



REPUBLIC OF KENYA



KENYA LAW
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**Musembi v Kavita (Environment and Land Miscellaneous Application
E025 of 2024) [2025] KEELC 8159 (KLR) (26 November 2025) (Ruling)**

Neutral citation: [2025] KEELC 8159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E025 OF 2024
NA MATHEKA, J
NOVEMBER 26, 2025**

BETWEEN

PETER NZIOKI MUSEMBI APPLICANT

AND

SUSAN NDUNGE KAVITA RESPONDENT

RULING

1. The application is dated 18th June 2024 and is brought under Order 51 of the Civil Procedure Rules and Section 72(2), 73 and 75 of the [Land Registration Act](#) Cap 300 seeking the following orders;
 1. That Susan Ndunge Kavita has no interest over land parcel registration number Iveti/Mungala/1763.
 2. That the Land Registrar Machakos County remove the wrongful caution lodged by Susan Ndunge Kavita over land parcel registration number Iveti/Mungala/1763 claiming beneficial interest.
 3. That the costs of this application be provided for.
2. It is based on the Affidavit of Peter Nzioki Musembi grounds that Land parcel registration number Iveti/Mungala/1763 is the property of Peter Nzioki Musembi which he acquired individually.
3. The Respondent submitted that the suit property was acquired during the subsistence of their marriage and was acquired through the contribution of both parties hence it is matrimonial property. That this court this court does not have jurisdiction and the same ought to have been initiated by an originating summons as stipulated unde Rule 7 of the matrimonial Property Rules. That the Applicant holds the suit property in trust.
4. This court has considered the application and the submissions therein. The applicant seeks removal of the caution lodged by Susan Ndunge Kavita over land parcel registration number Iveti/Mungala/1763



claiming beneficial interest by the Land Registrar. He has attached a search certificate dated 17th April 2024 and marked PNM1 as proof of ownership.

5. Be that as it may, Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. Granting the orders sought will indeed conclude this matter. This is the position that was adopted in *Witmore Investment Limited vs County Government of Kirinyaga & 3 Others* (2016) eKLR wherein it was held;

So where a party such as an applicant herein seeks an order that in effect appears to resolve with 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 law.”

6. In the case of *Nairobi West Hospital Limited vs Joseph Kariha & Another* (2018) eKLR it was held that;

.....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal that suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out.”

7. I concur with the Respondent’s submissions that if the suit land is matrimonial property then this court does not have jurisdiction to entertain the same. For these reasons I find this application is unmerited and an abuse of the court process. I consequently dismiss it with costs the Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF NOVEMBER 2025.

N.A. MATHEKA

JUDGE

