Muriithi (Suing on her own behalf and on behalf of the Estate of James Muriithi Kiumi) v Ngotho & 2 others (Civil Suit E003 of 2023) [2025] KEHC 3187 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3187 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E003 OF 2023

DKN MAGARE, J

FEBRUARY 25, 2025

BETWEEN

MERCY WAMBUI MURIITHI (SUING ON HER OWN BEHALF AND ON BEHALF OF THE ESTATE OF JAMES MURIITHI KIUMI) .... PLAINTIFF

AND

SIMON KARURI NGOTHO .... 1ST DEFENDANT

REGISTRAR GENERAL .... 2ND DEFENDANT

ATTORNEY GENERAL .... 3RD DEFENDANT

RULING

1. This is a ruling on the 1st Defendant's Notice of Preliminary Objection dated 8.3.2024 that is based on the following grounds:

    a. The suit is amorphous and does not disclose any cause of action.

    b. The suit is vexatious and an abuse of the court process.

    c. The suit is sub judice.

    d. The suit is time barred.

2. The Preliminary Objection was dispensed with by way of submissions.

Submissions

3. In the 1st defendant's submissions dated 19.7.2024, it was submitted that the suit was amorphous and disclosed no cause of action. He relied on Order 2 Rule 15 of the Civil Procedure Rules as follows:

> "At any stage of the proceedings the court may order to be struck out or amended any pleading on grounds that:-
>
> a. It discloses no reasonable cause of action.
>
> b. It is scandalous, frivolous or vexatious
>
> c. It may prejudice, embarrass or likely delay the fair trial of the action.
>
> d. It is otherwise an abuse of the court process.

4. The defendant submits that the suit should be dismissed as there is no cause of action that can be amended. He cited DT Dobie & Company vs Joseph Muchina & Another. Further, he relied on Paolo Murri v Gian Battista Murri & Another [2000] eKLR as follows:

> It seems to me that when that situation arises the comments of Lord Blackburn in Metropolitan Bank v Pooley (1885)10 App Cas 210 at 221, are applicable. He said that a stay or even dismissal of proceedings may 'often be required by the very essence of justice to be done'. The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear; and that is just this case. It is, I think, convenient now to turn briefly to consider if this is so.

5. The 1st Defendant submitted that the pleadings by the plaintiff have shown no cause of action to warrant an award of general damages or aggravated and exemplary damages. The object is to prevent parties from being harassed and put to the expense of frivolous, vexatious, or hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fall to the ground the moment the uncontested facts appear, and that is just the case. Reliance was also placed on the case of J.P Macharia T t/ A Machira & Company Advocates v. Wangethi Mwangi &Another [1998]eKLR. In that case the learned Judge cited the case of Dr. Murray Watson v. Rent-A-Plane Ltd and 2 others HCCC No. 2180 of 1994 where the learned Judge is recorded as saying that:

> "I need ask myself whether the amended plaint is scandalous. Now a pleading is not scandalous unless it alleges indecent, offensive or improper acts, omissions or motives against the adversary which are unnecessary in the proof of action pleaded."

6. The 1st defendant submitted that the suit was res sub judice as the issues pleaded in paragraphs 40, 41, 43, 45 and 46 of the plaint are still pending before a court with jurisdiction to determine them, and therefore, pleading them here is sub-judice since they are being dealt with in Karatina Civil Suit No. E005 of 2023, Mercy Wambui Muriithi v. Simon Karuri Ngotho and Another. To canvass res sub judice, reliance was placed on Kenya Banker's Association v. Kenya Revenue Authority (2019) eKLR.

7. The 1st Defendant also submitted that the suit was time barred as Section 2 of the Children's Act defined a child as: - an individual who has not attained the age of 18 years.

8. The Plaintiff filed submissions dated 4.11.2024, stating that this court has jurisdiction to determine the suit. She submitted that the preliminary objection was hinged on matters of evidence and, as such, did not meet the requirement under Mukisa Buscuits Manufacturing Company vs West End Distributors (1969) EA696.

