



**Onesmus Githinji & Company Advocates v Swaleh Mwangi & Company Advocates; Kinoti & Kibe Company Advocates & another (Interested Parties) (Environment and Land Miscellaneous Application E072 of 2025) [2025] KEELC 6328 (KLR) (29 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6328 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E072 OF 2025**  
**CA OCHIENG, J**  
**SEPTEMBER 29, 2025**

**BETWEEN**

**ONESMUS GITHINJI & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**SWALEH MWANGI & COMPANY ADVOCATES ..... RESPONDENT**

**AND**

**KINOTI & KIBE COMPANY ADVOCATES ..... INTERESTED PARTY**

**FK CHELUGET & COMPANY ADVOCATES ..... INTERESTED PARTY**

**RULING**

1. This suit was commenced vide the Applicant's Notice of Motion application dated the 28<sup>th</sup> March 2025 where the Applicant is seeking for the following Orders:
  - a. Spent.
  - b. That the Respondent be compelled to produce a statement of account of the account where the purchase price is held.
  - c. That an order be issued directing the bank where the purchase price is held to add the Applicant as a signatory to the account.
  - d. That the costs of the application be awarded to the Applicant.
2. The application is premised on grounds on its face and on the supporting affidavit of Onesmus Gichuhi Githinji, Advocate. He avers that he represents four (4) out of six (6) vendors in respect of an agreement for sale in respect to LR No. 209/3271/86, which was executed on the 10<sup>th</sup> December 2021. Further that the purchase price was Kshs.135 million. He claims that it was a term of the agreement that



- upon payment of the deposit of the purchase price into an account held by advocates acting for the vendors and the purchasers, the purchasers' advocates would commence renewal of the Lease to the subject property and that the completion date was to be one hundred and twenty (120) days from 10<sup>th</sup> December 2021 or any other date sooner as would have been agreed by the parties.
3. Further, that it was also a term of the agreement that upon payment of the purchase price, the vendors' advocates would provide all the completion documents, which they produced. He claims that on 18<sup>th</sup> January 2025, one Wangari Mweka flew from the United Kingdom to Kenya and signed the transfer documents in his chambers in the presence of the Respondent but since then, the Respondent has failed/neglected to inform him on the position of the matter despite demand and has failed to provide a statement of account. He contends that his clients are apprehensive that the purchase price might have been misappropriated.
  4. The application is opposed by the Respondent who filed Grounds of Opposition and a replying affidavit sworn by Swaleh Kanyeki, Advocate. He contends that the application is devoid of merit as it has not been anchored in a suit and that the orders sought are likely to be rendered in vain as banks have their own criterion for admitting parties as signatories.
  5. He asserts that the Sale Agreement dated 10<sup>th</sup> December 2021 only identifies four (4) vendors and as per paragraph 2 (21), the account contemplated herein was to be opened in the name of the "respective advocates acting on behalf of each of personal representatives" and the Respondent had no role to play.
  6. He explains that the Applicant refused to participate in the opening of the aforementioned account and as a result, the deposit was paid to the sole account of the 1<sup>st</sup> Interested Party. Further, that some completion documents are yet to be provided including; certified true copies of the PIN Certificate of the vendors, original receipts for the duly paid up land rates, current and valid rates clearance certificate for the property and a letter of consent/no-objection from all the beneficiaries of the estate of Godfrey Mweka and Zipporah Mweka.
  7. He avers that completion has delayed for over three (3) years mainly because of disagreements between the Applicant and the personal representatives /vendors on one part and Wanjiru Mweka (beneficiary) on the other part regarding the amount of fees payable to the Applicant and as a consequence, the beneficiary withheld her consent to transfer until 28<sup>th</sup> January 2025, when she executed the transfer. Further, that the vendors have since withdrawn their instructions from the Applicant and instructed other advocates and pursuant to a Deed of Remuneration Variation dated 8<sup>th</sup> September 2023 and 21<sup>st</sup> September 2023 respectively, executed between the vendors and the Applicant, it was agreed that the Applicant would only be remunerated for legal services thus rendered, while the balance of the purchase price would be paid to the beneficiaries directly, which obviates the need to include the Applicant as a signatory in the joint escrow account.
  8. He contends that throughout the delay, the Respondent and the purchaser consistently demonstrated patience and good faith to facilitate completion. He annexed a statement from the escrow account held at DIB Bank Kenya Limited.
  9. In response, the Applicant filed a supplementary affidavit reiterating his averments in his affidavit in support of the motion. He asserts that the relevant agreement clause is 2 (22) of the sale agreement and that at the time of opening the account contemplated herein, he was abroad. He reiterates that all completion documents were supplied and that it is evident from the incomplete statement supplied by the Respondent that it has been trading with the purchase price. Further, that the current balance is Kshs.6,383,172.30 against the required balance of Kshs. 135 million.



