



**Rudufu Limited v Keysian Auctioneers & another; Ein Geid Limited
(Interested Party) (Miscellaneous Application E013 of 2023)
[2023] KEELC 22030 (KLR) (6 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22030 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
MISCELLANEOUS APPLICATION E013 OF 2023
CG MBOGO, J
DECEMBER 6, 2023**

BETWEEN

RUDUFU LIMITED APPLICANT

AND

KEYSIAN AUCTIONEERS 1ST RESPONDENT

SBM BANK LIMITED 2ND RESPONDENT

AND

EIN GEID LIMITED INTERESTED PARTY

RULING

1. Before this court for determination is the Notice of Preliminary Objection dated 15th September, 2023 filed by the 2nd respondent in opposition to the validity of the miscellaneous application dated 23rd May, 2023 filed by the applicant on the following grounds: -
 1. That the plaintiff's application and suit herein offend the mandatory provisions of Order 3 Rule 1 and 2 of the *Civil Procedure Rules*, 2010 which require that a suit shall be instituted by way of a plaint, petition or an originating summons and therefore, there is no suit properly filed before this court for determination.
 2. That the present Miscellaneous ELC No. E013 of 2023 has been commenced through unprocedural means and thus it is fatally defective and incapable of obtaining the orders sought.
 3. That in the circumstances, and in the absence of a plaint, there is no substantive suit within the meaning of Order 3 Rule 1 and 2 of the *Civil Procedure Rules*, 2010, this therefore application is incurably defective, it would be a travesty of justice if this honourable court entertains it.



2. The Notice of Preliminary Objection was canvassed by way of written submissions. On 8th November, 2023, the 2nd respondent filed its written submissions dated 3rd November, 2023 where it raised one issue for determination which is whether the applicant's notice of motion offends the mandatory provisions of Order 3 Rule 1 and 2 of the [Civil Procedure Rules, 2010](#).
3. On this issue, the 2nd respondent submitted that the application is of a miscellaneous nature but the main prayers are naturally based on a plaint. Further, that the applicant is claiming proprietary interest in the suit property which essentially would call for the filing of a substantive suit together with an application. The 2nd respondent further submitted that there is no substantive suit to accompany the notice of motion due to the lack of all the requisite documents as stated in the application. In addition, that the impact of this in order to ensure that justice prevails, is to strike out the matter for want of a substantive suit. Further, that without a substantive suit, this court lacks jurisdiction to entertain this matter. The 2nd respondent relied on the cases of [Rajab Kosgei Magut versus Nuru Jepleting Choge](#) [2020] eKLR, [JP Machira T/a Machira & Co. Advocates versus Wachira Waruru & Another](#) [2007] eKLR, [County Government of Machakos versus Export Processing Zone Authority](#) [2015] eKLR and [Benson Makori Mwakworo versus Nairobi Metropolitan Services & 2 Others](#) [2022] eKLR.
4. On the 21st November, 2023 the interested party filed its written submissions dated 20th November, 2023. In its submissions, the interested party submitted that under Order 3 Rule 1 and Order 40 Rule 1 of the [Civil Procedure Rules](#), it is clear that for the applicant to seek the orders to prevent or overturn the alienation of the suit property by auction or otherwise, the application must be anchored in a suit. Further, that the mode of moving the court to stop or overturn transactions and acquire an interest in land is by institution of a suit and not by filing an application. The interested party relied on the cases of [Norah Ndunge Henry & Another versus Abednego Mutisya & Another](#) [2022] eKLR, [Kalyonge versus Karanja](#) (Miscellaneous Application E070 of 2021) KEHC 16174 (KLR) and [Joseph Kibowen Chemjor versus William C Kisera](#) [2013] eKLR.
5. By the time of writing this ruling, the applicant had not filed its written submissions.
6. Be that as it may, I have considered the preliminary objection and the written submissions filed by the 2nd respondent and the interested party and the issue for determination is whether the notice of preliminary objection has merit.
7. A Preliminary Objection was described in the [Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd](#) (1969) EA 696 to mean: -

Per Law, JA

“So far as I am 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. 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.”

Further Sir Charles Nebbold, P stated thus: -

“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 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.”

8. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

9. Having looked at what constitutes a preliminary objection, I am satisfied that the instant preliminary objection raises a pure point of law. Joseph Maingi filed a Notice of Motion Application dated 23rd May, 2023 which was accompanied by his supporting affidavit sworn on 22nd May, 2023. The applicant herein filed an amended application dated 9th June, 2023 sworn by Simon Ngigi Kimani. The initial application is only supported by documents which I believe the applicant intends to rely on the same in support of his case.

10. Section 19 of the [Civil Procedure Act](#) provides that: -

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

11. Further, Order 3 Rule 1 of the [Civil Procedure Rules](#) provides that: -

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

12. The application dated 23rd May, 2023 was seeking injunction orders against the respondents pending the hearing and determination of the application.

13. The law that governs applications for injunction is premised under Order 40 Rule 1 of the [Civil Procedure Rules](#) which provides as follows: -

“1. Where in any suit it is proved by affidavit or otherwise-

- a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
- b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



14. A reading of the above provision of the law points to the fact that any application for injunction ought to be anchored in a suit. Unfortunately, this was not the case. The applicant moved the court through a miscellaneous application and obtained ex parte orders pending the hearing and determination of the application.
15. Whereas this was a serious procedural mistake, I will not be quick to fault the applicant. The registry also had a role to play to the extent that the personnel manning the filing of this application would be diligent to notice the defects and issue instructions to the applicant informing him or its Advocate of the mistake.
16. As it is, the Notice of Motion application dated 23rd May, 2023 has no legs to stand on and the only order is for striking it out. The applicant is at liberty to file a proper suit to secure its rights under the law.
17. Arising from the above, the Notice of Motion dated 23rd May, 2023 is hereby struck out with costs to the 2nd respondent and the interested party. The orders issued on 12th June, 2023 are hereby vacated. Each party to bear its own costs. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 6TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

