

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL NO. E052 OF 2025

SYLVESTER OCHIENG ONYANGO [legal representative of the estate of PIUS ONYANGO OBAT (Deceased)]

.....1ST APPLICANT MARTIN BENS OSIMBO

MAGERO [legal representative of the estate of MAGERO SIMBO(Deceased)].....2ND APPLICANT

JULIUS OOKO OKELLO [legal representative of the estate of OKELLO OHUYA].....

.....3RD APPLICANT

TOM OBAT ODERO [legal representative of the estate of ADERO

OSIMBO(Deceased)].....

4TH APPLICANT ANNAH ATIENO ODHIAMBO [legal representative of the estate of ONJAK OSIMBO (Deceased)].....5TH APPLICANT

-VERSUS-

KCB KENYA LIMITED.....1ST RESPONDENT/INTERPLEADER

WYCLIFFE OUMA OKUTTA t/a OUMA OKUTTA & ASSOCIATES ADVOCATES.....

.....2ND RESPONDENT

**GEORGE MUGOYE MBEYA t/a MUGOYE & ASSOCIATES
ADVOCATES.....3RD**

RESPONDENT

PETER ODUOR WANDEI.....4TH

RESPONDENT

LAWRENCE OLOO UDUNY.....5TH

RESPONDENT

JACOB OGOS TALO.....6TH

RESPONDENT

MARTIN ONYANGO UDUNY.....7TH

RESPONDENT

RULING

BACKGROUND

1. Before me is a Preliminary Objection dated 12/9/2025 and Notice of Motion dated 9/9/2025. The Notice of Motion application precipitated the filing of the preliminary objection by the 2nd ,4th ,5th ,6 and 7 respondents.
2. It is important to first understand the context within which this appeal has been brought before court.
3. From the material placed before me, my understanding is that there was a sale of a portion of parcel UHOLO/MAGOYA/221 to Central Rift Valley Water Works Development Agency to pave way for water works. There was an ownership dispute on the said parcel pending in

Ukwala law courts. In view of the dispute it had been agreed by the parties that this should not stop the purchase for purposes of the water works provided that the money is secured in the joint account of the lawyers of the 2nd and 3rd Respondents. This was effected and the money was held in KCB Kenya Limited. At the point of distribution of the sale proceeds a dispute arose precipitating the suit MCELC No. E026 OF 2023. The suit was brought by the Interpleader Bank.

4. KCB having no interest in the money filed wanted to have an order for distribution of the money to meet its statutory obligations relating to the unclaimed financial assets, though this was resolved as the money was being kept awaiting the resolution of the ownership dispute in court.
5. In the ruling dated 8/9/2025 arising from the interpleader proceedings the trial court observed that there were no pending cases in court as the issue of ownership and occupation of UHOLO/MAGOYA/221 had since been resolved by the ELC High Court Siaya after this court upheld the findings of the land tribunal and set aside the decision of the Ukwala Court. The trial court also pointed that Kisumu Court of Appeal No. 191 of 2022 whose determination was being awaited was disposed of in agreement of all the parties. The trial court also noted that the decision of the tribunal had since been implemented as evidenced in the search dated 20/5/2022 and in the green card entries on 20/5/2022. The 9 names were listed.

6. The trial court in view of the above made orders for the distribution of the monies held by the interpleader/Applicant be released to the firm of Okutta Associates (appearing for the 2,4,5,6 and 7 respondents) for onward transmission to his clients less an amount paid to the firm of advocates. The balance was to be released to the firm of Mugoye associates less a sum paid to the said advocate. The trial court also made orders that the purchaser of the portion be issued with title thereof and survey works by land registrar to proceed for issuance of titles to the 9 beneficiaries above. The court directed that a decree is issued in this regard.
7. The appellant is aggrieved by the above orders and has moved this court on appeal as set out in the Memorandum of Appeal dated 9/09/2025.

Notice of Motion

8. Together with the appeal the appellant filed a Notice of Motion application dated 9/9/2025 and seeks the following verbatim orders;-

1) SPENT

2) THAT the Honourable Court be pleased to issue an order for Stay of Execution of the Ruling of Hon. Benjamin Limo delivered on 8th September 2025, pending the hearing and determination of this instant Application.

