



Kilonzo (Suing as one of the administrators of the Estate of Joseph Kilonzo Musyoki) v Kilonzo & 4 others (Environment & Land Case E023 of 2023) [2024] KEELC 13761 (KLR) (5 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E023 OF 2023**

**TW MURIGI, J
DECEMBER 5, 2024**

BETWEEN

JOSHUA NDAKA KILONZO (SUING AS ONE OF THE ADMINISTRATORS OF THE ESTATE OF JOSEPH KILONZO MUSYOKI) PLAINTIFF

AND

**PIUS MUTETI KILONZO 1ST DEFENDANT
CYRUS MUTETI MUNYAO 2ND DEFENDANT
DOREEN NTHENYA MUNYAO 3RD DEFENDANT
PATRICIA NDUKU MUTINDA 4TH DEFENDANT
CHARLES NZIOKA NDUNDA 5TH DEFENDANT**

RULING

1. This ruling in respect of the Notice of Preliminary Objection dated 5th September 2023 raised by the 1st, 2nd, 3rd and 5th Defendants on the following grounds:-
 - a. The suit offends the provisions of Order 31 Rule 2 of the Civil Procedure Rules.
 - b. The suit against the Defendants ought to be struck out with costs since it is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the circumstances.
2. On the basis of the above, the Defendants urged the court to strike out the suit with costs.
3. The Preliminary Objection was canvassed by way of written submissions



The 1st, 2nd, 3rd and 5th Defendants Submissions

4. The 1st, 2nd, 3rd and 5th Defendants submissions were filed on 31st January 2024.
5. On their behalf, Counsel relied on the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA696 to submit that a preliminary objection must be raised on a pure point of law. Counsel submitted that the Defendants preliminary objection is anchored on the provisions of Order 31 Rule 2 of the Civil Procedure Rules which provides for suits by or against trustees, executors and administrators.
6. Counsel further submitted that the Plaintiff's suit offends the provisions of Order 31 Rule 2 of the [Civil Procedure Rules](#) as it was instituted by one of the administrators of the estate of Joseph Kilonzo Munywoki instead of both hence, an abuse of the court process.
7. According to Counsel, the omission to join the co-administrator to the proceedings herein will prejudice the other beneficiaries who are not parties to the suit but are currently settled on the suit property. Counsel argued that since the suit property has been charged to secure a loan facility, the Plaintiff ought to have joined the financier to the suit herein.
8. Concluding his submissions, Counsel submitted that the suit is fatally defective and ought to be dismissed with costs.
9. None of the authorities cited by Counsel were availed for the courts perusal.

The Plaintiff's Submissions

10. The Plaintiff filed his submissions dated 24th May 2024.
11. On his behalf, Counsel submitted that the only issue for determination is whether the preliminary objection has met the threshold for the grant of the orders sought.
12. Counsel further submitted that for a preliminary objection to succeed, it must be based on a pure point of law. Counsel contended that the Defendants preliminary objection is based on the grounds that the suit herein was initiated by one of the administrators of the estate of the late Joseph Kilonzo Munywoki instead of both. Counsel argued that the omission to join the 2nd Administrator to the proceedings herein is a procedural defect which should not lead to the termination of the suit herein as the same can be cured. According to Counsel, courts should administer justice without undue regard to procedural technicalities.
13. Counsel argued that the omission to include the 2nd Administrator does not prejudice the Defendants as the Co-Plaintiff has not opposed the proceedings herein.
14. Counsel further submitted that Order 1 Rule 10 of the [Civil Procedure Rules](#) allows the court to rectify omissions by adding a party at any stage of the proceedings for proper conduct of the matter. Counsel contended that the Plaintiff is ready to join the 2nd Administrator to the proceedings herein. Counsel urged the court to enjoin the 2nd Administrator to the proceeding herein in order to ensure that all the necessary parties are brought on board. Counsel further contended that the Plaintiff will suffer prejudice if the preliminary objection is upheld as he will be required to file the suit afresh.
15. Concluding his submissions, Counsel submitted that the preliminary has not met the threshold of a preliminary objection set out in the case of *Mukisa Biscuits* supra. In conclusion, Counsel urged the court to dismiss the preliminary objection with costs. To buttress his submissions, Counsel relied on the authorities annexed to the submissions.



Analysis And Determination

16. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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.”

17. In *Oraro v Mbaja* (2005) eKLR Ojwang J. (as he then was) described it as follows: -

“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. An assertion which claims to be a Preliminary Objection and yet it hears 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”.

18. A preliminary objection should raise pure points of law which is argued on the assumption of all facts pleaded by the other side are correct. It cannot be raised if facts are disputed or have to be ascertained by way of evidence.

19. The Defendants preliminary objection is premised on the grounds that the suit herein is fatally defective as it offends the provisions of Order 31 Rule 2 of the *Civil Procedure Rules*.

20. The Plaintiffs on the other hand contended that the omission to join the co-administrator to the suit herein is a procedural defect which can be cured by the provisions of Article 159(2)(d) of the *Constitution* as read together with Section 1A and 1B of the *Civil Procedure Act*. Article 159(2)(d) of the *Constitution* requires the court to administer justice without undue regard to procedural technicalities.

21. Section 1A of the *Civil Procedure Act* provides that the objective of the Act and rules is to facilitate the just, expeditious, proportionate and affordable resolution of all disputes governed by the Act.

22. Section 3A of the *Civil Procedure Act* provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

23. Order 31 Rule 2 of the Civil Procedure Rules provides as follows:-

“Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them; provided that the executors who have not proved their testator’s will and trustees. Executors and administrators outside Kenya need not be made parties”.

24. The above provisions are couched in mandatory terms. It is a legal requirement and parties are bound to comply with the same. Failure to comply with the provisions of Order 31 Rule 2 is not a technical



issue. Article 159(2)(d) of the Constitution or Section 3A of the Civil Procedure Act cannot be invoked to cure failure to comply with the provisions of the law.

25. In the end, I find that the preliminary objection dated 5th September 2023 is merited. Consequently, the Plaintiff's suit is hereby struck out with costs to the Defendants.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 5TH DAY OF DECEMBER, 2024.

In the presence of:

Ms Mutua for the Plaintiff.

Kithuka for the 1st, 2nd, 3rd and 5th Defendants

C/A Alfred.

