



**Barnge'tuny v Deputy Registrar; Shirji & 9 others (Interested Party)
(Environment and Land Miscellaneous Application E035 of 2022)
[2023] KEELC 20238 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E035 OF 2022
JM ONYANGO, J
SEPTEMBER 28, 2023**

BETWEEN

OGLA JEMELI BARNGE'ETUNY PETITIONER

AND

DEPUTY REGISTRAR RESPONDENT

AND

VIRJI NARAN SHIRJI & 9 OTHERS INTERESTED PARTY

RULING

1. The Applicant filed an Application dated October 28, 2022 seeking orders for the unconditional release of her motor vehicle Registration No KAY 679T.
2. She also sought that the stay orders issued verbally by Hon. Justice Kibunja on September 19, 2022 be recorded.
3. The Application is based on the grounds set out on the face of the application and the Applicant's Supporting Affidavit sworn on October 28, 2022.
4. In the said, affidavit she avers that her motor vehicle registration NoKAY 679T was attached on October 26, 2022 by auctioneers without giving any valid reason. She alludes to a taxation which was fixed for hearing on October 31, 2022.
5. She contends that she is in need of the vehicle as she has back problems since she was involved in an accident.
6. In response to the application, the 1st and 2nd Interested parties filed a Notice of Preliminary Objection dated November 4, 2022 raising the grounds that the court lacks the jurisdiction to grant the orders



sought in the application as the same can only be granted in the main suit which is ELC. Constitutional Petition No13 of 2021.

7. The background of this matter is that the Respondent filed suit against the Applicant vide ELC. Case No 157 of 2016 seeking an order of specific performance in respect of a land sale agreement over land parcel No Eldoret Municipality Block 13/886.
8. The case proceeded for hearing and a judgment was entered in favour of the Plaintiff. The Defendant was ordered to convey the suit property to the Plaintiff. Additionally, an injunction was issued, restraining the Defendant from interfering with the Plaintiff's title over the suit property. She was also ordered to pay the costs of the suit.
9. In yet another matter the Applicant herein filed suit against Respondent and other parties being ELC. Constitutional Petition No E013 of 2021. The said Petition was dismissed and the Respondent filed their Party and Party Bill of costs which was taxed at Kshs.260,446.68 in a Ruling delivered on September 2, 2022.
10. The Applicant's vehicle was therefore attached in execution of the Respondent's costs. Following the attachment of the Applicant's vehicle, the applicant filed the instant application vide ELC. Misc. Application No 35 of 2022 seeking the release of her motor vehicle and a stay of execution.
11. It is against this background that the Interested parties filed the Notice of Preliminary Objection. In response of the Preliminary, the Applicant contends that the application dated October 28, 2022 was erroneously placed in this file instead of ELC. Petition No E013 of 2021. She therefore prays that the application be transferred to the right court file. The court directed that the Preliminary Objection be canvassed by way of written submissions which I have considered.
12. The singular issue for determination is whether the Preliminary Objection should be allowed.
13. In the celebrated case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Ltd* (1969)E.A 696 the court defined a Preliminary Objection as follows;

“ A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all 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 disaction”
14. Counsel for the 1st and 2nd Interested Parties has submitted that the prayers sought by the Applicant cannot be granted in a Miscellaneous application as there exist substantive suits where the same ought to be canvassed. It is his contention that this matter is sub-judice and the instant application is an abuse of the court process.
15. Counsel has relied on the case of *John Mundia Njoroge & 9 Others Cecilia Muthoni Njoroge & Another* (2016) eKLR in which the court outlined the grounds which could form the basis of a Preliminary Objection as follows;
 - a. Lack of jurisdiction over the subject matter of the action or the person of the Defendant; improper venue, or improper form or service of a court summons or complaint
 - b. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
 - c. Insufficient specificity in a pleading;



- d. Legal insufficiency of a pleading (demurrer);
 - e. Lack of capacity to sue; non joinder of a necessary party or misjoinder of a cause of action and
 - f. Pendency of a prior action or agreement for Alternative Dispute Resolution.
16. It is not in dispute that there are existing suits between the Applicant and the 1st and 2nd Interested parties in which the Applicant was ordered to pay costs. In fact the Applicant has admitted that the Application was erroneously placed in this file. The confusion may have arisen because the Applicant has filed numerous applications both in this file and in the suits alluded to herein. It is evident that the application has no relation to the Miscellaneous Application dated 25th July, 2022.
 17. Although the Applicant has requested the court to transfer the application to the ELC. Petition NoE013 of 2021 the court's jurisdiction to transfer matters can only be invoked within the confines of Section 18 of the Civil Procedure Act.
 18. Transferring this application in its current form to another file would just create more confusion. It would have been expedient for the Applicant to withdraw the Application and file one in the correct file.
 19. In view of the foregoing I uphold the Preliminary Objection and strike out the application, I shall spare the Applicant the costs of the application.

Dated signed and delivered this 28th day of September, 2023

.....

J.M ONYANGO

JUDGE

In the presence of;

Mr. Kwame for the Interested Party

No appearance for the Applicant

Court Assistant: A. Oniala

ELC.MIS E035 OF 2022 RULING	0
------------------------------------	---

