



REPUBLIC OF KENYA



**Kitumbi (Suing on Behalf of the Estate of the Late Kitumbi Nzavyu) v  
Mbukoni Holdings Company Limited & 3 others (Environment & Land  
Petition E025 of 2022) [2025] KEELC 4244 (KLR) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4244 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND PETITION E025 OF 2022**

**AY KOROSS, J**

**JUNE 3, 2025**

**BETWEEN**

**MARTIN NZIOKA KITUMBI ..... PLAINTIFF  
SUING ON BEHALF OF THE ESTATE OF THE LATE KITUMBI NZAVYU**

**AND**

**MBUKONI HOLDINGS COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT  
THOMAS M WAMBUA ..... 2<sup>ND</sup> DEFENDANT  
THE LAND REGISTRAR MACHAKOS ..... 3<sup>RD</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling seeks to determine the 3<sup>rd</sup> and 4<sup>th</sup> respondents' preliminary objection (PO) dated 24/02/2023, in which they raised the following grounds: -
  - a. The respondent's suit offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules as no cause of action has been disclosed against the 4<sup>th</sup> defendant.
  - b. The 3<sup>rd</sup> defendant has been erroneously joined in the suit in clear disregard of the doctrine of privity of contract.
  - c. The plaintiff's suit is incompetent, defective, misconceived, frivolous and vexatious.
  - d. That the 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents have been wrongfully joined as parties to the suit.



2. Despite clear directions from the court, none of the parties filed written submissions; thus, the case was reserved for ruling today. This court has considered the PO, and the singular issue for determination is whether the PO met the legal threshold and whether its grounds are merited.
2. The precedent-setting case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696* has long settled the principles of POs in the following manner:

“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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”
2. As affirmed by paragraph 21 of the Supreme Court of Kenya decision of *Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)*, a PO serves two purposes of merit: firstly, as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, in its public cause, it spares scarce judicial time, so that time is committed only to deserving cases of dispute settlement.
2. Accordingly, it is inappropriate for a party to resort to POs as a sword, for winning a case instead of having the dispute resolved judicially, and on the merits.
2. The tests to be applied are 3, namely, the PO raises a pure point of law, there is a demonstration that all the facts pleaded by the other side are correct, and lastly, the facts need not be ascertained. On application of these principles on the PO, it emerges that the 3<sup>rd</sup> and 4<sup>th</sup> defendants’ points of law challenge the competency of the suit against them for the reason that no cause of action has been shown, or the doctrine of privity of contract does not apply to them.
2. Having considered the ingredients of *Mukisa* (supra), it is my finding that though the PO as raised can dispose of the motion, it does not meet the threshold of a PO as the PO has raised matters of facts that have to be ascertained such as whether the particulars of fraud have been proved against the 3<sup>rd</sup> defendant. As for the 4<sup>th</sup> defendant, it represents certain public entities in court cases.
3. The 3<sup>rd</sup> and 4<sup>th</sup> defendants have filed a defence dated 22/03/2022 denying the allegations made against them. These facts are liable to be contested, call for the adduction of evidence to prove it, and consequently, this court finds it does not meet the threshold of *Mukisa* (Supra). Having failed to meet the threshold, the court hereby dismisses the PO dated 24/02/2023 with costs being in the cause.

Orders accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 3<sup>RD</sup> DAY OF JUNE, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr Kuria for 3<sup>rd</sup> and 4<sup>th</sup> defendant



N/A for plaintiff

Ms Kanja- Court Assistant

