



**Karuma v Kibe (Environment and Land Appeal E003 of 2023)  
[2024] KEELC 14102 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14102 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

**JG KEMEI, J**

**DECEMBER 19, 2024**

**BETWEEN**

**MARY WANGONDU KARUMA ..... APPELLANT**

**AND**

**TYRUS KIBE ..... RESPONDENT**

**RULING**

1. By way of background the Plaintiff ( now Appellant) sued the Defendant vide a Plaint dated the 10/2/2023 seeking orders for;
  - a. A declaration that the Defendant is a trespasser on the Plaintiff's parcel of land known as L.R. No. 17564/2050 (Original No. 17564/1577/474).
  - b. An order that the Defendant, his servants and agents be evicted from the parcel of land known as L.R. No. 17564/2050 (Original No. 17564/1577/474).
  - c. An order restraining the Defendant, his servants and agents from re-entering into land parcel number L.R. No. 17564/2050 (Original No. 17564/1577/474).
  - d. Costs of this suit.
  - e. Any other or further relief this Honourable Court deems fit and necessary.
2. It was the Plaintiff's case that being the registered owner of the suit land, in 2015 she permitted the Defendant to occupy and erect a house on the suit land. That on 11/3/2022 she terminated and or withdrew the said consent and demanded the vacation of the suit land within 30 days. Upon the lapse of the said 30 days, the parties engaged in discussions towards the resolution of the dispute to no avail leading to the filing of the instant suit. That the Defendant's continued occupation of the suit land infringes on her right to ownership and enjoyment of the suit and amounts to trespass.



3. Simultaneously the Plaintiff filed of a Notice of Motion of even date and sought the following Orders;
  - a. That this Application be certified urgent and be heard in the first instance due to the urgent nature of the relief sought herein.
  - b. That this Honourable Court be pleased to issue an order of eviction against the Respondent herein for him to be evicted from the suit land known as L.R No. 17564/2050 (Original No. 17564/1577/474).
  - c. That the Applicant be at liberty to appoint an Auctioneer to evict the Respondent.
  - d. That the Officer Commanding Station (O.C.S) Juja Police Station do oversee the exercise of eviction and provide security for law and order to be maintained.
  - e. That the costs of this Application be provided for.
4. The application is premised on the grounds annexed thereto and the Supporting Affidavit of Mary Wangonde Karuma where she reiterated the contents of the Pleadings already captured in the preceding paras.
5. In resisting the application, the Defendant raised a Preliminary Objection on the following grounds;
  - a. That the suit is misconceived, incompetent and bad in law as the application is brought under Sections 152A, 152B, 152E, 152G of the Land Act 2012 Laws of Kenya and not under the Matrimonial Property Act 2013 Laws of Kenya as it is a division of matrimonial property disguised as an Environment and Land Court suit for trespass.
  - b. That suit offends Section 6(1), (a), (b), (c), 7 of the Matrimonial Property Act, 2013.
  - c. That this Honourable Court does not have jurisdiction over distribution of matrimonial property.
  - d. That by the Plaintiff's own admission the subject property of this suit is matrimonial.
6. The Defendant also filed a Replying Affidavit sworn on 27/2/2023 in which the deponent deposed that he is the son in law to the Plaintiff having married her daughter namely Janet Wanjiru Karuma in 2006. That in 2014 he and his wife Janet Karuma purchased the suit land from the Plaintiff and paid the purchase price in cash and through MPESA money transfer and that so far, he paid the sum of Kshs 537,500/-. That Thereafter they established a matrimonial home on the suit land where they lived with his family. That subsequently on the 11/3/2022 the Plaintiff served him with a notice to vacate the suit land on account that he is a trespasser. He stated that his wife left the home on her own volition and if he is evicted his children will be rendered destitute. That if the orders are granted he stands to suffer loss based on the monetary contribution he made in the purchase of the land as well as the construction of the home on the suit land. He faulted the Plaintiff for filing suit when they had agreed to sell the property and share the proceeds at the agreed ratio. He opined that the correct forum for the resolution of the dispute is through a matrimonial property cause which is usually preceded by Divorce proceedings.
7. In reply to the Preliminary Objection the Plaintiff filed a Supplementary Affidavit sworn on the 30/3/2023 in which she deposed and denied selling the suit land to the Defendant. That during the subsequent negotiations she offered to refund the Defendant his share of the contribution for the construction of the house upon its valuation by a licensed valuer and after the sale of the suit land. She refuted receiving the alleged purchase price from the Defendant and stated that according to the



records attached by the Defendant, the Defendant has not explained if he truly purchased the land in 2014 why he made the alleged payments in 2017 and 2018.

8. Upon hearing and determining the Preliminary Objection the Learned trial Court allowed the Objection in the following terms;

“It is therefore evident the Plaintiff has come to this Court with unclean hands after their out of Court settlement failed and come to seek eviction of the Respondent from the said property while she and her Advocates are well aware that distribution of matrimonial property is an undissolved or even dissolved marriage is best left to the family Court and to be precise, the High Court which has exclusive jurisdiction on the same. From the foregoing, I find that in the circumstances of this case, the Preliminary Objection has merit and I do uphold the same. Plaintiff’s application and whole suit herein is struck out with costs in favour of the Defendant.”

