



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC NO. E127 OF 2025

MILKA MORAA ONGUBO.....1ST
PLAINTIFF

JOYCE KERUBO MBUGUAH.....2ND
PLAINITFF

=VERSUS=

JUSTUS MORARA ONGUBO.....1ST
DEFENDANT

JUDY KEMUMA ONGUBO.....2ND
DEFENDANT

JAMES NYABUGA OKINYI.....3RD
DEFENDANT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 11th February 2025 raised by the 2nd Defendant on the following grounds: -

a) The Plaintiff's suit is incompetent, fatally defective, and bad in law,

b) The 2nd Plaintiff has no legal capacity to institute this suit.

c) That the Plaintiff's suit has not complied with the provisions of Order 3, specifically Rule 1 of the Civil Procedure Rules.

d) The Plaintiff's suit should be struck out with costs to the Defendant.

2. From the foregoing, the 2nd Defendant urged the court to strike out the suit with costs.
3. The Plaintiffs filed grounds of opposition dated 22nd May 2025, asserting that the preliminary objection is incompetent and an abuse of the court process. They stated that the 1st Plaintiff and her advocate signed the authority to act, which was filed and served on 7th April 2025. They contended that the 1st Plaintiff revoked the power of attorney, claiming that it was obtained fraudulently, and that she had reported the matter to the DCI.
4. In light of the foregoing, the Plaintiffs urged the court to dismiss the preliminary objection with costs.
5. The preliminary objection was canvassed by way of written submissions.

THE DEFENDANT'S SUBMISSIONS

6. The 2nd Defendant filed his submissions dated 28th May 2025. On behalf of the 2nd Defendant, Counsel outlined the following issues for the court's determination:-
 - a. *Whether the 2nd Plaintiff has the capacity to file this suit on behalf of the 1st Plaintiff?*
 - b. *Whether the Plaintiff's suit has complied with Order 3 Rule 1 of the Civil Procedure Rules?*
7. On the first issue, Counsel argued that although the 2nd Plaintiff attached an authority to act dated 20th

March, 2025, to demonstrate she has the authority to file this suit on behalf of the 1st Plaintiff, the authority is vested in the 1st Defendant as the 1st Plaintiff donated to him a power of attorney.

8. Counsel submitted that, based on the medical reports filed by the Plaintiffs, the 1st Plaintiff lacks the capacity to authorize anyone to file a suit on her behalf.

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9. It was submitted that the registered Power of Attorney dated 3rd January 2025 authorizes the 1st Defendant to represent the 1st Plaintiff and to manage all her affairs, including land parcels, vehicles, and bank accounts.
10. Counsel further submitted that the medical reports produced by the 1st Plaintiff confirm that their mother (the 1st plaintiff) lacks the capacity to institute the instant suit as she experiences lucid moments.
11. Counsel urged the court to note that the purported authority was to initiate legal proceedings against her children.
12. Counsel urged the court to determine whether a duly registered power of attorney should take precedence over an authority to act. To buttress this argument, Counsel relied on the case of **Gilbert Mayieka Ogato v Raymond Kiplagat & another [2020] eKLR**, where the court held that;
“.....Needless to state, a holder of a valid power of attorney can validly swear a verifying affidavit not because of the provisions of Order 9, but due to the universal legal efficacy of a valid power of attorney, which puts the recipient in the same legal position as that of the donor.”
13. It was submitted that the 2nd Plaintiff lacks the capacity to file and maintain this suit against the Defendants because she does not own the suit property.
14. Regarding the second issue, Counsel submitted that a suit must be anchored in a plaint, originating summons, and a petition, not an application. Counsel further submitted that the Plaintiffs initiated

this suit through an application filed under a certificate of urgency. To buttress this point, reliance was placed on the case of **Rudufu Limited v Keysian Auctioneers & another; Ein Geid Limited (Interested Party) (Miscellaneous Application E013 of 2023) [2023] KEELC 22030 (KLR) (6 December 2023) (Ruling)**

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15. Concluding his submissions, Counsel urged the court to uphold the preliminary objection and dismiss the suit with costs.

