

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**

**HCC. MISC. APPLN NO. E1241 OF 2023**

**KINGSLEY KARIUKI, CATHERINE OTIENO & STEPHEN OTHIENO** (*suing in their capacity as Chairman, Treasurer and secretary of PAA CRESENT RESIDENTS ASSOCIATION*)  
.....**PLAINTIFF/APPLICANT**  
**VERSUS**

**MOSOBA ORIKI** ..... **1<sup>ST</sup>**  
**DEFENDANT/RESPONDENT**

**GITHUMBI GITAU**..... **2<sup>ND</sup>**  
**DEFENDANT/RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED**..... **3<sup>RD</sup>**  
**DEFENDANT/RESPONDENT**

**EQUITY BANK LIMITED**..... **4<sup>TH</sup>**  
**DEFENDANT/RESPONDENT**

**RULING**

*(On Motion Dated 19/12/2023 and PO dated 2/02/2024)*

- 1.** The **motion dated 19/12/2023** was brought by the Plaintiff citing provisions of **Order 40 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules (CPA)** and **Sections 1A, 1B and 3A of the Civil Procedure Act.**
- 2.** The applicant seeks Orders:-
  - 1) Spent.**

- 2) *That pending the hearing and determination of this application and the appeal before the Attorney General's office (Registrar of Societies Department) this Honourable court be pleased to issue an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents by themselves, their servants, their agents and or through Tyson One's Association from interfering in any way with the estate known as PAA CRESCENT ESTATE.*
  - 3) *That pending the hearing and determination of this application and this Honourable Court be pleased to issue orders directing the 3<sup>rd</sup> and 4<sup>th</sup> Respondent to allow the applicant access to its bank accounts.*
  - 4) *That this court do hereby order that the Registrar of Societies to cancel the registration of Tyson One Association.*
  - 5) *That the cost of this application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.*
3. It is supported by the affidavit of the Plaintiff sworn on an even date, and grounds at its face it is the deponent's dispositions that as elected officials of PAA Crescent Residents Association (hereinafter PAA) they have only two sources of income; from monthly subscriptions by the members, and from lease agreement with Live Ad Limited.
  4. That there is pending in the Environment and Land Court(ELC) a suit instituted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

vide MCLEL/E021/2021 against Live Ad Ltd and the current officials of PAA, who have also registered a rival association in violation of the Societies Act known as Tyson One Association Rg no. 53533 on 24/02/2021 and upon application, it was ordered by the court by an **order dated 4/06/2021** to prosecute its case which they have not done.

5. The Applicant further posits that there is pending a complaint lodged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents against the Plaintiffs at the Registrar of Societies accusing them of gross violation of the Society's Constitution and financial mismanagement; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents influenced the Registrar of Societies to cause the 3<sup>rd</sup> Respondent Kenya Commercial Bank Ltd to freeze its accounts thereto thus crippling its operations.
6. It is further averred that by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents actions by false accusations and deceit, including personal attacks, and failed attempts to file annual returns for the years 2019, 2020 and 2021 were rejected due to the dispute hereof.
7. For the reasons aforesated and amplified in the supporting affidavit, the Applicants seek the orders in their motion stating that it just and equitable to remedy the grievances and prevent escalation of the same.

**8. The application is opposed** by a Replying Affidavit sworn on 2/02/2024 by the 1<sup>st</sup> Defendant, Mosoba Oriki and by the 3<sup>rd</sup> Defendant Kenya Commercial Bank Ltd by way of **grounds of opposition dated 8/02/2024** and by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants **Notice of Preliminary Objection dated 2/02/2024.**

9. The **Preliminary Objection** raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants raises the following issues :-

*1) Prayer(s) 2 & 4 of the Applicants application dated 19<sup>th</sup> December, 2023 are untenable. The application is premised on the provisions of Order 40 Rule 2 of the civil Procedure Rules yet the same is not anchored in a suit. The rules require in mandatory terms that an application for interim relief should be anchored in a suit; a miscellaneous application is not a suit nor is it an originating process.*

*2) Prayer 3 of the Applicant's application is similarly untenable on the basis of being res judicata. The issue of the unfreezing of bank accounts was substantially an issue before the judicial review division of the Nairobi High Court in an application dated 23<sup>rd</sup> November, 2022 HCJR E170 of 2022. The proceedings were between the same parties as herein and justice Ngaah in his ruling dated 24<sup>th</sup> November, 2022 declined an invitation to unfreeze said bank accounts.*

*3) The applicant's applicant is incurably bad and defective and should be struck out in limine with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.*

10. As is a requirement of a Preliminary Objection stated in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696**, once raised, it ought to be determined in the first instance as if successful, may dispose of the suit. The court will therefore interrogate the Preliminary Objection as concerns institution of the suit by way of a miscellaneous cause.

Directions were taken that parties file submission on the Preliminary Objection and the motion dated 19/212/2023.

