on its own merit accordingly.

IV. Analysis and Determination

4. I have keenly considered the objection raised through the Notice of Preliminary Objection dated 9th January, 2024, the rival and detailed written submissions, the myriad authorities cited, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
5. In order to reach at an informed, reasonable and fair decision on the matter, the Honorable Court wishes to be guided by the following three (3) issues for its determination. These are:-
 - a. Whether the objection raised through the Notice of Preliminary Objection dated 9th January, 2024 meets the threshold founded in Law and precedents.
 - b. Whether the Applicant is entitled to the relief sought from filed Notice of Preliminary Objection dated 9th January, 2024.
 - c. Who will bear the Costs of the Objection.

Issue No. a). Whether the objection raised through the Notice of Preliminary Objection dated 9th January, 2024 meets the threshold founded in Law and precedents.

6. Under this sub title this Honorable Court will deal with it as a preliminary objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

7. The above legal preposition has been made graphically clear in the now famous case of “*Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*. [1969] EA 696”. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points 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 demurer 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”

8. I have further relied on the decision of “*Attorney General & Another v Andrew Mwaura Githinji & another* [2016] eKLR”:- as it explicitly extrapolates in a more concise and surgical precision what 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.
9. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. From the most of them of the issues and facts of contention in this objection are to be adduced during a full trial.
10. Likewise, the Court in the case “[Oraro v Mbaja](#) [2005] eKLR 141”, on the nature of preliminary objections observed that:
- “A preliminary objection 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 the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
11. The Preliminary objection in this matter is founded on the notion that the Plaintiff has sued a deceased person. It will be necessary for this Honourable Court to peruse the proceeding in the High Court matter. That determination being a factual one, it cannot form the subject of a preliminary objection unless the facts are agreed. In that decision I relied on “[Oraro v Mbaja](#) [2005] 1 KLR 141” in which Ojwang, J (as he then was) expressed himself as follows:
- “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. The first matter relates to 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, 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 the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence. If the applicant's instant matter required the affidavit to give it validity before the Court, then it could not be allowed to stand as a preliminary objection clearly out of order and, apart from amounting to a breach of established procedure, it had the unfortunate effect of provoking filing of the respondent's very detailed "affidavit in reply to an affidavit in support of preliminary objection", which replying affidavit was expressed to be "under protest"... The applicant's "notice of preliminary objection to representation" cannot pass muster as a procedurally designed preliminary objection. It is accompanied by affidavit evidence, which means its evidentiary foundations are not agreed and stand to be tested. Secondly, the essential claims in the said preliminary objections are matters of great controversy, as their factual foundations are the subject of dispute."

12. The preliminary objection is hinged on the fact that the Plaintiffs sued a deceased person. It is my view that all the relevant facts as summarized above are not in dispute. Resultantly therefore the objection is a pure point of law.

Issue No. b). Whether the Applicant is entitled to the relief sought from filed Notice of Preliminary Objection dated 9th January, 2024.

13. I have considered the Objection the question for determination is not whether the defendant is dead but whether the property is one vesting in the estate of the defendant. I am afraid that the question is actually whether the defendant had died at the time that this suit was filed and if I find for a fact that he was deceased at the time, then I will have no choice but to strike out this suit as null and void. I say so for one cannot sue a dead man and claim that the suit is properly before court.
14. The issue was comprehensively addressed by Mbogholi Msagha J (as he then was) in the case of "[Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others](#), High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR" where he reviewed various authorities as follows:-

In the Indian case of *C. Muttu v Bharath Match Works* AIR 1964 Kant 293 the court observed,

"If he (Defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the Defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person."

In yet another Indian Case of *Pratap Chand Mehta v Chrisna Devi Mehta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

"....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined.



If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

15. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity. Going by the materials on record, I am persuaded that suit filed against the 1st Respondent and his estate cannot be sustained. Having said so, the preliminary objection hereby succeeds and the said claim is declared incompetent, null and void as it is founded on proceedings that were also null and void ab initio against a deceased person.

Issue No. c). Who will bear the Costs of the Objection

16. It is trite law that issues of Costs are at the discretion of the Honorable Court. Costs are award granted to a party at the conclusion of any legal action or proceedings in a litigation process. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

The proviso under the provisions of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that Costs follow events. By events it means the results and outcome of any legal action, proceeding or process in any litigation. In the case of “*Reids Hewett & Company v Joseph* AIR 1918 cal. 717 & *Myres v Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

17. The events in the instant case is that the Preliminary Objection raised by the Objector herein has succeeded. For that very reason, the Objector herein will have the Costs of the objection to be borne by the Applicants herein.

VI. Conclusion & Disposition

18. In conclusion, having conducted an intensive analysis of the framed issues herein, on preponderance of probability, the Honorable Court proceeds to make the following orders.
- a. That the Notice of Preliminary Objection dated 9th January, 2024, by the Objector herein be and is hereby found to have merit and the same is hereby sustained with costs.
 - b. That consequent to (a) above, the suit against the 1st Respondent filed in the year 2023 be and is hereby struck out on the grounds of being null & void ab initio.
 - c. That for expediency sake, this matter to be heard on 18th March, 2025. There be a mention on 5th February, 2025 for purposes of conducting Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - d. That the costs of the Notice of Preliminary objection to be awarded to the Objector.

It is so ordered accordingly.



RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 20TH DAY OF DECEMBER 2024.

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

Ruling delivered in the presence of:

- a. M/s. Fridaus Mbula, the Court Assistant.
- b. Mr. E. K Mutua Advocate for the Advocate for the 1st Respondent/Objector.
- c. M/s. Kimani Advocate holding brief for Mr. Njenga Advocate for the 2nd Respondent.
- d. No appearance for the Applicant and the Interested Parties.