3) THAT the Honourable Court be pleased to issue an order for Stay of Execution of the Ruling of Hon. Benjamin Limo delivered on 8th September 2025, pending the hearing and determination of the Applicant's intended Appeal.

4) THAT the costs of this application be provided for.

Notice of Preliminary Objection

9. In response to the application the 2nd, 4th, 5th, 6 and 7 respondents raised a preliminary objection dated 10/9/2025 premised on the grounds:

a) THAT the Court Lacks Jurisdiction to entertain an Appeal arising from Interpleader proceedings relating to the division of money commenced and determined by a Civil Court under Section 7 of the Magistrates' Court Act. The Appeal and application run foul provisions of section 13(2) of the Environment and Land Court Act.

b) THAT the appeal and the attendant application, premised on it, offend provisions of Order 9, Rules 9 & 10 of the Civil Procedure Rules, as the same have been filed by a firm of advocates not properly on Record for some of the named Appellants/ Applicants.

10. In addition to the Notice of preliminary objection, the 2nd, 4th, 5th, 6 and 7 respondents also filed a replying affidavit sworn by Martin Onyango Uduny in response to

the application as well as grounds of opposition dated 10/09/2025. Mr. Okutta the 2nd respondent also filed a replying affidavit.

11. The grounds of opposition are stated verbatim as hereunder;-

- 1) THAT the Notice of Motion is not merited, is frivolous, and incurably defective.
- 2) THAT the appeal intituled as ELCLA No. E052 OF 2025 is instituted in a wrong Court since the decree/order appealed from is by a magistrate's court instituted as per Section 58 of Civil Procedure Act and Order 34 Rule 1-6 of Civil Procedure Rules and not Magistrate's Court Environment and Land Case under Section 9 of the Magistrate's Court Act.
- 3) THAT the application does not meet the threshold spelt out under Order 42 Rule 6 of Civil Procedure Rules for reason:
 - a) The intended execution is for monetary put at a paltry Sum of Kshs.2,337,269.80/- which can easily be refunded in event of an unlikely successful appeal and hence no substantial loss which cannot be mitigated by way of a refund.
 - b) There is no competent appeal instituted and hence no arguable one on account of Jurisdiction aforementioned.
 - c) Security for costs have not been offered by any of the applicants whose ability to settle any

costs adjudged by Court in previous proceedings have proved problematic.

d) The appeal and the attendant application premised on it offends provisions of Order 9 Rules 9 & 10 of Civil Procedure as the same have been filed by a firm of Advocate not properly on Record for some named Appellants/Applicants if proceedings in the lower court file and or pleadings in this instant proceedings are to go by.

e) This court is functus the issue of ownership of land parcel No.Uholo/Magoya/221 by dint of previous decisions by its self and or other Courts of equal status duly constituted either on appeal and or decree by other courts already implemented on the ground.

12. On 10/09/2025 I granted prayer (2) of the Notice of Motion which orders are subsisting pending the determination of the application herein Interpartes. I also allowed the order 7 (c) to proceed.

13. On 16/09/2025 the court issued directions that the application and the preliminary objection be heard concurrently to avoid sitting twice to write two separate rulings which would not be efficient use of the so scarce judicial time. Parties complied with the court's directions on the hearing.

ANALYSIS AND DETERMINATION

14. Upon considering the foregoing the main issue that arises on the preliminary objection is Whether this court has jurisdiction to determine the instant appeal. And if the answer is in the affirmative whether the Notice of Motion application dated 9/9/2025 has merit.
15. It is trite that jurisdiction is everything and without it, a court cannot move one more step. A preliminary objection by its very nature is capable of determining a matter at interlocutory stage without necessarily going into hearing on merit. - See **Owners of the Motor Vessel M.V Lillian S. v. Caltex Oil (K) Limited [1989] KLR 1.**
16. My first duty will be to determine whether the preliminary objection has been properly raised. In this regard the preliminary objection has been raised on two fronts namely whether the appeal is properly before the court and whether the court is functus officio.
17. For a preliminary objection to be properly raised it must satisfy certain attributes. I will highlight decisions in this regard

In the case of **Mukisa Biscuits Manufacturing Co. Ltd - vs- West End Distributors [1969] E.A. 696** where Law JA at page 700 stated;

“... 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. Examples

are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Further Black’s law Dictionary 11th Edition defines a preliminary objection as

‘..as an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection to the court’s jurisdiction is an example of a preliminary objection’.

