



**Golden Century Limited v Josef (Miscellaneous Application
E224 of 2024) [2025] KEELC 4397 (KLR) (12 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION E224 OF 2024**

**JG KEMEI, J
JUNE 12, 2025**

BETWEEN

GOLDEN CENTURY LIMITED APPLICANT

AND

PROF SCIBORSKI ROMUALD JOSEF RESPONDENT

RULING

(In respect of the Applicant's application dated 17/10/2024 and the Respondent's Preliminary Objection dated 28/10/2024 and the application dated 3/3/2025)

The Applicant's Application dated 17/10/2024

1. The Applicant's application is expressed to be brought under the provisions of Section 3A of the Civil Procedure Act, Order 40 Rules 3 and 7 and Order 51 Rule 1 of the Civil Procedure Rules, 2010. Principally, the Applicant seeks the following orders;
 - a. That this Honourable Court be pleased to order the Respondent to remove himself and/or any other person that he may have placed on from LR 3734/1478 Apartment No. B-004, Block B on the Ground Floor of Golden Century Apartment forthwith and in default the Plaintiff and or such person (s) be forcibly evicted and vacant possession be given to the Defendant.
 - b. That Betabase Auctioneers do effect and execute the above eviction orders.
 - c. That the OCS Kileleshwa Police Station, Kileleshwa Division, do offer security in ensuring compliance with the prayers above.
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of it and further supported by the Affidavit of Lan Xiao sworn on even date. The applicant has deposed inter alia that a dispute arose between the



parties herein over the sale of Apartment No. B-004, Block B on the Ground Floor Golden Century Apartments on LR No. 3734/1478, Othaya Road, Lavington, Nairobi (the suit property herein). That the dispute was referred to arbitration as provided in the agreement for sale over the apartment. Subsequently, the arbitral process was conducted by a sole arbitrator and a final Arbitral Award issued on 15/7/2023. The Arbitrator found the Respondent to be in breach of the Sale Agreement and ordered him to pay a sum of Kshs. 19,057,486/= or vacate the premises by 30/09/2023, failing which he would forfeit part of the purchase price and become liable for eviction.

3. The deponent avers that the Applicant being the successful party, filed an application being Misc. Cause No. E581 of 2022 seeking for recognition of the Award and issuance of a Decree to enable execution. That in turn, the Respondent also filed Misc. E068 of 2023 seeking to set aside the Arbitral Award. That both applications were heard together and determined in a Ruling dated 12/02/2024 in which the Court found the application for adoption and recognition of the Arbitral Award merited and dismissed the Respondent's application for setting aside the award. The deponent further enumerates other suits filed by the Respondent which were all dismissed in favour of the Applicant.
4. The deponent contends that as it stands, the Respondent has been in occupation of the suit apartment since 1/1/2022 to date without paying the license fee of Kshs. 120,000 per month which has accumulated to Kshs. 3,960,000/=. The Applicant accuses the Respondent of failing to pay costs of the numerous legal processes it has been subjected to as well as the refund of the Arbitral fees. That although the Respondent has made offers to vacate and pay license fee, he has not honored his promises hence he has no right to remain in occupation of the Apartment. He therefore ought to be evicted to effect the Arbitral Award and the Decree thereto hence the orders sought in the application.
5. The Respondent, Prof. Sciborski Romuald Josef, opposed the application vide the Replying Affidavit sworn on 28/10/2024 and a Preliminary Objection of the same date. The Applicant in rebuttal, filed a Further Affidavit sworn by Lan Xiao, its Director, dated 14/03/2025 in response to the assertions stated in the Respondent's Replying Affidavit.