**The preliminary Objection (PO).**

11. The Applicants/Plaintiffs submissions are dated 22/02/2024. The issue at hand here is whether the Preliminary Objection is merited and or valid; based on the material presented before the court.
12. A Preliminary Objection to be successful, several parameters and tests must be satisfied as set out in the **Mukisa Biscuit Manufactures Ltd case (Supra)**. These are;-
- a) It must raise a pure point of law.*
  - b) It is argued on the assumption that all the facts pleaded by the other side are correct.*
  - c) It cannot be raised if any fact has to be ascertained; or*

d) *If what is sought is the exercise of judicial discretion.*

**A pure point of law?**

13. It is a legal question that can be decided without reading to determine any factual disputes, clear and well defined. If a court has to ascertain or hear evidence to ascertain the facts, or exercise its discretion, then it cannot be said to be a pure point of law.

The **Court of Appeal in Nitin Properties Ltd v. Singh Kalsi & Another [1995]** amplified the question and maintained that a Preliminary Objection ought to be based on points of law only and fails if any fact need to be ascertained.

14. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants urge that there is no suit upon which the provisions of **Order 40 CPR** can be anchored as the “suit” hereof is brought by way of a Miscellaneous cause.

**Section 2** of the **Civil Procedure Act, Cap 21 Laws of Kenya** defines “suit” - as all Civil proceedings commercial in any manner prescribed; that include by way of a Plaintiff, petition or originating summons as also stated at **Order 3 Rule 1.**

15. On the other hand, Miscellaneous Applications are typically used for procedural issues generally to seek leave of court for orders that are ancillary to existing and properly filed suits as held in the case of **Golden Century Limited v. Josef (Misc. Appln. E224 of 2024[2025] KEEL 4337(KLR))**

where a similar issue was raised as to the manner and purport of a Miscellaneous Applications as a mode of filing a substantive suit,

16. **Section 19 of the Civil Procedure Act**, further prescribes that every suit shall be instituted in such a manner as may be prescribed by the rules, meaning, the Civil Procedure Rules. The Court of Appeal in the case of **Telematics International Sales Ltd V. Stoic Company Ltd & Another [2017] eKLR** held that:-

*“...the manner of initiating a suit cannot be a mere technicality. It is the basis of jurisdiction... the application should have been anchored on a suit. 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 the 2<sup>nd</sup> Respondent would suffer or what purpose the suit would have served. The discretion cannot be used to override a mandatory statutory provisions..”*

Consequently, the Preliminary Objection was upheld, that the matter (suit) instituted by way of a Miscellaneous Application found not to be a suit as instituted seeking substantive and final orders.

17. Going back to the instant matter under consideration, the Plaintiff instituted the matter by way of High Court Miscellaneous Application, more particularly by a Notice of

Motion dated 19/12/2023 against the Defendants premised on Order 40 Rule 2 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.

The reliefs sought thereto are orders of, among them, injunction directing the defendants to allow them access to their bank accounts and orders directing the registrar of Societies to cancel registration of a duly registered association from its registers;

18. The matter came up under a certificate of urgency before the court. Upon service, the Respondents/Defendants filed their responses and the Preliminary Objection now under consideration.

In the meantime, the court issued temporary orders in terms of prayer 3 that pending hearing and determination of the motion; the 3<sup>rd</sup> and 4<sup>th</sup> Respondents (Kenya Commercial Bank Ltd and Equity bank Limited) were directed to allow the Plaintiff to access its bank accounts. These orders are inforce.

19. Further to the earlier cited learned decisions, the court in a recent decision in **Misc. Application No. E31 of 2024 - Norman Abdulkarim v. Munavarali Abdulkarim Ebrahimji Mulla & Another [2024] KEHC 13987 (KLR)** citing other cases **Y. A. Shretta v. Leisure Lodges Ltd [2015]eKLR; Proto Energy ltd v. Hashi Energy Ltd [2019] eKLR; Samuel Chege Thiari & Another v. Eddah**

*HC. Misc. Appln. No E1241 of 2023*

**Wanjiru Wangari & 3 Others [2018]eKLR**, held that Miscellaneous Applications or Notice of Motions are not suits as provided under Order 3 Rule (i) (ii) reiterating that suits shall be instituted by way of a plaint, petition or an originating summons.

20. It is therefore a legal point of law that Misc. Applications and Notices of Motion seeking substantive reliefs in the first instance as is the case in the motion under review are not “suits” as envisaged under **Sections 2 of the Civil Procedure Act**, or under **Order 3 of the Civil Procedure Rules**, and further that Miscellaneous Applications are made for procedural issues to seek orders that are anchored on existing and properly filed suits as held by the Court of Appeal in the case **Golden Century Ltd (Supra and others)**.

21. Consequently, the Preliminary Objection dated 2/02/2024 raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants succeeds on the first issue; that it raises a pure point of law; and upon interrogation, it’s evident that the matter having been instituted by way of a Miscellaneous Cause, and a Notice of Motion dated 19/12/2023 does not qualify the same as a suit upon which the orders sought by the Plaintiff can be anchored upon.

**22. The upshot is that the Preliminary Objection dated 2/02/2024 succeeds; and the interim stay orders**

**issued by the court on 8/02/2024 are hereby vacated;  
and**

**23. Finally, the Miscellaneous Cause hereof is hereby struck out with costs to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents/Defendants.**

**Orders accordingly.**

**Delivered Dated and Signed at Nairobi this 6<sup>th</sup> day of November, 2025.**

.....

**JANET MULWA.**

**JUDGE**