19. A preliminary objection must therefore be based on a pure point of law and where any issue must be ascertained by looking into the facts then the objection ceases to be a point of law.

20. It has been urged that this court is functus officio the issue of ownership of land parcel No.Uholo/Magoya/221 by dint of previous decisions by itself and or other Courts of equal status duly constituted either on appeal and or by other courts already implemented on the ground. I have already pointed the observations made by the trial court in the impugned ruling herein where a number of litigations and cases are referred to. It is stated that the gist of the interpleader proceedings was only to distribute the proceeds of the purchased portion.

21. The respondent in his replying affidavit states on advice of his advocate that the interpleader proceedings filed by the Bank was for determination of the division of

the money based on documentary evidence available to parties and was not to re-open litigation on ownership of the land and right of occupation which is a reserve of the ELC and had already been determined conclusively (see paragraph 9 -11).

22. In his replying affidavit filed on 12/9/2025 Mr. Okutta who is named as the 2nd respondent in the present proceedings has outlined in detail the various cases that are said to have been concluded in the matter and why it would not be proper to reopen such litigation under the interpleader claim and this appeal. While this may turn out to be correct or not what is for determination at this juncture is whether the preliminary objection has been properly raised.

23. To ascertain whether litigation is being reopened as pointed by Mr. Okutta the court must look into the decisions made in the various courts against the facts to be able to determine if the present appeal is reopening litigation on ownership and if also the trial court erred in any way in the decree issued. Consequently, it is the finding of this court that this point has not raised a pure issue of law. The ground has therefore not been properly raised and can only be determined in a full hearing of this appeal.

24. The respondents further contend that the Court Lacks Jurisdiction to entertain an Appeal arising from Interpleader proceedings relating to the division of money commenced and determined by a Civil Court under

Section 7 of the Magistrates' Court Act. And that the appeal runs foul provisions of section 13(2) of the Environment & Land Court. This is the substantive ground. It is submitted by the respondents herein that the issues in the lower court were purely Civil in nature and therefore any Appeal arising from such decree of the Civil Court as constituted would be in the High Court Civil Division as opposed to the ELC.

25. Section 7 of the Magistrates Court Act stipulates the pecuniary jurisdiction of the magistrate courts in proceedings of a civil nature at various hierarchy/levels and the revision thereof.

26. Section 7 of the Magistrates Court Act is on Claims in employment, labour relations claims; land and environment cases and reads';-

A magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the

Environment and Land Court Act (No. 19 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -

environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

27. The first question I must deal with is to confirm the domicile of the order the subject of this appeal. Based on the material placed before this court it is noteworthy the decision the subject of this appeal is the ruling of the Hon. Benjamin Limo in the Magistrates Court in Siaya delivered on 8/09/2025 in MCELC No. E026 OF 2023. Clearly the interpleader suit was filed before the Chief Magistrate Court Environment Land Court.

28. Consequently, then the pertinent question that arises is where do appeals lie on decisions of the Magistrates court sitting on environment and land matters?

29. The jurisdiction of the Environment and Land Court is derived from Article 162 (1)(2)(b) of the Constitution to hear and determine disputes relating to environment, and the use and occupation of, and title to land. This article is read together with the Environment & Land Court Act Sec.13 which confers the Environment and Land Court with jurisdiction as hereunder; -

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or

any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes; -

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b)

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land

(e) any other dispute relating to environment and land.

30. Section 13(4) of the Environment and Land Court Act (Kenya) grants the Court appellate jurisdiction to hear and determine appeals from subordinate courts and local tribunals on matters within its jurisdiction. In the present case the matter was heard by the Magistrates court pursuant to the provisions of section Section 9(a) of the

Magistrates' Courts Act which vests jurisdiction in designated magistrates to hear and determine land matters.