The Respondent's Preliminary Objection dated 28/10/24

6. The Preliminary Objection is in respect of the Applicant's application date 17/10/2024. The ground for the objection is that;

“The application dated 17/10/2024 offends Article 50 of the Constitution and Order 3 Rule 1 of the Civil Procedure Rules to the extent that it is seeking an eviction order without according the Respondent a fair hearing by failing to file and serve him with substantive suit pleadings to be adjudicated in full hearing seeking the specific orders of eviction.”
7. The applicant opposed the Preliminary Objection vide the Replying Affidavit of Lan Xiao, the Applicant's Director dated 14/3/2025. The Applicant argues that the preliminary objection is misconceived, frivolous and an abuse of the court process. She asserts that the Applicant has properly instituted this application in accordance with the law.
8. The deponent denies the assertion that the Respondent has been denied a fair hearing is factually incorrect and misleading. The Applicant lists the previous matters in which the Respondent has been actively involved including the Arbitration proceedings, High Court in HCCOM ARB E068 of 2023 where the Arbitral Award was adopted and the Respondent's application to set aside was dismissed, ELC Misc. 12 of 2022 and ELC EPCC Case No. E008 of 2023 which were both dismissed for being res judicata. That the Respondent cannot claim that he has been denied a fair hearing.



9. She deposes that the Respondent's allegation that the main application for eviction is defective for lack of a substantive suit is baseless on the basis that the application falls under Sections 152A-152F of the Land Act, 2012. She contends that the instant Preliminary Objection fails the test of such as it raises issues of fact that require evidence. The Applicant urges the Court to dismiss the Respondent's Preliminary Objection with costs.
10. The Preliminary Objection was canvassed by way of written submissions. Both parties complied. The Respondent/Objector filed his submissions dated 3/04/2025 whereas the Applicant's submissions are dated 25/04/2025.
11. The Respondent submits that the main issue arising from the application and the Preliminary Objection is; Whether Eviction orders should be sought through Miscellaneous applications. The Respondent cites the provisions of Section 19 of the Civil Procedure Act which states that every suit shall be instituted in such a manner as may be prescribed by the rules. The Respondent further cites Order 3 Rule 1 which provides that every suit shall be instituted by presenting to the court or in such other manner as may be prescribed.
12. In view of the said provisions, the Respondent submits that it is trite law that miscellaneous applications should not be used to institute a suit. That an eviction order is inherently final in nature and as such cannot be sought through a miscellaneous application. He cites the case of Lynette Nasimiyu Wafula –vs- David Mwangi & 4 Others (2022) e KLR in which the Court upheld a similar objection and held that the Applicant ought to have commenced the suit by way of a Plaintiff.
13. In its joint submissions to both the application and the Preliminary Objection, the Applicant identifies two issues for determination. That is; whether the application violates Article 50 of the Constitution; and whether the Applicant is entitled to the eviction orders.
14. On the first issue, the Applicant argues that the Respondent has been duly served with the present motion and he has duly responded to it. Further, that these proceedings emanate from the lengthy arbitration proceedings where the Respondent participated and an Award was made in favour of the Applicant.
15. The Applicant contends that the Respondent was fully aware of the effects of non-compliance with the Arbitral Award which was his vacating the apartment for failure to pay the amounts required of him. That therefore, the Respondent cannot be heard to say that substantive pleadings have not been served upon him. It is argued that averments will amount to re-litigating the matter. It maintains that the Respondent is not a stranger to the proceedings hence he is not being condemned unheard.
16. As to whether, the Applicant is entitled to the eviction orders, the Applicant submits that the Respondent has continued to occupy the suit premises without any legal right in view of the Arbitral Award and the non-compliance thereto. The Applicant avers that Section 152E of the Land Act entitles the owner of the land to seek an eviction order where an occupier has no legal right to remain thereon. It is asserted that the applicant has established all the statutory preconditions for the grant of the order.
17. The Applicant submits that the requisite Notice to Vacate dated 31/10/2024 under Sections 152C, 152D and 152E of the Land Act has been served as evidenced in the Applicant's Supplementary Affidavit dated 14/03/2025. The Applicant cites the case of Kwinga & 4 Others –vs- Chai & Another (2024) e KLR, where the Court upheld that eviction orders could properly be granted via a miscellaneous application where the question of title or ownership was not in dispute.
18. The Applicant urges the Court to uphold the rule of law by enforcing its prior decree emanating from the Arbitration process and not to allow a purchaser who has not paid the purchase price to continue occupying the suit premises.



The Respondent's Application dated 3/3/2025.

