



CM Advocates LLP v Cole & Moikobu (Sued as the Administrators of the Estate of Josephine Eleanor Moikobu) & 3 others (Land Case (Originating Summons) E009 of 2025) [2025] KEELC 6583 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE (ORIGINATING SUMMONS) E009 OF 2025
OA ANGOTE, J
SEPTEMBER 30, 2025**

BETWEEN

CM ADVOCATES LLP APPLICANT

AND

ANDREW OMANDI COLE & OMAIYO MINDA MOIKOBU (SUED AS THE ADMINISTRATORS OF THE ESTATE OF JOSEPHINE ELEANOR MOIKOBU) 1ST RESPONDENT

BOYANI KERUBO MOIKOBU 2ND RESPONDENT

ST HANNAH'S PREPARATORY SCHOOL 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

RULING

Background

1. What is coming up before the court is the 1st and 2nd Respondents' Notice of Preliminary Objection dated 15th April, 2025 objecting to the present Originating Summons on the grounds that:
 - i. This Honourable Court lacks the requisite jurisdiction to entertain or enforce orders issued in ELC Suit No E015 of 2020, as it is not the court that issued the said charging order.
 - ii. The Originating Summons is fatally defective and incompetent, as it seeks reliefs including an inhibition arising from an order made in a separate suit without proper transfer, leave or compliance with procedural requirements under the Civil Procedure Rules.



- iii. Under Order 22 Rule 6 of the Civil Procedure Rules, execution or enforcement of a decree must be undertaken in the court which passed the decree, unless a formal transfer has been made which has not occurred in this matter.
- iv. That the entire suit is misconceived, frivolous, vexatious and an abuse of the process of this Honourable Court and ought to be struck out in limine.

Submissions

2. The Objection was canvassed by way of submissions
3. In support of the Preliminary Objection, the 1st and 2nd Respondents filed submissions on the 19th June, 2025. Counsel submitted that as explained in *Owners of Motor Vessel Lillian S vs Caltex Oil (Kenya) Ltd [1989] KLR*, jurisdiction is everything without which a decision by the court is invalid and unenforceable.
4. It was submitted that the Applicant herein was previously engaged as an Advocate for the 1st Respondent; that a dispute arose between them as regards the issue of legal fees and vide ELC Case No E015 of 2020, the Applicant sought a charging order over the suit property, L.R 1159/92 I.R 19925 now Nairobi/Block/47/367, Karen Mutuini in a bid to protect its interests, to wit the legal fees and that the orders were granted on the 20th December, 2022.
5. According to Counsel, a reading of Section 34(1) of the *Civil Procedure Act* as read with Order 22 Rule 6 of the Civil Procedure Rules makes it clear that unless a formal transfer has been undertaken as per Section 30 of the *Civil Procedure Act*, which has not been done herein, issues relating to execution of decrees must be resolved by the court that issued the decree.
6. Reliance in this regard was placed on the cases of *Eunice Grace Njambi Kamu & Anor vs Kenya National Highways Authority & 3 Ors[2022]KEELC 276(KLR)* and *Republic vs Chief Land Registrar & 2 Ors Ex-parte Regina Wamuyu Kany[2019]KEELC 3719 (KLR)*.
7. It was submitted that the Applicant by this Originating Summons is attempting to seek similar orders to those granted in ELC E015 of 2020 and the inclusion of the 3rd and 4th Respondents is an attempt to hoodwink the court that the same constitutes a new matter.
8. This, it was urged, constitutes abuse of court process which was defined by the court in *Muchanga Investments Ltd vs Safaris Unlimited (AFRICA) Ltd & 2 Others [2009] KECA 453 (KLR)* as the improper use of judicial power by a party in litigation to interfere with the administration of justice, which includes the institution of a multiplicity of actions on the same subject matter against the same opponent on the same issues, or a multiplicity of actions on the same matter between the same parties.
9. It was urged that the court has inherent jurisdiction to guard itself against abuse of its processes and should in this respect dismiss the Originating Summons. Reliance in this respect was placed on the cases of *Billy Ngongah vs Khan & Associates should, Civil Appeal No 104 of 2001*; *Richard Saidi vs Sambu Motors Civil Appeal No 9 of 1991* and *Arbthnot Export Services Limited vs Manchester Outfitters Nairobi HCC No 2252 of 1989*.
10. The Applicant filed submissions dated the 7th July, 2025. According to Counsel, the assertion that the Originating Summons has been filed in contravention of Order 22 Rule 6 of the Civil Procedure Rules is erroneous as the suit has not been filed merely in pursuit of execution or enforcement but seeks several remedies that can only be adjudicated vide the Originating Summons.