31. Based on the foregoing it is clear that appeals concerning environmental issues, land use, occupation, and title, which were originally decided by magistrates' courts or other tribunals, can be brought before the Environment and Land Court. The appeal herein therefore ought to lie in the ELC Court exercising its appellate jurisdiction from the Magistrates Court.
32. It is the finding of this court that the appeal is properly filed before this court.
33. Moreover, I respectfully agree with the position that in deciding if the court has jurisdiction consideration should be on the predominant purpose. This test was discussed in the case of **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR**, where Justice Joel Ngugi as he then was stated as follows: -

'17. At the same time, however, it is imperative that a Court should not approach jurisdiction in an ultra-technocratic fashion as an essentialist parsing of sticks in a bundle. Jurisdiction is a substantive standard aimed at ensuring only the right court or tribunal clothed with the legitimate mandate deals with a dispute or controversy. It is not a jurisprudential thaumatrope to keep litigants

guessing to which Court their controversy belongs at the pain of having their timeously pleaded case struck out for not pigeon-holing their claim in the correct box. The correct approach to jurisdiction is one which treats the question functionally as opposed to technically; one that looks at the constitutional objectives in creating equal status Courts as opposed to engaging in an essentialist, taxonomical and categorical analysis.

18. Happily, this is the approach taken by our Courts to the question. In this regard, I can do no better than quote Justice Abuodha of the Employment and Labour Relations Court, who, faced with a “mixed grill case” delivered this jurisprudential gem’

34. But it is also important to look at the cause of action in MCELC No. E026 of 2023 to determine whether the Court has the requisite jurisdiction. The applicants submit that the core issue before the lower court, is the determination of the lawful owners and beneficiaries of Land Title No. UHOLO/MAGOYA/221 before the proceeds of sale held in trust can be released. That being the case, the subject matter of the dispute is predominantly a land dispute, and therefore, this Honourable Court properly exercises jurisdiction.
35. For me I will not over emphasise this point. Firstly, the Bank commenced the proceedings before the ELC Chief

Magistrate court recognising the proceeds it was holding in trust originated from a sale of land transaction and which it was holding awaiting resolution of the land ownership dispute as to the correct beneficiaries. It is clear that the proceeds cannot be severed from the issues of the beneficiaries as this allows for any emerging issues on who these beneficiaries are, to be resolved within the ambit of a court that has jurisdiction to deal with such emerging issues. And indeed, this is what has happened in this appeal. The High would not have such jurisdiction.

36. In view of the foregoing it is the finding of this court that the preliminary objection on the above ground must fail.
37. The respondents advance that the appeal and the attendant application, premised on it, offend provisions of Order 9, Rules 9 & 10 of the Civil Procedure Rules, as the same have been filed by a firm of advocates not properly on record for some of the named Appellants/ Applicants. It is submitted that the firm of Aphonce Barack & Associates is not properly on record for all the parties. That some of the parties were not part of the proceedings in the lower court and the said firm has not sought for leave, consent and or order of the Court before enjoining them. It is contended that an advocate cannot purport to act for parties without proper instructions and being not on record
38. One emerging issue seems to be an issue of joinder of parties who are said not to have been parties in the lower

court proceedings. Section 2 of the Civil Procedure Act defines a suit to mean ‘All Civil Proceedings commenced in any manner prescribed’. An appeal is therefore a suit for purposes of section 2 . It is trite that no suit shall be defeated on grounds of misjoinder or nonjoinder – see **Blue Valley Enterprises Limited Vs National Government Constituencies Development Fund [2025] KEHC 4254 (KLR)**.

39. I think for me the question that should be clear is who is the right party or a necessary party to the suit. This can be dealt with as part of the appeal. The applicant states only some of the parties are affected and not all of them and therefore this means the entire appeal cannot collapse on the basis that some parties were not parties in the previous proceedings.
40. Order 9 of Civil Procedure Rules, 2010 is on Recognised Agents and Advocates. Order 9 Rule 9 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

a. upon an application with notice to all the parties; or

b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”

41. In **Tobias M. Wafubwa v Ben Butali [2017] EKLR** the Court of Appeal made the following observation concerning the application of Order 9 Rule 9 of the Civil Procedure Rules; -

