



**Mbiti v Anthony & 2 others (Environment & Land Case E006 of 2022)  
[2023] KEELC 15793 (KLR) (21 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15793 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E006 OF 2022  
A KANIARU, J  
FEBRUARY 21, 2023**

**BETWEEN**

**NJIRU MBITI ..... PLAINTIFF**

**AND**

**DOMINIC NJERU ANTHONY ..... 1<sup>ST</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR, EMBU ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein would wish that this suit is dismissed with costs because it allegedly contravenes section 79(1)(b) of the *Land Registration Act* No 3 of 2012. It is the 2<sup>nd</sup> and 3<sup>rd</sup> defendants position that because of the alleged violation of Section 79(1)(b) (supra), this court is divested of jurisdiction to entertain the suit. To secure the dismissal that they desire, the 2<sup>nd</sup> & 3<sup>rd</sup> defendants first intimated their intention to raise a preliminary objection in their defence filed on March 8, 2022. They subsequently made good their intention by filing a notice of preliminary objection dated March 14, 2022 on March 15, 2023.
2. For a clearer perspective, I proceed to set out ipsissima verba the points on which the preliminary objection is hinged:
  - 1) That the suit expressly contravenes the provision of Section 79(1) (b) of the *Land Registration Act* No 3 of 2012.
  - 2) That the court lacks jurisdiction to entertain this suit and application (sic) for rectification as the plaintiffs (sic) ought to have first sought for rectification from the Land registrar before coming to this court.



3. As the suit is the target of the objection, it is necessary to have some peek at it. The suit is as follows: By a plaint dated February 7, 2022 and filed on February 9, 2022, the plaintiff impleaded the three defendants before this court averring, inter alia, that land parcels Nos MBETI/GACHURIRI/1267 and MBETI/GACHURIRI/1268 are his properties but are now currently registered in the names of 1<sup>st</sup> defendant who procured them 'through fraud, forgery and outright misrepresentation as the defendants acted in cahoots to cancel from the register the name of the plaintiff as the legal owner, effectively transferring the suit property to the 1<sup>st</sup> defendant using forged documents without the knowledge and consent of the plaintiff.'
4. The plaintiff therefore wants an order declaring the transfer of the suit properties to 1<sup>st</sup> defendant fraudulent; an order to rectify the land register to reflect the plaintiff as owner; an order authorizing the Land Registry to sign all necessary documents to effectuate change of ownership; cost of the suit and interests thereof; mesne profits; and/or other fit or just relief.
5. All the defendants filed their defences denying the plaintiff's claim.
6. The objection was canvassed by way of written submissions. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants submissions were filed on May 18, 2022. The 1<sup>st</sup> defendant did not file submissions but associated himself with the submissions filed by 2<sup>nd</sup> and 3<sup>rd</sup> defendants. In the submissions filed by 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the issues addressed relate to whether the court has jurisdiction to determine the suit; whether the objection has met the requisite threshold required for a proper preliminary objection; and whether the suit contravenes Section 79 (1)(b) of the [Land Registration Act](#) No 3 of 2012.
7. On whether the objection is a proper one as envisaged by law, reliance was placed on the case of [Dickson Ngige Ngugi Vs Consolidated Bank Ltd \[2020\] eKLR](#) which made reference to the case Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969]. Mukisa's case (supra) addressed itself to what a preliminary objection is, or should be. It was then submitted by 2<sup>nd</sup> & 3<sup>rd</sup> defendants that the preliminary objection before the court is a proper one as it 'is based uncontested facts and challenges the jurisdiction of the court to hear and determine the dispute which then satisfies the threshold set.'
8. On whether the suit contravenes Section 79(1) (b) (supra). It was submitted that it does as the plaintiff did not first exhaust the remedies provided. It was further submitted that the suit can only be resolved by the Land Registrar and that the matter is therefore prematurely before the court. On this issue too, the doctrine of exhaustion was invoked and the case of [Geoffrey Muthinja Kabiru & 2 others Vs Samuel Mugure Henry & 1756 others \[2015\] eKLR](#) was cited for guidance and/or persuasion.
9. The plaintiff's submissions were filed on September 12, 2022. Earlier on – that is to say May 4, 2022 to be specific – the plaintiff had also filed grounds of opposition in response to the objection. The grounds of opposition faulted the objection for not being based on pure points of law; for being based on facts that need to be investigated or ascertained; for muddling the issues and seeking to curtail the plaintiffs right to be heard; for being draconian, unconstitutional, and delaying speedy hearing of the suit; and finally for being 'incompetent, naïve, too pedestrian' and being 'an abuse of the court process.'
10. The submissions filed by the plaintiff seem to proceed on the basis that all the defendants raised objections. According to the plaintiff, the 1<sup>st</sup> defendant is said to have raised an objection to the effect that there is a pending suit between the parties over the same subject matter.
11. With tremendous possible respect, this is not the position. This point is raised in the 1<sup>st</sup> defendants defence but it was never brought forward as a preliminary objection. The submissions on this point are therefore redundant and/or superfluous. The rest of the submissions however are properly in response to the objection raised by the 2<sup>nd</sup> & 3<sup>rd</sup> defendants. According to the plaintiff, the objection



