

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC MISC CASE NO. E049 of 2025**

**HAMIDA ALHUSSEIN**

**NAJMUDDIN HASSAN MOHAMEDALI**

**MOITZ NOORBHAI**

**ZEHRABHA TEHERIALI ..... APPLICANTS**

**VERSUS**

**KURSHEE FAROOQ ..... RESPONDENT**

**OMAR ABEID KUBBY ..... INTERESTED PARTY**

**RULING**

1. By a Miscellaneous application titled “Summons for an Order to Transfer Property known as Mombasa/Block XVI/203”, the four (4) Applicants pray for the following:

**1) Spent;**

**2) That the Court to order the Respondent as an Administrator to sign the transfer for property known as Mombasa/Block XVI/203 in favour of the Interested Party;**

**3) That in the alternative the Court do issue an order to effect the transmission of the property known as**

**Mombasa/Block XVI/203 from the administrators to the Interested Party; and**

**4) That the costs of this Application be costs in the cause.**

2. The summons is supported by an Affidavit sworn by Najmuddin Hassanali Mohamedali Noorbhai (the 2<sup>nd</sup> Applicant) wherein the Applicants avers that the said Mombasa/Block XVI/203 is owned by the Omar Abeid Kurby (the Interested Party) who was issued with a Certificate of Lease dated 23<sup>rd</sup> July 2014 having acquired the lease interest from Gulamhussein MohamedAli Noorbhai & 9 Others who are all deceased.
3. The Applicants further aver that the Lessee had made a request which was agreed to by all the Administrators to convert the title to freehold at a consideration of Kshs. 10,000,000/=. It is their case that thereafter, a transfer was prepared in favour of the purchaser and the same as signed by all the representatives save for the Respondent who declined to execute the same.

4. Khurshee Farooq (the Respondent) is opposed to the application. By a Notice of Preliminary Objection dated 30<sup>th</sup> June 2025 the Respondent asserts that:

- 1. The suit filed herein is misconceived, incompetent, incurably defective and bad in law;**
- 2. The summon application is not anchored on any Plaint or other Originating Process and has no legs to stand on;**
- 3. That the said summon and entire suit filed herein are an abuse of the process of this Honourable Court as they seek remedies not available in law; and**
- 4. The said summons is an attempt to circumvent the legal process for a transfer as prescribed by law in an attempt to coerce the Respondent to transferring her property against her will.**

5. I have carefully perused and considered both the application as well as the Preliminary Objection raised thereto by the Respondent. I have similarly perused and considered the

submissions placed before me by the Learned Advocates representing the parties.

6. The proceedings herein have been commenced by the Applicant through a pleading titled “Summons for an Order to Transfer Property Known as Mombasa/Block XVI/203”. The Respondents object thereto on the ground that the proceedings have not been commenced in the manner contemplated in law.

7. Section 19 of the Civil Procedure Act provide that;

**“Every suit shall be instituted in such manner as may be prescribed by Rules.”**

8. On the other hand, Order 3 Rule 1 (1) of the Civil Procedure Rules 2010 provides that:

**“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”**

9. Considering those provisions in ***Board of Governors, Nairobi School -vs- Jackson Ileri Geta (1999) KLR***, the court observed as follows:

**“2. Pleading is defined in Section 2 of the Civil Procedure Act to include a petition or summons,**

**and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.**

**3. The use of the term “summons” in the definition of the term “pleading” must be read to mean “Originating Summons” as that is a manner prescribed for instituting suits.”**

10. In their submissions before the court, the Applicants assert that they have come to court through a Miscellaneous application and that while such is not a suit, it is a procedural device used in courts to address various non-contentious, or ancillary matters that arise during the course of a larger legal case or before a case is formally instituted.

11. While it is indeed permissible for a person to file a Miscellaneous application where the court is not being asked to

determine any issues between the parties, I was not persuaded that that was the case herein.

12. In the matter before me, it was apparent that the subject matter thereof is a property known as Title No. Mombasa Block XVI/203 which is jointly registered in the names of the Applicants and the Respondent herein. It was also apparent that unlike the Respondent herein, all the Applicants had agreed to transfer their interest in the title to the Interested Party herein at a consideration of Kshs. 10,000,000/=.
13. By the miscellaneous proceedings filed before this court, the Applicants urge this court to compel the Respondent to transfer her rights and interest in the said title to the Interested Party at a pre-determined consideration. The order being sought does not arise from a judgment of this court pertaining to the subject matter and it was unclear to me on what basis the court can make that order without first and foremost fully adjudicating on the rights of the parties in regard to the subject property.
14. Where, as it would appear, the Applicants are aggrieved by the Respondent's failure to execute the transfer in favour of the Interested Party, they ought to institute a suit in the manner

prescribed by the Rules. The Miscellaneous Application filed herein and the accompanying “Summons” are not legally recognised as an originating process and I find the same to be incurably defective and a non-starter.

15. Accordingly, I do find merit in the Preliminary Objection dated 30<sup>th</sup> June 2025 and I hereby strike out the Miscellaneous Application dated 16<sup>th</sup> June 2025 with costs to the Respondent.

**Ruling dated, signed and delivered in open court and virtually at Mombasa this 11<sup>th</sup> day of December, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Mkan Advocate for the Applicants
- c) Mr. Ahmed Advocate the Respondent