

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELCLC NO. E396 OF 2024

JACKSON THUAH KIHAGI(suing as the
Legal Representative of the Estate of
CHARLES KIHAGI THUAH
(Deceased).....PLAINTIFF/APPLICANT

VERSUS

MARY WANJIKU KARANJA(Sued as the
Legal Representative of the Estate of
KARANJA KAGO
(Deceased).....DEFENDANT/RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 25th September, 2024 and the notice of preliminary objection dated 7th March 2025 respectively. The notice of motion dated 25th September 2024 is filed by the plaintiff/applicant and it is expressed to be brought under **Order 40 Rules 1 & 2** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking the following orders: -

1. ***That pending the hearing and determination of this suit, Duncan Mwebia Arimi, be ordered to deposit the monthly license fee of Kenya Shillings One Hundred and Ten Thousand (KShs. 110,000/-) into a joint interest-earning bank account to be held in the names of the advocates representing the respondent and the applicant herein.***

2. That the said joint account be maintained until the rightful owner of Plot No. 9363/312 is determined by the honourable court.

3. That costs of this application be in the cause.

2. The application is premised on the grounds on its face. The application is further supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that his late father is the owner of Plot No. 312 having purchased the same from Vika Investments Limited, and that Duncan Mwebia Arimi, through his company Dunrays Ondemand Limited entered into a license agreement with his late father for the suit property. He deposed that the said Duncan Mwebia breached the license agreement on grounds that the suit property is owned by the defendant/respondent wherein they entered into a new tenancy agreement.
3. The plaintiff/applicant deposed that following the ruling delivered by the Business Premises Rent Tribunal, the court suspended all titles relating to plot No. 9393/65 pending the determination of this matter. Further, that the estate of his late father is at the risk of suffering irreparable harm due to the diversion of the rent, and that it is imperative that the monthly license fee paid by the said Duncan be secured in a neutral and fair manner until the rightful ownership of the suit property is determined. Further, that given

the complexity of the suit property, it is fair and in the interest of justice that this court orders the said tenant to deposit the rent in a joint interest earning bank account to held in the names of the parties' advocates.

4. The defendant/respondent filed her notice of preliminary objection dated 7th March, 2025 challenging the application on the following grounds: -

i. That the plaintiff's application do not disclose any reasonable cause of action against the defendant which is in contravention of Order 2 Rule 15 of the Civil Procedure Rules, which provides for striking out pleadings that do not disclose a reasonable cause of action against the sued party.

ii. That the plaintiff has not demonstrated any legal or factual basis upon which the defendant should be held liable for breach of the license agreement by the said Duncan Mwebia, not included as a party to the suit.

iii. That the orders sought by the plaintiff lack legal basis and are unenforceable in the absence of an existing contractual or legal obligation between the parties.

iv. That the court lacks jurisdiction to entertain a claim that improperly seeks to impose

***obligations on a party who is not legally bound
by the alleged license agreement.***

5. The application and the preliminary objection were canvassed by way of written submissions. The plaintiff/applicant filed his written submissions dated 10th July, 2025. The defendant/respondent filed her written submissions dated 18th July, 2025.
6. I have carefully analyzed and considered the application, the preliminary objection and the written submissions filed by both parties. The issue for determination is *whether the application and the preliminary objection have merit.*
7. I will begin with the notice of preliminary objection. The defendant/respondent submitted that this court has the power to order the striking out of pleadings which do not disclose a reasonable cause of action, that are scandalous and vexatious. While relying on the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited [1969] EA 696**, she contended that the preliminary objection raises a pure point of law.
8. The defendant/respondent argued that the application is founded on vague unsubstantiated allegations without a single word pleaded against her, and that the plaintiff/applicant failed to particularize why she should be part of the alleged breach.

Further, that this court lacks jurisdiction since the cause of action is based on a lease agreement which is not legally enforceable against her.

9. Law, J.A. in **Mukisa Biscuits Manufacturing Company Limited - vs- West End Distributors (1969) EA 696** stated as follows: -

“So far as I am aware, 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, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

10. Also, the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR**, it was held that:-

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

11. Further, Ojwang J (As he then was) in **Oraro -vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that:-

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....”

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

12. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose of the

issue that is before court without going to trial and lastly, the same ought to stem from and not outside of pleadings.

- 13.** In applying the above principles to the instant objection, I differ with the defendant/respondent that the allegations are unsubstantiated. This would in essence mean that the defendant/respondent is opposed to the statements or averments made by the plaintiff/applicant in his application. To succeed in claiming that the allegations are unfounded and vague, the court will have to look at evidence to confirm the same. A preliminary objection is not the best tool to use in the circumstances of this case. More so where facts are disputed. Further, and I note that the defendant/respondent has not filed her response to the application to enable the court appreciate the disputed facts and the undisputed facts.
- 14.** However, and looking at the application as it is drafted, it is clear that the plaintiff/applicant seeks that the tenant pays the rent obligations which he has failed to do, in a joint interest-earning account. The entire application seeks orders against the tenant and not the defendant/respondent. The plaintiff/applicant has not joined the said tenant in these proceedings and it would be a serious miscarriage of justice for the court to issue orders against a party who did not have an opportunity to participate in the proceedings.

In that case, the only grounds that succeed in the objection are 1 and 2, in as far as the tenant is not a party to these proceedings.

- 15.** Having said that, and looking at the substance of the application, and in the interest of justice, it is necessary that the party whom the orders are sought against is made a party to these proceedings. As it is, the instant application cannot survive against the defendant/respondent.
- 16.** From the above, the notice of preliminary objection dated 7th March, 2025 succeeds in terms of grounds 1 and 2. The notice of motion dated 25th September, 2024 is hereby struck out. The costs of this application is awarded to the defendant/respondent and it is assessed at KShs.30,000/.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY
THIS 28TH DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.
JUDGE
28/11/2025.**

In the presence of:

Mr. Benson Agunga - Court assistant

*Ms. Nyaranda Ayuma holding brief or Mr. Gikandi for the
Plaintiff/Applicant*

Ms. Chemutai for the Defendant /Respondent