



REPUBLIC OF KENYA



**Kimalel v Ombasa & another (Environment and Land Miscellaneous  
Application E257 of 2024) [2025] KEELC 4269 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 4269 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E257 OF 2024**

**TW MURIGI, J**

**MAY 30, 2025**

**BETWEEN**

**GILBERT KIMALEL ..... APPLICANT**

**AND**

**MOSES KIANGOI OMBASA ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 15<sup>th</sup> November 2024 brought under Section 18 and 19 of the [Land Registration Act](#) and Section 9 of the Magistrate Court Act, the Applicant herein seeks the following orders: -
  - a) Spent.
  - b) That an order of temporary injunction be issued restraining the 1<sup>st</sup> Respondent, his agents, proxies, employees, workers, undertakings or whomsoever acting under their instructions from undertaking, proceeding and/or continuing with the construction of the perimeter on their parcel of land known as L.R No. 209/10481/28 pending the hearing and determination of the boundary dispute by the Land Registrar.
  - c) That the Sub County Police Commissioner Langata and the Officer Commanding Police Division (OCPD) Langata Police Station through their agents, officers and permitted assigns ensure strict compliance with orders 2 and 3 above pending the hearing and determination of this application and boundary dispute by the Land Registrar.
2. In response to the application, the 1<sup>st</sup> Respondent filed a Notice of Preliminary Objection dated 7<sup>th</sup> March 2025 raising the following grounds: -



- a. That the prayers in the Notice of Motion application are devoid of substantive legal substratum are hollow and incapable of the jurisdiction and discretion of this Honourable court.
  - b. That the prayers amount to invitation of the Honourable court to summarily determine the rights attendant to the two distinct properties and ownership rights which the applicant has by conduct violated and or demonstrated intention to violate to the detriment of the 1<sup>st</sup> Respondent.
  - c. That the application is bad in law, incompetent, defective, devoid of legal substratum and thus incapable of being entertained and processed in its current format and substance.
  - d. That the application offends *the Constitution* and property rights of the 1<sup>st</sup> Respondent as enshrined under Articles 40 and 64 of *the Constitution* of Kenya 2010 and that the same can only be predicated on and or determined through substantive plaint or petition. Costs of the application be borne by the Plaintiff/Respondent.
3. The preliminary objection was canvassed by way of written submissions.

### **The 1<sup>st</sup> Respondent's Submissions**

4. The 1<sup>st</sup> Respondent filed his submissions dated 1<sup>st</sup> April 2025.
5. On behalf of the 1<sup>st</sup> Respondent, Counsel outlined the following issues for the court's determination: -
  - a. Whether an order of temporary injunction can issue in a Miscellaneous application?
  - b. Whether the Applicant has established a prima facie case for the grant of an injunction.
6. On the first issue, Counsel relied on Section 19 of the *Civil Procedure Act* and Order 3 Rule 1 of the Civil Procedure Rules to submit that an application for injunction must be anchored on a suit. Counsel further submitted that the instant suit is a non-starter and should be struck out with costs.
7. With regards to the second issue, Counsel submitted that an application for an injunction must be anchored on a substantive suit. According to Counsel, the application herein is incompetent as the orders sought cannot be granted in the absence of a suit.

### **The Applicant's Submissions**

8. The Applicant filed his submissions dated 18<sup>th</sup> March 2025.
9. On behalf of the Applicant, Counsel outlined the following issues for the court's determination: -
  - i. Whether the application has met the threshold for the grant of the orders sought.
  - ii. Whether the court has jurisdiction to hear and determine the application?
  - iii. Whether the preliminary objection by the Respondent is unmeritorious and an abuse of the court process?
10. On the first issue, Counsel submitted that the application has met the threshold for the grant of an injunction set out in the case of *Giella v Cassman Brown and Co Ltd* [1973] EA 358. Counsel relied on the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR to submit that the Applicant has established a prima facie case with a probability of success. Counsel further submitted that the Applicant has proved that the 1<sup>st</sup> Respondent has encroached on his parcel of land.



