



Cheruiyot v Onsando & another (Environment and Land Miscellaneous Application E010 of 2024) [2025] KEELC 3737 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEELC 3737 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2024**

MN MWANYALE, J

MAY 8, 2025

BETWEEN

GABRIEL CHERUIYOT APPELLANT

AND

RICHARD ONSANDO 1ST RESPONDENT

ABEL MORONGA ONSANDO 2ND RESPONDENT

RULING

1. This Ruling relates to the Notice of Preliminary Objections dated 11 /11/2024 filed by the Respondents in respect of the Notice of Motion Application dated 5th November 2024. The P/O is premised on the following grounds that:
 - i. The Plaintiff's/Applicants contravenes order 51 rule 4 of the Civil Procedure Rules 2010.
 - ii. The Application offends section 7 of the Civil Procedure Act as it is Res judicata.
 - iii. The application is an abuse of the court process, being misconceived, malicious, vexatious, and an embarrassment to the court and the Respondents.
 - iv. The application is meant to delay justice in the execution proceedings of the Judgment arising out of Kilgoris CM EL NO. 36 OF 2018
 - v. The Applicant is out to misuse the discretionary powers of the court which should be used judiciously.
 - vi. The Application has not met the threshold set out in order 42 rule 6 of the Civil Procedure Rules the suit filed on 2nd December 2024 is premature, a pure fishing expedition aimed at enhancing the ends of fraudulent dealings. it is an afterthought upon the declaration of the 1st respondent / defendant as the rightful owner thereby time barred



- vii. That court orders rulings and judgments are not made in vain they should be complied with first then seek redress later thus the Applicant has move d to court with tainted hands.
2. on the strength of the above the Respondents sough dismissal of the Application dated 11.11.2024
3. The hearing of the P/O was directed to be by way of written submissions which both parties filed and which the court has considered.

Issues For Determination.

4. Having analyzed the Notice of preliminary objection as well as the rival submissions by the parties, the authorities cited by the parties the court frames the sole issue for determination as follows,

Whether the Preliminary objection before court meets the threshold of a Preliminary Objection capable of determining the suit in limine?

Analysis And Determination.

5. The first, second and sixth grounds of the P/O that the application contravenes Order 51 rule 4 of the Civil Procedure Rules and offends Section 7 of the Civil Procedure Act as well as not meeting the conditions of Order 42 rule 6 are undoubtedly points of law, however the other grounds of the preliminary objection are factual narrations which should have formed either grounds of objection or depositions in the Replying affidavit.
5. The Court shall now consider whether the Preliminary objection as filed in this Matter meets the threshold of Preliminary Objections as was observed in the decision in the case of *In Mukisa Biscuit Manufacturer Limited vs Westend Distributors Limited*; the Court held in respect of a preliminary objection, that “so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as 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 acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”
6. Similarly in the decision in the case of *Omondi vs National Bank of Kenya Limited and 2 others*; as quoted in the decision of J. N. and 5 others vs Board of Management St. G. School Nairobi and Another where it was held that; “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.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
7. From the above excerpts a Preliminary Objection must no deal with issues of ascertainment of the facts and evidence. The issues of the delaying of the judgment as well as the abuse of the court process factual issues and not legal issues which requires examination of facts and evidence to be availed before court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence. It follows therefrom as drawn the preliminary objection fails to meet the threshold of a preliminary objection as this P/O involves ascertainment of facts through the rules of evidence and the P/O as drawn must therefore fail, as it hereby does, and the court shall not dwell on its merits or otherwise.
8. The court shall consider the issue of the application contravenes Order 51 rule 4 of the Civil Procedure Rules and offends section 7 of the Civil Procedure Act as well as not meeting the conditions of order



42 rule 6 as part of the response to the application dated 5.11.2024., that way it shall be possible to ascertain the facts and evidence.

9. The upshot is that the preliminary objection dated 11.11.2024 is hereby struck out with costs in the cause.

DATED AND DELIVERED AT KILGORIS THIS 8TH DAY OF MAY 2025.

HON. M.N. MWANYALE

JUDGE