9. Aggrieved by the said Ruling the Appellant moved this Court and invoked its appellate power to determine the appeal comprised in the Memorandum of Appeal on the following grounds;

- a. That the Learned Trial Magistrate erred in law in misapprehending and misapplying the general principles in *Mukhisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* 1969 E.A. 696 in determining the Respondent’s Notice of Preliminary Objection dated 15<sup>th</sup> February 2023.
- b. That the Learned Trial Magistrate erred in law and in fact by disregarding the fact that the Respondent filed a Replying Affidavit which raised contested facts and issues.
- c. That the Learned Trial Magistrate erred in law and in fact in entertaining and/or delving into issues of facts while making a determination on the Preliminary Objection raised by the Respondent.
- d. That the Learned Trial Magistrate erred in law and in fact by failing to deal with the pleadings wholly as filed.
- e. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate and consider the Appellant’s cause of action against the Respondent.
- f. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the dispute herein.
- g. That the Learned Trial Magistrate erred in law and in fact in making a decision based on complete misapprehension of *the Constitution* particularly the definition of Land as stipulated in Article 260 of *the Constitution*.
- h. That the Learned Trial Magistrate erred in her evaluation and analysis of the pleadings and the evidence adduced before the Court.
- i. That the Learned Trial Magistrate erred in law and in fact by failing to consider the evidence adduced in its entirety hence arriving at a decision against the weight of evidence placed before the Court.
- j. That the Learned Trial Magistrate erred in law in failing to fully analyze the evidence tendered by the Appellant and giving undue weight to the Respondent’s case and least weight to the Appellant’s case.



- k. That the Learned Trial Magistrate erred in law and in fact in disregarding and/or failing to consider the Appellant's submissions and legal authorities relied upon in support thereof.
  - l. That the Learned Trial Magistrate erred in law and in fact in striking out the Appellant's application and suit dated 10<sup>th</sup> February 2023 thereby occasioning gross miscarriage of justice.
10. The Appellant prays for the following orders;
- a. That the appeal be allowed
  - b. An order be made setting aside the subordinates Court Ruling and order striking out the Appellants application and suit with costs to the Respondent and the same be substituted with an order dismissing the Respondent's Preliminary Objection dated the 15/2/23 and allowing the application dated the 10/2/23
11. On the 9/10/2024 directions were taken to canvass the appeal by way of written submissions. I have read and considered the said submissions in the Ruling.
12. The key issue for determination is whether the appeal is merited.
13. 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 in the leading case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A 696* the celebrated case on Preliminary Objection, it was held as follows:
- “ ... The first matter related 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 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 improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse issues. This improper practice should stop.”
14. The Supreme Court in *Hassan Ali Joho & Another Vs. Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR* stated that 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.
15. Flowing from the above it emerges that 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*.
16. The Respondent raised a Preliminary Objection impugning this trial Court's jurisdiction to entertain the suit as filed. It is trite that jurisdiction goes to the root of a matter and as such it is a pure point



of law. In the case of celebrated case of Owners of the Motor Vessel “Lillian S” Vs. Caltex Oil (Kenya) Ltd [1989] eKLR it was stated thus;

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. The next test is whether the objection is merited. The case of the Appellant as can be gleaned from the pleadings on record is that she is the registered proprietor of the suit land according to the copy of the title annexed to the affidavit on record. It was the Appellant’s case that she permitted the Respondent to occupy the suit land and construct a house thereon. That after 7 years she terminated her consent and issued notice to vacate the suit land but the Respondent has refused to vacate.
18. The Respondent on the other hand has claimed that he and his wife purchased the suit land sometime in 2014 and paid the Appellant through cash and Mpesa money transfer service. It is the case of the Respondent that the suit land is matrimonial property and that the Court is devoid of jurisdiction to determine the same.
19. For the Court to arrive at the decision one way or another respecting the issue as to whether or not the Respondent purchased the land, it has to ascertain if indeed there was a sale between the parties; if in the negative the next question will be whether the occupation was as a licensee; whether as a licensee the Respondent has any rights to the house without the land. The more critical issue is whether the property is a matrimonial property to warrant the same being determined as such. The Appellant has informed the Court that she is the mother in law of the Respondent. Be that as it may, the Court must ascertain and determine whether the definition of matrimonial property included property owned by a parent of one’s spouse. These to my mind are issues that the Court must make a determination so as to arrive at whether or not the Court has jurisdiction to determine the suit. The gist of the cause of action of the Appellant is trespass on which the Appellant has premised her prayer for eviction.
20. Arising from the above it is clear that the objection cannot be founded on contentious facts and for that reason the objection is ousted from being a pure point of law. The Court finds that the Learned Magistrate erred in arriving at the conclusion in the Ruling and for the reasons set out above the same is overturned.
21. The Court notes that the prayers sought in the Notice of Motion and the suit are more or less similar and in the interest of justice I direct that both the Notice of Motion and the suit be heard by a Magistrate with jurisdiction other than the Hon S. Atambo (CM).
22. In the end the appeal partially succeeds.
23. Costs shall be in favour of Appellant.
24. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Mugure for the Appellant



Billy HB Wambugu for the Respondent

Court Assistant – Phyllis

