



REPUBLIC OF KENYA



**KENYA LAW**  
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**Riro v Kahonge & 3 others (Environment and Land Miscellaneous Application  
E077 of 2022) [2023] KEELC 16433 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16433 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E077 OF 2022  
OA ANGOTE, J  
MARCH 16, 2023**

**BETWEEN**

**DR SOLOMON MATIKO RIRO ..... APPLICANT**

**AND**

**PATRICK KAHUGI KAHONGE ..... 1<sup>ST</sup> RESPONDENT**

**FABIAN KIMIRI MWAURA ..... 2<sup>ND</sup> RESPONDENT**

**LUCY MELANY WANJIRU KAHONGE ..... 3<sup>RD</sup> RESPONDENT**

**SAMSON ALEXANDER MWICIGI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the respondents' preliminary objection dated June 6, 2022 in which they have averred that:
  - a. There is no suit properly filed before the court for determination.
  - b. The present miscellaneous application ELC No E077 of 2022 has been commenced through unprocedural means and thus is fatally defective and incapable of obtaining the orders sought. The orders sought are hanging in the air and therefore unavailable.
  - c. The application before the court is a clear contravention of article 159 of the *Constitution*, sections 1A, 1B and 19 of the *Civil Procedure Act* and order 3 rule 1 of the *Civil Procedure Rules* for commencement of a suit and should therefore be rejected.
  - d. The miscellaneous application ELC no E077 of 2022 is fatally defective, incompetent, bad in law and should be struck out with costs to the applicant.
  - e. The application is an abuse of the court process.



2. The preliminary objection proceeded by way of written submissions. The respondents, relying on the cases of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 and *Avtar Singh Bhamra & Another vs Oriental Commercial Bank*, Kisumu High Court Civil Case no 53 of 2004, submitted that the preliminary objection meets the required threshold as it has been filed before judgement and it raises a point of law.
3. Relying on section 19 of the *Civil Procedure Act*, Order 3 Rule 1 of the Civil Procedure Rules and the case of *Peter Mwema Kaboro vs Benson Maina Githethuki* [2005] eKLR, the respondents submitted that the present suit is seeking a civil remedy and should have been commenced as prescribed by the law. It was averred that the Notice of Motion on record is not accompanied by a Plaint. Consequently, the application is defective.
4. On the other hand, while relying on the cases of *David Nyekorach Matsanga & another vs Philip Waki & 3 Others* [2017] eKLR and *Hassan Ali Joho & Another vs Suleiman Said Shabbal & 2 Others* [2014] eKLR, the applicant submitted that the preliminary objection is not meritorious as there was no point of law raised nor arising by implication from the pleadings. The applicant submitted that the respondents just threw sections of the law around without supporting them with evidence.
5. The applicant argued that Section 19 of the Civil Procedure Rules does not create a monopoly on how suits should be instituted and that where there is no action being enforced, a litigant can approach the court for orders by way of a miscellaneous application. Additionally, the Applicant submitted, this court has jurisdiction in this matter as it is a land matter and the Court’s jurisdiction had not been ousted by an arbitration clause.
6. The Applicant submitted that he is seeking to protect a fundamental right; and that the Court should look at the substance of the suit as opposed to the form as per Article 259 of the *Constitution*.
7. The definition of a Preliminary Objection was set out as follows in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696:
 

“So far as I’m aware, 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.”
8. The point of law raised by the Respondents is that there is no substantive suit on which the Applicant’s application is hinged. The Respondents have averred that the Applicant is trying to commence a suit in a manner that is unprocedural. On the other hand, the Applicant has averred that it is possible to approach the Court for orders using a miscellaneous application without filing a substantive suit.
9. Section 19 of the *Civil Procedure Act* provides:
 

“Every suit shall be instituted in such manner as may be prescribed by rules.”
10. Order 3 Rule 1(1) of the Civil Procedure Rules provides as follows:
 

Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.



11. Dealing with a similar issue, the Court in the case of *Norah Ndunge Henry & another vs Abednego Mutisya & Another* [2022] eKLR stated as follows:

“The issue for determination is whether a party can seek to enforce a right through a miscellaneous application. The Applicant has sought for restraining and eviction orders against the Respondents herein. .... 8. As a general rule, suits are instituted by way of a Plaint unless the rules prescribe any other manner. Order 3 Rule 1 of the Civil Procedure Rules stipulates that: -

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.”

9. Similarly, Section 19 of the *Civil Procedure Act* provides that: -

“Every suit shall be instituted in such manner as may be prescribed by the rules.”

10. For an action for injunction to succeed, the Applicant should adhere to the provisions of Order 40 Rule 1 of the Civil Procedure Rules which provide that an application for restraining orders must be anchored in a suit. It is therefore clear that, for the Applicant to seek for the above orders, there must be in existence a suit upon which this application can be hinged on.”

12. In the impugned application, the Applicant is seeking injunctive orders against the Respondents. However, the application is not based on any substantive suit. Consequently, and based on the foregoing sections of the law, it is clear that the application is defective as the Applicant is seeking orders where there is no substantive suit.
13. A suit can only be commenced by way of a miscellaneous when all that a person wants is an order of court where the rights of the parties are not in contention, and where the discretion of the court is being sought or a procedural issue is sought to be endorsed.
14. This is permissible where all that the party wants is a mere order from the court which does not settle any rights or obligations of the parties. Where there is a call to adjudicate on rights of parties, then it must be said that there is a “civil action” which must be commenced in the manner prescribed by the Rules, and not a miscellaneous application.
15. The Applicant’s application is not seeking for leave or order from the Court to do a certain thing. It is seeking for the Court to adjudicate on the parties’ rights with respect to injunctive orders. It should therefore be hinged on a substantive suit which must be commenced by a Plaint or Originating Summons or Petition as the case may be.
16. Based on the foregoing, I find that the Preliminary Objection has merit. There is no suit properly filed as required by law. For those reasons, the Applicants suit is struck out with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16<sup>TH</sup> DAY OF MARCH, 2023.**

**O A ANGOTE**

**JUDGE**

**In the presence of;**

**Ms Karungo holding brief for Gitau for Applicant**

**No appearance for Respondent**



**Court Assistant - June**