19. The Respondent's application is expressed to be brought under the provisions of Section 3A and 3B of the Appellate Jurisdiction Act, Cap.9 of the Laws of Kenya and Rule 5 (2) (b) of the Court of Appeal Rules, 2010 seeking the following orders;
- a. Spent;
 - b. That pending the interpartes hearing of this application, the Honourable Court be pleased to issue orders to stay all proceedings and/or enforcement of the ruling and orders issued in ELCMISC E224 of 2024 on the 20th February, 2025.
 - c. That pending the hearing and determination of the appeal, this Honourable Court be pleased to issue an order setting aside the Reinstatement Orders/Directions delivered virtually on 20/02/2025 in ELCMISC APPLICATION NO. E224 of 2024 at the Milimani- Environment & Land Court.
 - d. That this Honourable Court be pleased to reinstate Orders of 5/11/2024 dismissing the Applicant's application dated 17/10/2024 in ELCMISC APPLICATION No. E224 of 2024 and further dismiss the Respondent's Notice of Motion application dated 7/11/2024.
 - e. The costs of the application.
 1. The application is premised on the grounds on the face of it and further supported by the Affidavit of Prof. Sciborski Romuald Josef, the Applicant herein, sworn on 3/3/2025. The Applicant avers that vide the Ruling delivered on 20/02/2025, the Learned Judge reinstated the application dated 17/10/2024 which had been dismissed on 5/11/2024.
 2. He contends that the application had been lawfully dismissed as the Respondent had been duly served with a hearing notice but failed to attend court. He contends that the reason advanced by the Respondent's Counsel for non-attendance of Court is vague and a calculated afterthought to circumvent due process of the Court. He faults the Court of failing to appreciate that the Respondent's conduct amounted to inexcusable negligence and blatant indolence.
 3. The deponent contends that the reinstatement of the dismissed application has subjected him to unwarranted legal uncertainty, substantial financial prejudice and irreparable harm. He states that the impugned Ruling has reopened issues that had been conclusively determined, contrary to the doctrine of finality in litigation. He asserts that the Honourable Court misdirected itself by exercising its discretion in favour of the Respondent without any sufficient or credible justification thus occasioning a miscarriage of justice. He avers that he has lodged an appeal and that unless the impugned Ruling is set aside, he shall continue to suffer undue anxiety, substantial financial loss and unjust deprivation of the fruits of a lawfully obtained decision.
 4. The Applicant opposed the application vide the Replying Affidavit dated 14/03/2025 sworn by Lan Xiao, the Applicant's Director. The deponent contends that the Respondent has moved this Court vide the Court of Appeal Rules which are not applicable to this Court hence the application is a non-starter.



5. In further response thereof, the Applicant avers that setting aside the orders issued on 20/2/2025 and reinstating the dismissal orders amounts to this court sitting on its own appeal hence the orders sought cannot be granted. The deponent further avers that the Respondent is keen on using every available method to prevent the full hearing of the substantive application and this conduct is denying them justice by filing different matters listed thereon.
6. She deposes that the current proceedings seeks to effect the Judgment of the court in Misc. No. E581 of 2022 dated 12/02/2024, that recognized the Arbitral Award settling the issues between the parties. She argues that the Respondent cannot continue to reside on the suit property without any colour of right and without ownership and in total defiance of a court order in such a manner as to necessitate the court proceedings for eviction. That the instant application is yet another attempt by the Respondent to waste judicial time and frustrate the Applicant from enforcing its rights. The application should therefore be dismissed with costs and the Applicant's for eviction be heard on merit.
7. The Respondent identified two main issues for determination is support of the application; whether the Applicant has met the threshold for granting a stay of execution and; whether the appeal would be rendered nugatory should stay be denied.
8. On the first issue, the Respondent submits that for stay of execution to issue, an applicant must satisfy two conditions being that; the appeal must be arguable and not frivolous and that the appeal shall be rendered nugatory if stay is not granted. The Respondent argues that the appeal is premised on fundamental tenets of procedural fairness, finality in litigation and the equitable doctrine that no party should benefit from its own indolence. That the reinstatement of the Applicant's application undermines the integrity of judicial processes and that courts should not indulge parties who exhibit lethargy and procedural laxity. That the reinstatement amounts to an abuse of judicial discretion and a travesty of procedural justice.
9. As to whether the appeal would be rendered nugatory should stay be denied, the Respondent submits that the intended appeal is not only arguable but has high chances of success as it challenges the exercise of judicial discretion in favour of a party that failed to diligently prosecute its case. Further, that the appeal will be rendered nugatory as the reinstatement order will have already exposed the Appellant to unnecessary legal proceedings. That the Applicant shall not suffer any prejudice should the stay be granted as it would merely preserve the status quo until the appeal is determined. That the application is not frivolous as it seeks to prevent an injustice occasioned by the trial court's erroneous ruling.
10. As for the doctrine of finality in litigation, the Respondent cites the case of Florence Nyaboke Machani –vs- Mogere Amosi Ombui & 2 Others (2024) eKLR where the Court held that courts should not indulge litigants who exhibit procedural lethargy. The Respondent urges the court to allow the application in the interest of justice.
11. In opposition to the application, the Applicant identified the issues for determination as follows;
 - a. Whether the Respondent has met the legal threshold for granting a stay of proceedings