THE PLAINTIFFS'SUBMISSIONS

16. The Plaintiffs filed their submissions dated 22nd May 2022.

17. On behalf of the Plaintiffs, Counsel outlined the following issues for the court's determination:

a) Whether the Plaintiffs complied with Order 3 Rule 1 of the Civil Procedure Rules.

b) Whether the 2nd Defendant established grounds that there was no authority to act granted to the 2nd Plaintiff.

c) Who should bear the costs of the application?

18. On the first issue, Counsel submitted that the Defendants were served on 24th March 2025 with a plaint, verifying affidavit, list of documents, list of witnesses, statement, and authority to act. Counsel further submitted that the 1st Defendant's Advocate acknowledged receipt of the pleadings via email. Additionally, Counsel submitted that the Plaintiffs' Counsel had communicated with the 2nd Defendant's advocate, Mr. Ouma, and shared the payment receipt with him. It was argued that the preliminary objection is intended to delay the determination of this matter.

19. Regarding the second issue, Counsel contended that the 2nd Defendant failed to prove that no authority was given to the 2nd Plaintiff, since the authority to act was signed by both the 1st Plaintiff and her legal representative. It was therefore

submitted that, the 2nd Plaintiff has the authority to depose and act on behalf of the 1st Plaintiff.

20. It was further submitted that Mr. Ombogo confirmed having seen the plaint, verifying affidavit, list of documents, list of witnesses, witness statements, and authority, which are available in the CTS.
21. Counsel further argued that the 1st Plaintiff revoked the power of attorney granted to the 1st Defendant on 25th April, 2025, thereby granting authority solely to the 2nd Plaintiff. To support this claim, Counsel cited Sections 107, 108, and 109 of the Evidence Act.
22. In conclusion, Counsel contended that the preliminary objection does not meet the necessary threshold and should be dismissed with costs.

ANALYSIS AND DETERMINATION

23. Having considered the preliminary objection in light of the pleadings, the grounds of opposition, and the rival submissions, the following issues fall for determination:-
- a) Whether the 2nd Plaintiff has the capacity to institute this suit on behalf of the 1st Plaintiff?*
 - b) Whether the suit is defective due to non-compliance with the law?*
24. The 2nd Defendant contends that the 2nd Plaintiff lacks the capacity to institute these proceedings on behalf of the 1st Plaintiff. She argued that the 1st Plaintiff donated a power of

attorney to the 1st Defendant to manage all her affairs, including the filing of this suit.

25. The 2nd Plaintiff claimed she has authority to act on behalf of the 1st Plaintiff. In this regard, she produced an authority to act dated 20th March 2025, which shows that the 1st Plaintiff gave the 2nd Plaintiff authority to act on her behalf.

26. Based on the foregoing, I find that the 1st Plaintiff has demonstrated to the satisfaction of this court that she has the authority to act on behalf of the 1st Plaintiff.

27. Regarding the second issue, the 2nd Defendant contends that the suit offends the provisions of Order 3 Rule 1 of the Civil Procedure Rules and Section 19 of the Civil Procedure Act.

28. Order 3 Rule 1 of the Civil Procedure Rules provides as follows;

“Every suit shall be instituted by way of a Plaint or in any other manner that may be prescribed.”

29. Similarly, Section 19 of the Civil Procedure Act states that: -

“Every suit shall be instituted in such manner as may be prescribed by the rules.”

30. The record shows that the Plaintiffs commenced this suit by way of a Plaint dated 24th March 2025 and not by way of a Misc application as alleged.

31. In the end, I find that the preliminary objection is devoid of merit and the same is hereby dismissed.

32. In view of the fact that the parties herein are closely related, I order that each party bear its own costs.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 21ST DAY OF NOVEMBER, 2025.**

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**T. MURIGI
JUDGE**

IN THE PRESENCE OF:

Ouma for the 2nd Defendant

Ahmed- Court Assistant

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