‘There is no question that the objective of rule 9 is to not only serve as notification to the court in ongoing proceedings that there has been a change of counsel for the parties, but also to safeguard the interests of the outgoing counsel. In this case, Kituyi and Company Advocates having taken over representation of the respondent from Kweyu and Company Advocates, we see no prejudice that would be visited upon Mr. Sifuma’s client, save to ensure the expeditious and just disposal of justice’

In **Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR** cited by the Court of Appeal in Tobias M Wafubwa above, the court stated thus

‘where in addressing the issue of non-compliance with order 9 rule 9 this Court observed thus; “All in all we are not persuaded that non-compliance with Order 111 rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed at all times, the

set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all...”

42. In its submission counsel for the respondents seem to emphasize on the requirement for service upon all the parties and the outgoing advocates. The Court of Appeal laid more emphasis on whether this would affect the substance of the appeal. This clearly cannot go to the root of the appeal. It does not cause any prejudice to the respondents, it is a procedural matter. It is my finding that this cannot render the appeal incompetent to warrant its striking out.

NOTICE OF MOTION

43. Having resolved the preliminary issues above I must now deal with the Notice of Motion application dated 9/9/2025 seeking stay of execution of the orders issued by the trial court.
44. Order 42 Rule 6 of the Civil Procedure Rules, is on stay of execution and provides:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court Appealed from may for

sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

45. The Court of Appeal of the Kenya in **Women Microfinance Limited Vs Martha Wangari Kamau 2020 eKLR**, stated as hereunder:-

'29.In Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High

Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.'

46. Has the applicant demonstrated substantial loss that will be suffered should the orders of stay of execution not be granted. A look at what amounts to substantial loss for purposes of order 46 Rule 6 is pertinent. What amounts to substantial loss was expressed by the Court of Appeal in the case of **Mukuma vs Abuoga (1988) KLR 645** where their Lordships stated that "Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."
47. It is averred in the supporting affidavit sworn by Sylvester Onyango Obat on 9/9/2025 that orders have been made to release the purchase price held by the interpleader Bank in trust for the beneficiaries be divided among the applicants and the 4th to 7th respondents. That the 2nd respondent was on the verge of implementing the orders when the said 4th to 7th defendant have no legal claim to the monies they have been ordered to receive.
48. The applicant depones that if the orders sought are not granted he is bound to suffer since the said 4th - 7th defendants shall benefit from proceeds of the purchase price amounting to unjust enrichment. This is the main concern of the applicant.

49. But is unjust enrichment a demonstration of substantial loss? My answer is in the negative for the reason that the decree is monetary and I have not been shown by evidence that the parties who have been ordered to be paid the money will not be able to refund the money should the appeal fail. Substantial loss is loss which would not be compensable – see **Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR**. In the present case the amount for compensation is known.
50. The threshold for demonstrating substantial loss has simply not been met.
51. The above notwithstanding the 2nd respondent has deponed that since the money decreed by the trial court to be given to the 4th – 7th defendants through the law firm of the 2nd respondent, he is making a professional undertaking to the Court to refund all of it should the appeal succeed. The court is invited to issue an order on this undertaking upon discharge of the temporary stay issued.
52. I have anxiously considered the invitation and magnanimous offer extended by the 2nd Respondent. It is my considered view that in the interest of justice this will cushion everybody in the matter. However a Bank Guarantee in the equivalent sum would be the better option to the professional undertaking.

53. The upshot of the foregoing is that preliminary objection has failed and it is dismissed with no orders as to costs in view of the goodwill extended by the 2nd respondent.
54. The court will dispose of the application dated 9/9/2025 by discharging the temporary orders of stay of execution and replacing the same with orders for the deposit of a Bank Guarantee of Kshs.2,337,269.80/-to be issued to the firm on record for the appellants.

Orders accordingly.

Delivered and Dated at Siaya This 20th Day of November 2025

LADY JUSTICE A.E. DENA

JUDGE

20/11/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Barack for Applicants/Appellants

Mr. Mwaniki Holding Brief for Mr. Mbaabu for 1st Respondent

Mr. Okutta for 2nd ,4th ,5th ,6 and 7

Mr. Ishmael Orwa Court Assistant.

ORIGINAL