11. In particular, it was submitted, the Originating Summons seeks the invalidation of the transfer of the suit property to the 3rd Respondent on account of fraud and in breach of its rights as a creditor and holder of a charging order under Section 52 of the *Advocates Act* and the *Land Registration Act*. Further, their proceedings involve third parties who were not parties to the ELC Case No E015 of 2020.
12. It was submitted that in the case of *I & M Bank Rwanda Limited vs Atulkumar Maganlal Shah; Sameer Vipin Shah & another (Interested Parties)* [2021] eKLR, the court declined to entertain an application seeking cancellation of a title noting that the same can only be granted after full hearing of a Plaint or an Originating Summons. Reliance was also placed on the cases of *Miwani Sugar Mills Limited & another vs Crossley Holdings Limited & 2 Others* [2020] eKLR, and *Mwok & Another (Suing as Executors and Administrators of the Estate of Paul Mwok- Handa - Deceased) vs Arur* [2024] KEELC 4498 (KLR).
13. Similarly, it was urged, the Originating Summons falls within the provinces of Order 37 Rule 1 and 8 of the Civil Procedure Rules and as such, is rightfully brought. It was urged that the Preliminary Objection failed to appreciate the nature of the claim and the legal foundation on which it rests.
14. The 3rd Respondent indicated that they would not be participating in the Preliminary Objection.

Analysis & Determination

15. Having considered the Preliminary Objection, and the submissions thereto, the issues that arise for determination are:
 - i. Whether the Preliminary Objection is competent and if so?
 - ii. Whether the Preliminary Objection is merited?
16. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of *Mukisa Biscuits Manufacturing Co. Ltd. vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated 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. 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.”
17. Newbold, P further held:

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
18. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others* [2014] eKLR re-affirmed the principle as set out in the *Mukhisa Case*(supra) stating:

“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.”

19. The 1st and 2nd Respondents contend that this court lacks jurisdiction to entertain the present Originating Summons. They argue that the summons essentially seeks to enforce an order issued by a different court in contravention of Section 34 of the Civil Procedure Act and Order 22 Rule 6 of the Civil Procedure Rules.
20. Having considered the Originating Summons, it is indeed admitted therein that a charging order was issued in ELC E015 of 2020 together with injunctive/inhibition orders and there is an alleged breach thereof. As such, the issue before the court is simply whether, in the circumstances, this court is precluded from entertaining the Summons by virtue of the provisions of Section 34 of the Civil Procedure Act and Order 22 Rule 6 of the Civil Procedure Rules. This is a jurisdictional question, and guided by the Mukisa case(supra) is a pure question of law. The Preliminary Objection is well taken.
21. It is trite that jurisdiction is everything. This position was succinctly captured by Nyarangi, J.A. in Owners of Motor Vessel ‘Lillian S’ vs Caltex Oil (Kenya) Limited [1989] KLR 1 thus:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
22. Elaborating on the same, the Supreme Court in In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR) (20 December 2011) (Ruling) stated:

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.” The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”
23. By way of brief a background, the Applicant instituted the present Originating Summons on 17th February, 2025. The Applicant seeks, inter-alia, interim injunctive orders restraining the Respondents from any interference with the suit property- L.R. 1159/92 IR. 19925(converted to parcel Nairobi/



Block 47/367(Karen Mutuini) through Kenya Gazette Vol CXXIV-No 27 situate in Nairobi and registration of an inhibition order thereon.

