



**Musembi (Suing on behalf of the Estate of the Late Wilson Musembi Muthaisu
- Deceased) v County Government of Makueni & another (Environment &
Land Case E05 of 2022) [2023] KEELC 620 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 620 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E05 OF 2022
TW MURIGI, J
JANUARY 25, 2023**

BETWEEN

**BEATRICE NTHIKWA MUSEMBI (SUING ON BEHALF OF THE ESTATE OF
THE LATE WILSON MUSEMBI MUTHAISU - DECEASED) APPLICANT**

AND

**COUNTY GOVERNMENT OF MAKUENI 1ST RESPONDENT
ECM LAMD URBAN DEVELOPMENT & CLIMATE CHANGE MAKUENI
COUNTY GOVERNMENT 2ND RESPONDENT**

RULING

1. By an application dated April 11, 2022 brought pursuant to the provisions of the [Judicature Act](#) cap 8, [The High Court \(Practice and Procedure Rules\)](#) (part1 rule 3), section 1A, 1B, 3A and section 18 of the [Civil Procedure Act](#) and all other enabling provisions of the law, the applicant seeks the following orders:-
 1. That an order be issued transferring Makueni Chief Magistrate's ELC case No E028 of 2021 to Tawa law courts for hearing and final determination.
 2. That the costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the applicant sworn on even date.

The Applicant's Case

3. It is the applicant's case that the suit property is within the geographical jurisdiction of Tawa law courts. The applicant averred that the parties to the suit are agreeable to having Makueni CMCC ELC case No



E028 of 2021 transferred to Tawa law courts for hearing and determination. She argued that the court should in the interest of justice grant the orders sought as no prejudice would be occasioned to either party. In her further affidavit filed in court on July 29, 2022, the applicant averred that the trial court in its ruling delivered on January 18, 2022 upheld the preliminary objection raised by the defendant that the suit should be transferred to Tawa law courts.

The Respondent's Case

4. In opposing the application, the respondents filed a notice of preliminary objection on the following grounds:-
 1. That having found that the court did not have jurisdiction to hear the matter, the suit became a nullity thus there is nothing to transfer and the court is divested of jurisdiction to transfer a suit which is a nullity.
 2. That the respondents pray that the application be dismissed with costs.
5. The preliminary objection was canvassed by way of written submissions.

The Respondents Submissions

6. The respondents submissions were filed in court on June 14, 2021.
7. Counsel for the respondents submitted that the requirements of a preliminary objection were set out in the case of *Mukisa Biscuits Manufacturing Co Ltd v West end Distribution Ltd* (1969) E A 696.
8. Counsel submitted that *vide* its ruling delivered on January 18, 2022 the trial court declared that it lacks jurisdiction to hear and determine the matter since the subject matter is within the jurisdiction of Tawa law courts. Counsel argued that pursuant to the said ruling, the court is divested of jurisdiction to transfer a suit which is a nullity. Finally, counsel urged the court to dismiss the application with costs to the respondents.

The Applicant's Submissions

9. The applicant's submissions were filed in court on July 24, 2022.
10. Counsel for the applicant identified the following issues for the court's determination:-
 1. Whether the honourable court is vested with the requisite jurisdiction to order the transfer of Makueni Chief Magistrate's Court ELC case No E028 of 2021 to Tawa law courts for hearing and determination.
 2. Whether the applicant is entitled to the orders sought.
11. Counsel submitted that the threshold in a preliminary objection was set out in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors* (1969) EA 696.
12. Counsel further submitted that section 18 of the [Civil Procedure Act](#) vests the High Court with powers to transfer suits of a civil nature. Counsel went on to submit that it is not in dispute that Makueni Chief Magistrate's Court is divested of jurisdiction to hear and determine the matter as the same falls within the jurisdiction of Tawa law courts.
13. In addition, counsel submitted that *vide* the ruling delivered on January 18, 2022, the court directed that the matter be placed before the superior court for an order of transfer.



14. Counsel maintains that the applicant will suffer irreparable loss if the orders sought are not granted. To buttress his arguments, counsel placed reliance on the following authorities:-
1. [*Phoenix of E.A Assurance Co Limited v S.M Thiga T/A Newspaper Service*](#) (2019) eKLR.
 2. [*Kithita Ngeana v Mwaniki Kisume*](#) (2018) eKLR.
 3. [*John Mwangi Karanja v Alfred Ndiangui*](#) (2011) eKLR.

Analysis And Determination

15. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law.
16. Both parties referred to the well known decision in *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* (1969) EA 696, where 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

17. Further on Sir Charles Newbold JA stated;

“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 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 had 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 the issue. The improper practice should stop.”

18. 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.”

19. The Court of Appeal in [*Nitin Properties Ltd v Singh Kalsi & another*](#) (1995) eKLR also captured the legal principle when its stated as follows;

“A preliminary objection 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.



20. Having considered the application, the preliminary objection and the rival submissions, I find that the issue that arises for determination is whether ELC No E028 of 2021 is a nullity and hence incapable of being transferred.
21. The applicant herein has called upon the court to find that Tawa law courts is the best placed court to hear the case as the subject matter is within its geographical jurisdiction. The applicant submitted that the trial court in its ruling delivered on January 18, 2022 directed that the matter be placed before the superior court for directions on transfer. In this regard, the applicant annexed the ruling delivered on January 18, 2022 in CMCC Makueni ELC No E020 of 2021. The respondent on the other hand argued that pursuant to the ruling delivered by the trial court, the suit became a nullity and hence incapable of being transferred to another court.
22. The power bestowed upon the High Court to transfer suits of a civil nature is provided for in section 18 of the *Civil Procedure Act* that stipulate thus:
- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage -
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) re transfer the same for trial or disposal to the court from which it was withdrawn.
 - (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”
23. At the onset, the applicant filed his suit in Makueni Chief Magistrate’s Courts. From the trial court’s ruling, it is clear that the defendant raised a preliminary objection that the trial court lacked territorial jurisdiction to hear and determine the matter. The court declined to dismiss the suit and instead directed the parties to move to a superior court to have the matter transferred to Tawa law courts. Having declined to dismiss the suit, it goes without saying that the suit is still alive. It is therefore not correct to state that the suit is a nullity and incapable of being transferred. It is not in dispute that the suit ought to have been filed before Tawa law courts.
24. Article 159 of the *Constitution* enjoins the court to administer justice without undue regard to technicalities. Similarly, sections 1A, 1B and 3A of the *Civil Procedure Act* enjoins the court to administer justice in a just, expeditious, efficient and effective manner. Filing the suit in Makueni law courts is a technical issue which should not affect the substance of the suit.
25. In the end, I find that the preliminary objection has no merit and the same is dismissed.

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HON. T. MURIGI



JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TERMS THIS 25TH DAY OF JANUARY. 2023.

IN THE PRESENCE OF: -

Court assistant - Mr. Kwemboi

Muthoki for the Defendant

Kithuka for the Applicant