9. Further, she submitted that the court had unlimited jurisdiction and included adoption matters. Reliance was placed on Article 165 (3) (a) of *the Constitution*. Lastly, it was submitted that the issues were contested and of an evidentiary nature that did not suit the determination by way of a preliminary objection.

Analysis

10. This claim questions the very essence of having courts and the matters that should be justiciable. Justiciability revolves around the question whether, a matter submitted to a tribunal or court ought to be heard by the court. To deal with a preliminary objection, the same should be in a manner that it disposes off the suit. It cannot be factual. A preliminary law, has to be on non-disputed facts in its constitution. It cannot be based on disputed facts or argumentative postulations. The court is not involved with questions of fact. In hearing a preliminary objection, this court proceeds on an understanding that what is pleaded is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

11. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus The Board Of Trustees of the Cashewnut Industry Development Trust Fund, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the Mukisa Biscuit case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

12. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd (supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969)EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....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.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

> " A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...."

13. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the 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, 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. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

14. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

15. The preliminary objection herein is based on the question whether a person can be held liable for orders in personum issued in a case they are not parties. I have to discern whether I have jurisdiction. The jurisdiction of this court is circumscribed under Article 165(3) of *the Constitution* of Kenya, which posits as follows: -

    (3) Subject to clause (5), the High Court shall have-

        (a) unlimited original jurisdiction in criminal and civil matters;

        (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

        (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

16. Before determining the Preliminary Objection on its merits, I have first to find whether the Preliminary Objection meets the test of what a preliminary objection is before venturing to determine its merit. The

locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

17. It is therefore my view that a preliminary objection must be based on current law, and be factual. The facts should not be disputed. It is paramount for this court to also discern whether the issues raised by the 1st Defendant in the Preliminary Objection can dispose of the Plaintiff's suit. They were stated as follows:

   a. The suit is amorphous and does not disclose any cause of action.

   b. The suit is vexatious and an abuse of the court process.

   c. The suit is sub judice.

   d. The suit is time barred.

18. The Plaintiff sought the following reliefs in the amended plaint dated 15.3.2023:

   a. A declaration that James Muriithi Kiumi (deceased) did not adopt the 1st Defendant.

   b. A declaration that Charity Muthoni Kiumi (deceased) did not adopt the 1st Defendant.

   c. A declaration that the 1st defendant has never been adopted within the meaning and application of the Adoption Act Cap. 143 of the Laws of Kenya (Repealed).

   d. A declaration that the 1st defendant is a lawful offspring and or progeny of Wilson Ngotho Kogi and Mary Nyambura Ngotho.

   e. A declaration that James Muriithi Kiumi (deceased) never assumed any parental responsibility (whether temporary or permanent) over the 1st defendant.

   f. A declaration that Charity Muthoni Kiumi (deceased) never assumed any parental responsibility, (whether temporary or permanently) over the 1st defendant.

   g. A declaration that the 1st defendant is not a beneficiary of the estate of Charity Muthoni Muriithi within the meaning of the *Law of Succession Act*.

   h. A declaration that the plaintiff is the only lawful offspring of James Muriithi Kiumi and Charity Muthoni Muriithi.

   i. An injunction be issued restraining the 1st defendant from masquerading, designating, titling, identifying, and passing off as an adopted son of Charity Muthoni Muriithi.

   j. An injunction be issued, restraining the 1st defendant from masquerading, designating, tilting, identifying, and passing off as an adopted son of James Muriithi Kiumi.

   k. An order directed to the 2nd Defendant to furnish this honourable court with a written status from the register of Adoption Orders of the purported adoption of the 1st Defendant.

   l. An order of general damages for loss, pain, and hardship against the 1st defendant.

   m. An order for aggravated and exemplary damages against the 1st defendant.