'is an attempt to justify, rationalize and accommodate the wrongful acts committed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants acting in concert to alienate the plaintiffs property contrary to the Constitution and the law'.

12. It was reiterated that the objection is based on facts that are contested and which therefore would require proof through evidence. On whether the suit violates Section 79(1)(b) of the Land Registration Act No 3 of 2012, the 2<sup>nd</sup> & 3<sup>rd</sup> defendants were said to have misapprehended the plaintiffs pleadings and the applicable substantive and procedural law relating to rectification of register at the instance of the Land Registrar. According to the plaintiff, that provision relates to only a minor error and mutual consent of both parties is also required. The plaintiff in this matter was said to be seeking more than mere rectification. He is seeking also cancellation of title and an order for reinstatement of himself as the registered owner.
13. The plaintiff also submitted that this court has jurisdiction to hear the matter. To the plaintiff, it is the Land Registrar, not the court, who lacks jurisdiction. To drive his point home, the plaintiff cited the cases of Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Company Ltd [1969] EA 696, Oraro Vs Mbaja [2005] 1 KLR 141, and Foundation & Another Vs East Africa Partnership Ltd & Another [2012] eKLR.
14. I have considered the objection as raised, the response made, rival submissions, and the pleadings on record generally. The nature of a preliminary objection was well captured in the locus classicus case of Mukisa Biscuits Co Ltd Vs West End Distributors Ltd [1969] EA 696 as follows:

Per Law JA:

' So far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration'

Per Sir Charles Newbold P:

' A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is on the assumption that all the facts pleaded by the other side are correct. It can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

15. The position expressed in Mukisa's case (supra) has been followed in a long line of cases including Muiruri Vs Kimemia [2002] 2 KLR 197 and Kiprono Vs Sirma [2005] 1 KLR 197. In these two cases, the court expressed itself almost word for word in the fashion of Sir Charles Newbold in Mukisa's case (supra).
16. In the matter at hand, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are of the view that the plaintiff should have first gone to the Land Registrar's office to urge for rectification of registrar. To the two defendants, by-passing that step and coming to court directly makes the plaintiffs case in court an improper one and it also divests the court of jurisdiction to hear the case. I have looked at Section 79 of the Land Registration Act No. 3 of 2012. It is about instances where the Land Registrar can order rectification of registrar and the matters incidental to such rectification. The particular provision said to be contravened by the plaintiff – Section 79(1)(b) – provides for rectification with the consent of all affected parties.