24. The Applicant also seeks orders directing the 3rd Respondent to provide original records for the sale of the suit property being the original sale agreement, payment of stamp duty, consent to transfer and proof of payment of the purchase price, a declaration that the transfer registered in favour of the 3rd Respondent on the 30th March, 2022 is fraudulent, and its cancellation, and registration of the suit property in the name of the 2nd Respondent, the beneficiary, for purposes of registration of the charging order.
25. Finally, the Applicant seeks the issuance of a prohibition on the suit property pending the conclusion of the taxation proceedings and payment of all legal fees due and owing from the Estate of Josephine Eleanor Moikobu.
26. It is the Applicant's case in this regard that it acted for the Estate of Josephine Eleanor Moikobu in various legal matters that led to the securing of the title to the suit property which the estate was at risk of losing through fraud. Upon securing the property, the 1st Respondent failed to pay its legal fees constraining it to commence taxation proceedings and make an application for a charging order over the property, the estate's sole property under Section 52 of the *Advocates Act* in ELC E015 of 2020.
27. The charging order was granted on 20th December, 2022. Similarly, the court granted an injunction restraining any dealings with the suit property. The orders aforesaid were to subsist pending full satisfaction of the fees found due and owing to the Applicant and the issuance of an appropriate discharge from the court.
28. According to the Applicant, despite numerous attempts, it was unable to trace the file and register the charging order. It has since discovered that in total disregard of the prohibition, charging and injunctive orders, the 1st and 2nd Respondents being the administrator and the beneficiary of the suit property have proceeded to sell and transfer the property to the 3rd Respondent. It maintains that the aforesaid transfer is fraudulent and intended at defeating its rights as a creditor over the said property.
29. As aforesaid, the Applicant was granted a charging order over the suit property in ELC E015 of 2020. A charging order is a statutory lien granted under Section 52 of the *Advocates Act*, Cap 16, which enables an Advocate to secure his fees by way of a charge on property recovered or preserved through his legal services. It provides thus:

“Any court in which an advocate has been employed to prosecute or defend any suit or matter may at any time declare the advocate entitled to a charge on the property recovered or preserved through his instrumentality for his taxed costs in reference to that suit or matter, and may make orders for the taxation of the costs and for raising money to pay or for paying the costs out of the property so charged as it thinks fit, and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a bona fide purchaser for value without notice, be void as against the advocate: Provided that no order shall be made if the right to recover the costs is barred by limitation.”
30. The Applicant was also granted injunctive orders restraining interference with the suit property pending full settlement of fees found owing to it and discharge orders from the court.
31. It is the 1st and 2nd Respondents' position that the Originating Summons seeks orders whose nature is to enforce the orders issued in ELC E015 of 2020 and by virtue thereof, this court is divested of jurisdiction to entertain the same. On the other hand, the Applicant asserts that this matter has been properly brought.



32. The 1st and 2nd Respondents' Objection is premised on Section 34 of the [Civil Procedure Act](#) and Order 22 Rule 6 of the Civil Procedure Rules. For context, Section 34 of the [Civil Procedure Act](#) provides as follows:

- “(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
- (2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.”

33. Section 28 of the [Civil Procedure Act](#) clarifies that the provisions of this Act relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

34. On the other hand, Order 22 Rule 6 of the Civil Procedure Rules states:

- “(1) Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A:

“Provided that, where judgment in default of appearance or defence has been entered against a defendant, no execution by payment, attachment or eviction shall issue unless not less than ten days' notice of the entry of judgment has been given to him either at his address for service or served on him personally, and a copy of that notice shall be filed with the first application for execution.”

35. Indeed, a reading of the two provisions shows that the proper forum for determining issues relating to the execution, discharge, or satisfaction of a decree or indeed an order, is the court that issued the same, unless there has been transfer of the decree/order. Speaking to this, the court in *Waitiki v Muchena t/a Arimi Kimathi & Co. Advocates & another* (Civil Case E734 of 2021) [2025] KEHC 3720 (KLR) (Commercial and Tax) (26 March 2025) (Ruling) stated:

“In *South Nyanza Sugar Co. Ltd vs Alfred Sagwa Mdeizi t/a Pare Auctioneers*(2010)eKLR, Makhandia J, as he then was, held: - “Section 34 of the [Civil Procedure Act](#) strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law, the Learned Magistrate held that the applicant if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of Section 34 of the [Civil Procedure Act](#), this conclusion was clearly erroneous.” 22. From the foregoing, it is clear that the letter and spirit of section 34 of the [Civil Procedure Act](#) is that no independent suit should be initiated to canvass, ventilate or determine issues that



arise out of execution proceedings. All such issues should be ventilated in the suit in which the of execution arose.”