19. The matters raised in the suit pertain to the deceased in his person and are largely matters to be determined through the lenses of a succession suit. The preliminary objection thus raised points of law that are not blurred with factual details as to require evidence and which denies this court the jurisdiction even to determine the dispute in the suit herein. Justice Prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the 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, 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. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

20. There is no need to ascertain the facts as it is evident that the suit disposes of matters that the deceased is said to have owned and disowned. In the Tanzania Court of Appeal sitting in Dar Es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010),Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."

21. On locus standi, the matters alleged in the suit impute conduct on the part of the deceased while he was living. The tales of the dead are spoken through their representatives and not their beneficiaries or dependants. There is no Grant of Letters of Administration filed in court. It is therefore doubtful whether the Applicant has locus standi to sue in this suit.

22. The court is alive to the pending succession disputes involving the estate of the deceased but that alone does not automatically confer locus upon the Plaintiff in this suit. She needs letters of administration in order to represent the matters she asserts in this suit and in the absence of which she is not properly

before this court for want of a right to be heard. In Law Society of Kenya vs 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". Further in the case of Alfred Njau and Others ..Vs.. 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".

23. The first question is, what is the alleged cause of action? The plaintiff was suing through the estate of the late James Muriithi Kiumi. He is deceased. Who constitutes his estate and beneficiary is a matter solely within the domain of the Succession Act. Section 2(1) thereof provides as follows:

    (1) Except as otherwise expressly provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of, and shall have universal application to, all cases of intestate or testamentary succession to the estates of deceased persons dying after, the commencement of this Act and to the administration of estates of those persons.

24. Therefore to determine heirs of an estate, it can only be done through the succession proceedings. This court, sitting as a civil court cannot determine who heirs of the estate were. If transfers of land happened before the demise of the estate, that is not a question for this court.

25. The question of parental responsibility is irrelevant when it comes to adults beyond the age of 26. It is not a justiciable question. It is also unfathomable that a civil court can determine who is or is not a child of one person or another. The estate of Charity Muthoni Kiumi is the only one best placed to know its heirs. They may even decide to decline to inherit. The court cannot in proceedings of this nature, in absence of Wilson Ngotho Kogi and Mary Nyambura determine who the progeny are. This is a question for DNA and not for the court to determine.

26. The court cannot and should never declare heirs to any estate as a civil court. It is up to the heirs, if they so wish, allege and prove. The plaint lays no nexus between the plaintiff and Charity Muthoni Muriithi. I have perused the suit, and cannot find any cause of action. Even the claims for damages, are a ruse with no legs to stand on. The suit is a nullity and cannot be sustained. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

    > "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

27. It is true that the court should be cautious before striking out a suit. However, bogus and hopeless suits are anathema to administration of justice and must, ex debito justiceae be struck out. In D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR) the court of Appeal posited as follows:

    > "That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in

the statement of claim, or in such affidavits as he may file with a view to amendments." per Lindley L.J. ibi, p. 602. "It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution." Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419. "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219. "The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court." per Danckwerts, L.J. in Nagle v. Fielden (1966) 2 Q.B.D. 633 at p. 646.

28. In Trust Bank Limited v Amalo Company Limited [2002] eKLR, the court of appeal posited that the court is entitled to strike out frivolous pleading.

29. I will not venture into subjective as that is a question of fact. It is not a matter for a preliminary objection. The issue of the time bar does not arise from pleadings. It is equally a question of fact. There was no cause of action disclosed. Ipso facto, it is hard to know under which law the same was to be time barred.

30. Consequently, I uphold the preliminary objection and strike out the suit herein as untenable. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

31. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR as follows: -

    (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is

the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

32. The costs follow the event. The preliminary objection has succeeded. The suit is consequently struck out with costs of Ksh 85,000/= to the 1st Defendant. The file is closed.

Determination

33. The upshot of the foregoing is that I make the following orders: -

   a. This suit is struck out.

   b. The Defendant shall have costs of Ksh. 85,000/-.

   c. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by: -

No appearance for parties

Court Assistant – Michael

M. D. KIZITO, J.