- b. Whether the Respondent’s application is capable of being granted by this court
 - c. Whether the Respondent’s conduct amounts to deliberate delay tactics warranting dismissal of the application.
12. I will not belabor summarizing the Applicant’s submission on the first issue as the prayer for stay of proceedings is spent.
 13. On the second issue, the Applicant submits that the Respondent’s application is fatally defective as it invites this Court to reconsider, review or overturn its own orders without following the proper legal channels. That this violates the well-established doctrine of *functus officio*, which limits a court’s jurisdiction after it has issued a final decision. That a court cannot revisit a matter it has determined unless through a properly filed appeal or review.
 14. The Applicant argues that court having made its ruling that the suit be reinstated, the court cannot set aside its own ruling unless under an application for review. That the application is therefore incompetent. Counsel cites the Court of Appeal case of Charles Mwangi Gitundu –vs- Charles Wanjohi Wathuku (2021) Eklr where it was stated that;

“.....this court cannot hear and determine an application similar to a similar one it had dealt with earlier. It is trite law that this Court cannot sit on appeal of its own ruling or judgement for it already determined the issue of stay in its ruling delivered on....”
 15. As to whether the Respondent’s conduct amounts to deliberate delay tactics warranting dismissal of the application, the Applicant submits that the Respondent’s conduct in the present case constitutes a deliberate abuse of the court process. That the Respondent is keen on frustrating the enforcement of valid court orders by filing multiple applications (which were dismissed), failing to comply with court orders and using procedural loopholes to frustrate justice.
 16. Further, that the instant application was served outside the required timelines as a tactic to ambush the Applicant and delay the determination of the main application. That the Respondent cannot be allowed to benefit from his own procedural misconduct. The Applicant cites the case of Shimmers Plaza Limited –vs- National Bank of Kenya Limited (2015) eKLR where it was held that; “... a party who refuses to obey court orders should not be allowed continue litigating before the same court whose orders they are in contempt of.”

Analysis and Determination

17. Having considered the instant application, the responses by the Respondent and the submissions filed, the issues for determination in the court’s opinion are:
 - a. Whether the Preliminary Objection dated 28/10/2024 by the Respondent meets the fundamental threshold of a preliminary objection.
 - b. Whether a Miscellaneous Application is the proper way of initiating a suit as the instant one seeking substantive and final orders.



- c. Whether the Respondents application dated the 3/3/25 is merited
- d. Who meets the costs of the applications and the Preliminary objection?

A. Whether the Preliminary Objection dated 28/10/2024 by the Respondent meets the fundamental threshold of a preliminary objection

- 18. I will therefore start with the Preliminary Objection before determining the application depending on the outcome of the objection.
- 19. What constitutes a Preliminary Objection was discussed in the case of Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 Others SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case Mukisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A where the Court of Appeal said that:

“...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 need to be ascertained or if what is sought is the exercise of judicial discretion.”
- 20. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection can only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.
- 21. The Preliminary objection herein challenges the manner in which the suit was commenced which is legally provided and the right to be heard. In my view, these are pure points of law as they do not require the court to examine the facts of the case to make its determination.