17. Section 79 as a whole is about what the Land Registrar can do. It speaks to the registrar, not to the parties. Any reference to the parties is secondary to the primal role given to the registrar to rectify the register. Such reference is only made in the context of facilitating or enabling the registrar to rectify the register. As regard the particular provision said to be contravened by the plaintiff, the affected parties are required to have entered into a consent. It is that consent that enables the registrar to rectify the register. A critical omission in the submissions of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is failure to state whether such consent existed to enable the plaintiff to go to the Land Registrar for rectification. It appears plain to me that such consent did not exist. That being the position, it is lost on me how anybody can fault the plaintiff for not going to the Land Registrar first.
18. The 2<sup>nd</sup> & 3<sup>rd</sup> defendants also submitted that the objection is based on uncontested facts. With respect, it is not very much so. The suit is generally based on fraud. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a defence on March 8, 2022 denying the fraud. The 1<sup>st</sup> defendant's defence filed on March 22, 2022 is also not an admission of the suit. And if, per chance, what is deemed uncontested is the fact of the plaintiff not going to the Land Registrar first before coming to court, it is very clear from the plaintiff's submissions that he does not believe that he needed to go to the Registrar first before coming to court. The question still remains: what is uncontested? And by whom is it not contested? The truth of the matter is that the objection is not based on plain or uncontested facts. It is also clear that it is based on a mis-apprehension of the context in which Section 79(1)(b) of the [Land Registration Act](#) should apply.
19. The plaintiff on his part submitted that the objection is not based on points of law. The first limb of the objection is about non-compliance with a clearly stated provision of law. The second limb of the objection is about lack of jurisdiction. These two are pure points of law. In other words, an averment that a particular legal provision is violated or contravened is a pure point of law. An allegation that the court does not have jurisdiction is also a pure point of law. The submission by the plaintiff therefore 'That the defendant's preliminary objection is legally untenable as it is not premised on a pure point of law' is fallacious. But the point made by the plaintiff 'That the preliminary objection raises arguable factual issues that need to be investigated and ascertained by the court before arriving at a determination on the merit is in my view generally sound. This is so because all the crucial facts forming the backbone or core of the case are controverted.
20. It is generally accepted in law that a proper preliminary objection is one that is based on pure points of law and based on uncontested, admitted, and/or incontrovertible facts. It is this second requirement that makes me make a finding, which I hereby do, that what is before me is not a proper preliminary objection.
21. It is also necessary to take a broader view of the matter. The Land Registrar is a party in this suit. A look at the plaint filed by the plaintiff shows clearly particulars of fraud attributed to him. A question then arises whether the plaintiff can be faulted for not appearing before a party whom he views as a wrongdoer. A question further arises as to whether the Land Registrar can, in the context of this case, be seen as a neutral arbiter in a matter between 1<sup>st</sup> defendant and the plaintiff. In this regard, it is necessary to appreciate that the plaintiff has pleaded that the defendant – Land Registrar included - acted together to deprive him of his land. Seen in this context, it seems to me rather unfair to insist that the plaintiff should have gone to a person who did not appear neutral or impartial to him.
22. I need to emphasize also that the main desire of the court is always to hear and determine cases on the merits. This position was clearly stated by the court of appeal in the cases of [Peter Ngugi Kabiri Vs Esther Wangari Githinji & Another \[2015\] eKLR](#) and [Kutima Investments Limited Vs Muthoni Kihara & Another \[2015\] eKLR](#). In these two cases, the court of appeal emphasized that it is a fundamental right for the parties to be heard on merits.



23. The upshot, when all is considered, is that the preliminary objection herein is for dismissal. I hereby dismiss it with costs to the plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21<sup>ST</sup> DAY  
FEBRUARY, 2023.**

In the presence of

M/s Jeptebkeny for Kiongo for 2<sup>nd</sup> & 3<sup>rd</sup> defendants;

Njage Wanjeru (absent) for 1<sup>st</sup> defendant and

Kipkoech (absent) for plaintiff

Court assistant: Leadys

**A.K. KANIARU**

**JUDGE**