36. Further, the court in *Michael Oringo Alusi & 2 Others vs Jobson Salano Mulanda*[2016]eKLR persuasively stated that issues arising from proceedings anticipated under Section 34, however weighty, do not require the filing of a separate suit.
37. The court has keenly considered the pleadings. It is not in dispute that the Applicant, acting as Advocate for the Estate of Josephine Eleanor Moikobu, obtained an inhibition and thereafter a charging order and injunctive relief, all restraining interference with the suit property until payment of its fees.
38. However, it is admitted that that these orders were never registered against the title. It is also trite that the suit property has since been transferred to the 3rd Respondent in whose name it is currently registered.
39. Section 34 of the *Civil Procedure Act* and Order 22 Rule 6 of the Civil Procedure Rules provide that questions relating to the execution of a decree/orders must be determined by the court that issued it.
40. In this case, the core of the dispute stems from the enforcement of orders previously made in ELC E015 of 2020. The Applicant challenges the impugned transfer on the ground that it was effected in breach of those subsisting orders. While there are substantive issues concerning ownership, they are inextricably linked to the alleged violation of that earlier court’s orders.
41. As such, the court opines that entertaining the matter in this court would risk jurisdictional overlap and the possibility of issuing orders that conflict with those already made, or to be made, in ELC E015 of 2020. The prudent and proper course is therefore to leave the question of breach, and any consequential relief, to the court that issued the original orders.
42. In doing so, the rights of the now-registered proprietor, who was not a party to the original proceedings must be safeguarded. Article 40 of *the Constitution* protects the right to acquire and own property, and Section 26(1) of the *Land Registration Act* recognizes a registered title as prima facie evidence of ownership, defeasible only upon proof of fraud, misrepresentation, or unlawful acquisition.
43. Section 52 of the *Advocates Act* similarly provides that a transfer of property calculated to deprive the Advocate of his rights is void save for where there is a transfer to a bona fide owner. It is trite that any determination touching on the validity of such title must be made in proceedings where the proprietor is accorded a fair hearing.
44. Order 1 Rule 10(2) of the Civil Procedure Rules expressly empowers the court to amend pleadings or add parties at any stage of the proceedings, where it is necessary for the effective and complete adjudication of the matter. Courts have applied this principle to allow joinder of parties even after judgment to ensure that justice is done and orders are not rendered nugatory, as seen in *Mary Beach Limited vs Attorney General and 18 others* (2018) eKLR.
45. Accordingly, the appropriate course is for the registered owner to be joined in ELC E015 of 2020 so that he can be heard on the circumstances under which he bought the suit property, and whether this was in breach of the court’s orders, and the consequences thereof. This approach both preserves the integrity of the original proceedings and avoids the issuance of conflicting judicial pronouncements.
46. As to whether the summons falls within the province of Orders 37 Rules 1 and 8 of the Civil Procedure Rules and as such is properly brought, the court finds in the negative.



47. Order 37 Rule 1 of the Civil Procedure Rules permits executors, administrators, trustees, or persons claiming as creditors, devisees, legatees, heirs, or legal representatives of a deceased person, or as cestui que trust to take out an Originating Summons in respect of certain trust and estate matters. This are not the issues herein.
48. On the other hand, Order 37 Rule 8 of the Civil Procedure Rules is categorical that applications falling under the *Land Registration Act* apart from those falling under Part VII and Part VIII shall be made by Originating Summons. Part VII deals with restraints on dispositions including inhibitions which are sought herein.
49. As a consequence, this court declines jurisdiction over the present matter, and finds that the Preliminary Objection is well-founded and is hereby upheld.
50. The Originating Summons dated the 17th February, 2025 is hereby struck out with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH SEPTEMBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Njoki for 3rd Respondent

Ms Muange for 1st and 2nd Respondent

Ms. Njogu for Otunga for Applicant

Court Assistant: Tracy