10. The 2<sup>nd</sup> Interested party entered appearance but did not file a response while the 1<sup>st</sup> Interested party did not participate.
11. When the parties appeared before the Court on 30<sup>th</sup> April 2025, the Respondent raised a Preliminary Objection contending that a suit cannot be initiated by way of Miscellaneous application. The said issue was canvassed by way of written submissions.
12. The Respondent submits that this Court has no jurisdiction to adjudicate disputes concerning the interpretation of the sale agreement herein as the same properly falls within the mandate of the Commercial Courts, since it presents a distinct legal question and it is the interpretation of the contract that is at issue. To this end, it relies on the case of *Bank of Africa Kenya Limited & Another v TSS Investment Limited & 2 Others (Civil Appeal E055 of 2022) [2024] KECA 410 (KLR) (26 April 2024) (Judgment)*.
13. It also submits that the Applicant's failure to institute a suit by way of a Plaint, upon which the application could be properly anchored, renders it fatally defective for offending the provisions of Section 19 of the *Civil Procedure Act* and Order 3 Rule 1(ii) of the Civil Procedure Rules .To support its averments, the Respondent relies on the case of *Wanja & Another v Roothaert (Miscellaneous Application E193 of 2021) [2022] KEHC 10255 (KLR) (3 June 2022)* and Geoffrey Ndungu Theuri v Law Society of Kenya [1988] eKLR.
14. On its part, the Applicant submits that the prayers sought are within its rights and are not prejudicial to the Respondent. Further, that they are not substantive in nature and the application does not raise contested claims of facts that need to be disproved by evidence. To this end, it relied on the following cases: *Omar Shureie v Marian Rahse Yafar [2020] KECA 492 (KLR)*, *Seven L General Trading Ltd & Another v Karu (Miscellaneous Application 42 of 2024) [2024] KEHC 3979 (KLR) (24 April 2024) (Ruling)* and *Abdi Abdullahi Somo v Ben Chikamai & 2 Others [2016] eKLR*.

### **Analysis and Determination**

15. Having considered the instant Notice of Preliminary Objection, including the rivalling submissions, the only issue for determination is on the validity of the Applicant's instant Notice of Motion since it is not anchored on a suit and if this court has jurisdiction to determine the issues raised, which allegedly concern the interpretation of a contract.
16. On institution of a suit, Section 19 of the *Civil Procedure Act* provides that every suit shall be instituted in such manner as may be prescribed by rules. Further, Order 3 of the Civil Procedure Rules provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.
17. In *Adala v Anjere [1988] eKLR*, the Court of Appeal stated that:

“ There is no procedure whereby a claim of any sort can be commenced by chamber summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim..... These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathize with the respondent accepted the wrong procedure for entering judgment upon which execution could follow.”



18. The High Court stated as follows in Proto Energy Limited v Hashi Energy Limited (2019) eKLR:

“Order 3 rule (i) (ii) provides that every suit shall be instituted by way of a plaint. 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 recognized as an originating process. A notice of motion can only be filed within a property instituted suit. The applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective”

19. On its part, the Applicant relied on the decision of Abdi Abdullahi Somo v Ben Chikamai & 2 Others [2016] eKLR where the High Court held that:

“In my life as a Judge I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that as a matter of general principal, a notice of Motion is a competent way of initiating substantive proceedings in Court. it will all depend on the particular statute governing the particular proceeding in question...”

20. See also the case of Tatecoh Housing and Co-op Sacco Ltd Vs Qwetu Sacco Ltd (2021) eKLR.

21. From perusal of the Notice of Motion application herein including the annexures, noting that the Applicant’ claim revolves around a Sale Agreement over land as well as payment of the purchase price and the account in which the said monies have been paid, I opine that the dispute will require proof through viva voce evidence. I hence find that the Applicant cannot seek the orders of a substantive nature in this miscellaneous application, without going through the process of filing suit.

22. Based on the facts before me, while relying on the legal provisions I have cited as well as associating myself with the quoted decisions, I find that since the issues raised by the Applicant will require both the vendors and purchasers to present evidence and confirm the amounts of purchase price so far paid, I opine that this claim ought to have been commenced by way of a Plaint and not a miscellaneous cause.

23. In the circumstance, I find the instant Notice of Preliminary Objection merited and hold that this miscellaneous cause as it stands is incompetent and will proceed to strike it out with costs to the Respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2025**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

John Kaifa for Applicant

Ngetich holding brief for Kanyeki for Respondent

Court Assistant: Joan

