



REPUBLIC OF KENYA



In re Estate of Dr foulata Tabitha Kwena - Deceased (Miscellaneous Application E344 of 2025) [2025] KEHC 16135 (KLR) (Family) (4 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16135 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MISCELLANEOUS APPLICATION E344 OF 2025

CJ KENDAGOR, J

NOVEMBER 4, 2025

IN THE MATTER OF THE ESTATE OF DR. FOULATA TABITHA KWENA – DECEASED

BETWEEN

MARY YAPESA SHILISIA 1ST APPLICANT

ESTHER KWENA 2ND APPLICANT

AND

TRUPHENA K MAHINDU RESPONDENT

RULING

1. The late Dr. Foulata Tabitha Kwena (deceased) died on 14th October, 2025 while receiving treatment at Coptic Hospital in Nairobi.
2. The Applicants and the Respondent are related to the deceased, with the 1st Applicant being the mother-in-law, and the 2nd Applicant and the Respondent being the deceased's sisters.
3. After her death, a dispute arose regarding her place of burial. The Applicants filed the current Miscellaneous Cause, initiated via a Notice of Motion application.
4. The matter was referred to mediation, but the same was unsuccessful.
5. Before the application could be heard, the Respondent filed a Preliminary Objection. The Respondent argued that the matter, presented as a miscellaneous application, seeks substantive and declaratory relief that requires formal pleadings and witness evidence, which cannot be obtained in a miscellaneous cause. The Respondent urged the Court to find that the cause is defective, incompetent and an abuse of the Court process.



6. The Applicants argued that the Court has the jurisdiction necessary to hear and grant the reliefs sought and to issue a prompt and effective order in view of the urgency. The Applicants argued that dismissing the pleadings solely on technical grounds would run counter to the intent and spirit of Article 159 (2) of *the Constitution*, which emphasizes the need for justice to be administered without undue regard to technicalities.
7. The issue for determination in this ruling is whether the Preliminary Objection is merited and what orders the Court may issue in this matter.
8. What constitutes a Preliminary Objection was discussed in *Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696*, 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...”
9. In *Muumbo & another (C/o Muigai Kemei & Associates Advocates) v Mwingi View Point Lodge Limited & 8 others (Environment & Land Case 10 of 2023) [2024] KEELC 6921 (KLR), Mogeni J.* held as follows;

“a preliminary objection is a motion asking the judge not to entertain the matter or take into account the validity of the claims raised in the suit. By inference, a preliminary objection can only be raised purely on a point of law and not to question the truthfulness of a fact in a case because then it would be a breach of rules of procedure and ought not be entertained by courts of law.”
10. The essence of the Preliminary Objection relates to the form and substance of pleadings as provided for under Order 3 Rule 1 of the Civil Procedure Rules, which directs the manner of commencement of a suit and case track allocation. It states that every suit shall be instituted by presenting a Plaint to the Court, or in such other manner as may be prescribed, the prescription being by any other legislation.
11. In burial disputes, the Courts usually do not strike out such suits but instead look for every possible reason to enable it to determine the dispute on its merits.
12. The notice of motion application seeks the following orders;
 - i. Spent
 - ii. That this Honourable Court be pleased to issue a temporary injunction restraining the Respondent, her servants, agents, or anyone acting on her behalf from retrieving, removing, transporting, or burying the body of the Late Dr. Foulata Tabitha Kwena from Coptic Hospital Mortuary or interring the same at Langata Cemetery or any other place whatsoever pending hearing and determination of this application and/or the main suit.
 - iii. That the OCS Kilimani be and is hereby directed to enforce compliance with the orders herein.
 - iv. That costs of the application be provided for.
13. I have read the notice of motion application and the affidavits filed in this case. There is no main suit that has been filed in this case. The Applicants approached the Court by filing the notice of motion under miscellaneous applications’ case type.



14. The filing of notice of motion applications where there is no main suit was addressed in the case of *Chacha & another v Orbit Chemicals Industries Limited* [Environment and Land Misc. Case E003 of 2023 [2020] KEELC 3278 [KLR] where it was held that:

“...It behooves the Applicants to file a suit whereby the same is seeking substantive orders against the Respondents. Only then can the Applicants file an application for temporary injunction pending the determination of the suit. The orders of temporary injunction or even a permanent injunction can only be anchored on some foundation. For clarity, the foundation would be a substantive suit filed by the Applicants and in respect of which the same has inter-alia sought for orders of permanent injunction or appropriate declaratory reliefs.”

15. The Court continued to say that:

“For coherence, in the absence of a suit, to anchor the application for temporary/permanent injunction, the application for temporary/permanent injunction herein has certainly been made and mounted in vacuum....In this matter the Applicants did not anchor their Notice of Motion in a suit. They do not have a competent suit before the court. The application is not anchored in any pleading to give it validity. Not every procedural blunder can be excused as a ‘mere technicality’. The filing of a suit is a mandatory statutory provision which the court cannot simply wish away. In the case of *Dishon Ochieng v SDA Church* [2012] eKLR, the court held that an application must be anchored in a plaint and that failure to comply renders the said application fatally defective. The failure/omission of the Applicants to file substantive suit cannot be overlooked as a “mere technicality.”

16. The issues raised in this miscellaneous cause are clearly highly contested among the parties involved. Central to this dispute are matters of customary law, specifically those concerning burial rights and traditions. There is also a substantial point of contention regarding the deceased’s wishes regarding her burial location, which is stated that she communicated and arranged prior to her passing and competing rights of next of kin. Each party has put forth strong arguments that reflect their interpretations of the relevant rights and customs.

17. From the reading, I find that the dispute herein is not suitable for determination through a notice of motion as lodged in this miscellaneous cause.

18. The Applicant came by way of notice of motion, which is not prescribed as an originating process. The issues raised require the filing of a substantive suit in which pleadings can be filed and evidence may be led at the trial.

19. A miscellaneous application is generally used for procedural matters or applications incidental to an existing, substantive suit. Allowing this dispute to proceed as a miscellaneous application denies the opposing party the right to a fair hearing. Proper pleadings are not merely formalities; they are vital to exercising the constitutional right to be heard.

20. The originating process should also be filed at the Magistrates’ Court in the first instance, which has jurisdiction over this cause of action, to avoid depriving any party of the right to appeal to the High Court afterwards, following the hearing and determination at the Magistrates’ Court.

21. In light of the foregoing, I uphold the Preliminary Objection. I hereby strike out the notice of motion application as it is defective in substance and form and is improperly before the Court. The Applicants are at liberty to institute the proceedings afresh in accordance with the law.



22. Each party shall bear their own costs.

23. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 4TH DAY OF NOVEMBER, 2025.**

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Ms. Naliaka, Advocate for the Applicants

Mr. Omondi Advocate for Respondent