B. Whether a Miscellaneous Application dated the 17/10/14 is the proper way of initiating a suit as the instant one seeking substantive and final orders

- 22. Order 3 rule 1 of the Civil Procedure Rules, 2010 as cited by the Respondent, prescribes the form and manner of institution of a suit. In the case of Scope Telematics International Sales Ltd –vs- Stoic Company Ltd & Another [2017] eKLR, the Court of Appeal held that:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, overlooking a statutory imperative and the above authorities, the learned judge cannot be said to have exercised his discretion properly. There can be no other interpretation of rule 2. The application should have been anchored as a suit. It was not about what prejudice the appellant or and 2nd Respondent would suffer or what purpose the suit would have served. The discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was totally incurably defective.”
- 23. The Court of Appeal in the above cited matter, emphasizes that the manner of initiating a suit is not a mere technicality; it is actually the basis of jurisdiction. The import is that it is a matter that is so critical that the court can raise it suo moto without being moved by any party.
- 24. The Applicant seeks to evict the Respondent from the suit premises. Under the Land Act 2012, the eviction of persons from private land can take either of the following ways: -



- a. By the land owner issuing a notice to the person in occupation of his land without consent to vacate within 3 months. Such notice is issued under section 152 E of the Land Act. The person served with such a notice has a recourse under Section 152 F to apply to the Court for relief. The Court may confirm the notice and order the person to vacate or it may vary, alter, suspend or make additions to the notice as it deems equitable and just.
25. Section 152 E of the Land Act spells out the conditions/terms that must be met by a Land owner who intends to issue a Notice to evict an ‘unlawful occupier’ from private land. The Section provides that as follows:
1. If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
 2. The notice under subsection (1) shall -:
 - a. be in writing and in a national and official language.
 - b. In the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
 - c. Specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
 - d. Be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area”.
26. In the case of Julius L. Marten –vs- Caleb Arap Rotich [2021] e KLR, Mutungi J. held as follows:
- “Any eviction order has far reaching implications as it entails the removal forcefully of a party from land that he/she has been in occupation/possession for some time. Before such an order is given the court must be satisfied on its merits which means any person who stands to be affected by any order the court may make is entitled to be heard.”
27. The court takes note of the provisions of Section 152 E of the Land Act with regards to the procedure of evicting an unlawful occupier by the owner. However, the Applicant having chosen to move the court for an eviction order, it ought to file a proper suit to be determined on merit.
28. In the case of Rockland Kenya Ltd –vs- Commissioner General of KRA & Another (2020) eKLR, the court held that substantive orders cannot be issued in miscellaneous applications. The court had in turn cited with approval the decision in Witmore Investment Ltd –vs- County Government of Kirinyaga & 3 Others (2016) eKLR where Limo J had stated that;
- “.....where a party such as an applicant herein seeks an order that in effect appears to resolve with a finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy, raised in the application, it should have moved this court properly in the manner provided by the law.”
29. The court in the case of Nairobi West Hospital Ltd –vs- Joseph Karina & Another (2018) eKLR, made a similar finding that a substantive order cannot be issued through a miscellaneous application.



30. Based on the foregoing, it is my finding that eviction orders being substantive and final orders cannot be issued in a Miscellaneous application as sought by the Applicant. The Applicant ought to file a substantive suit to be determined by the Court on its merit.
31. Final orders for Disposal
- a. Consequently, the Preliminary objection dated the 28/10/24 is merited. It is upheld.
 - b. Resultantly, the Notice of Motion application dated 17/10/2024 is struck out.
 - c. Similarly, the Notice of Motion dated the 3/3/25 is moot. It is struck out
 - d. I order each party to bear their own costs of the respective applications.
32. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12th DAY OF JUNE, 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of;

1. Ms. Njoroge for the Applicant
2. Mr. Njenga & Ms. Nyambeki for the Respondent.
3. CA- Ms. Yvette