11. With regards to the second issue, Counsel submitted that this court has jurisdiction to hear and determinate the instant application. Counsel further submitted that the court has jurisdiction to grant the orders sought in the application pending the ascertainment of the boundary by the Land Registrar. To buttress this argument, Counsel relied on Article 165(6) and (7) of *the Constitution* and on the case of *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR and on the case of *Nancy Makoha Baraza v Judicial Service Commission & 9 others* [2012] eKLR.
12. On the third issue, Counsel submitted that the preliminary objection has not met the threshold set out in the case of *Mukisa Biscuits Co Ltd v West End Distributors* (1969) EA 696. It was submitted that the preliminary objection raises matters of fact which must be ascertained. Counsel further submitted that the dispute between the parties herein revolves around a boundary dispute between the two parcels of land. In conclusion, Counsel urged the court to dismiss the preliminary objection with costs.

### **Analysis And Determination**

13. Having considered the preliminary objection and the rival submissions, the issue that arises for determination is whether the preliminary objection is merited.
14. The law on preliminary objections is well settled. A preliminary objection must be on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of point of law which have 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.”

15. In *Oraro v Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows: -

“I think the principle is abundantly clear. A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

16. The Respondent contends that the instant application is incompetent since it is not filed within a suit.
17. The court is called upon to determine whether a party can seek to enforce a right through a miscellaneous application.
18. Section 19 of the *Civil Procedure Act* provides that:

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

19. Similarly, Order 3 Rule 1 of the Civil Procedure Rules provides as follows;

“Every suit shall be instituted by way of a Plaint or in any other manner that may be prescribed.”



20. In the case of *Joseph Kibowen Chemor v William C Kasera* [2013] eKLR the Court defined the filing of suits as follows;

“The word “suit” has several meanings. Black’s Law Dictionary defines “suit” as any proceedings by a party or parties against another in a court of law. Suit of a civil nature is defined to be a civil action.

A civil action is an action brought to enforce, redress, or protect a private or civil right.

Rules means rules and forms made by the Rules Committee to regulate the procedure of courts.

Pleadings include a petition or summons and the statements in writing of the claim or demand of any Plaintiff and of the defence of any Defendant thereto, and of the reply of the Plaintiff any defence or counter claim of a Defendant.

Section 2 of the *Civil Procedure Act* defines “suit” as all civil proceedings commenced in any manner prescribed under section 2 means prescribed rules.

Under section 19 of the *Civil Procedure Act*, every suit shall be instituted in such manner as may be prescribed by the rules. It will be observed that section 19 does not pretend that the Civil Procedure Rules have a monopoly on how suits may be instituted. It provides that suits may be instituted in the manner prescribed by the rules. There could be rules in other statutes on how proceedings may be commenced. For example, Probate & Administration Rules under the Succession Act prescribe how matters touching on succession of estates of deceased persons need to be instituted.

It means therefore that where a person is commencing a civil suit to enforce a civil action he needs to follow the prescribed rules.”

21. As a general rule, a suit can only be instituted by way of a Plaint, Petition or an Originating Summons. A Notice of Motion is not legally recognised as an originating process. It can only be filed within a suit. The Applicant is seeking an injunction pending the determination of a boundary dispute between the parties herein. The law that governs injunctions is founded under order 40 Rule 1 of the Civil Procedure Rules. Ordinarily, an injunction is granted pending the hearing and determination of a suit.
22. For the Applicant to seek injunctive orders, there must be in existence a suit upon which this application can be hinged on. It therefore follows that a Notice of Motion can only be filed within a properly instituted suit.
23. The record shows that the dispute between the parties herein revolves around a boundary dispute.
24. Section 18 of the *Land Registration Act* provides as follows: -
- (1) 1) Except where in accordance with section 20 it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any field plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
  - (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determine in accordance with this section.

It is clear from this provision that that disputes relating to boundaries should be determined by the land Registrar unless the boundaries are fixed.



25. The dispute between the parties herein relates to a boundary dispute. The dispute is pending before the Land Registrar for determination. The Plaintiff has invoked the jurisdiction of this court prematurely as he ought to have had the dispute determined by the Land Registrar before approaching this court.
26. In the case of Speaker of National Assembly v Karume [1992] KLR the court held that “Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed”.
27. Section 18(2) of the Land Registration Act prohibits courts from entertaining proceedings related to boundary disputes.
28. In the end I find that preliminary objection is merited. Consequently, the application dated 15<sup>th</sup> November 2024 is hereby stuck out with costs to the Respondent.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF MAY, 2025.**

.....

**HON. T. MURIGI**

**JUDGE**

In The Presence of;

Ms kwamboka for the 1<sup>st</sup> Respondent

Willy for the Applicant

Abdi – Court Assistant

