

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
LAND APPEAL NO. 4 OF 2024

BENARD ANTONIE OTIENO.....
.....APPELLANT

-VERSUS-

JOAN ATIENO OWINO.....
RESPONDENT

JUDGEMENT

1. By a Memorandum of Appeal dated 4/6/2024 the Appellant raised the following grounds of appeal against the ruling of HON. L. N. SARAPAI PM delivered on 3rd October, 2023 in Ukwala MCELC MISC NO. E004 OF 2023;-

1) THAT the Learned Trial Magistrate erred in Law in dismissing in Part and allowing in Part the Preliminary Objection dated 1st September, 2023.

2) THAT the Learned Trial Magistrate erred in Law in coming into the Arena of litigation by guiding a Party on what procedure to take in blatant disregard to the Statutory Provision that parties are bound by their pleadings.

2. Based on the above grounds it is proposed to this court that this Appeal be allowed, the Ruling of the lower Court be set aside and the Preliminary Objection be allowed with Costs.

Background

3. The proceedings in the trial court were commenced by the respondent herein by way of a Miscellaneous Application being Ukwala MCELC MISC NO. E004 OF 2023 through a Notice of Motion dated 20/07/2023 seeking the following orders;-

1) This application be certified urgent and be placed before the Honourable Magistrate to be heard ex-parte in the first instance for appropriate orders and directions.

2) THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue orders of Injunction restraining the Respondent and the beneficiaries of the estate of Erastus Mwanga Olila by themselves, their servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienation, dealing, disposing, trespassing and/or in any other manner interfering with the LR. **NO. NORTH UGENYA/SEGA/274.**

3) THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue demolition orders in order to grant the Applicant access to her home situated in **LR. NO. NORTH UGENYA/SEGA/274**, the Respondent herein having erected structures at the entrance/gate of the Applicant's home, effectively denying her access to the said home.

4) THAT pending the hearing and determination of **UKWALA SUCCESSION CAUSE NO. E194 OF 2023**, this Honourable Court be pleased to issue orders of Injunction restraining the Respondent and the beneficiaries of the estate of Erastus Mwanga Olila by themselves, their servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienation, dealing, disposing, trespassing and/or in any other manner interfering with the **LR. NO. NORTH UGENYA/SEGA/274**.

5) THAT pending the hearing and determination of **UKWALA SUCCESSION CAUSE NO. E194 OF 2023**, this Honourable Court be pleased to issue demolition orders to demolish the temporary structure in front of the gate to the Applicant's home in order to grant the Applicant access to her home situated in **LR. NO. NORTH UGENYA/SEGA/274**, the Respondent herein having erected structures at the entrance/gate of the Applicant's home, effectively denying her access to the said home.

6) THAT the OCS, Segga Police Station does provide Security to oversee enforcement of Order Numbers 3 and 5 as sought herein.

7) THAT this Honorable Court be pleased to issue orders for maintenance of status quo pending the hearing and determination of **UKWALA SUCCESSION CAUSE NO. E194 OF 2023**.

8) Costs be provided for.

4. In response to the application the respondent who is the appellant herein responded by raising a preliminary objection on the following verbatim grounds;-

- 1) The proceedings herein are fatally defective.
- 2) The entire suit as commenced is absolutely against the statute.
- 3) The Notice of Motion dated 20th July 2023, vide MISC. ELCNO. E004 OF 2023 is misconceived, bad dismissed in law, with incompetent and an abuse of the due process of the Court and should therefore be costs.

5. The preliminary objection was canvassed before the trial court by way of written submissions which both parties filed and exchanged. After considering the same the trial court in a brief ruling delivered on 3/10/2023 held as follows;-

‘Article 159 (2) (d) of the constitution of Kenya as read with section 1A, 1b and 3A of the civil Procedure act are imperative. Technicalities and rules of produce and the hand mill of substantive justice. In that regard substantive justice in this are demands, that the production order dated 01.09.2023 be dismissed in part and allowed in part by renewing the orders of court dated 09.08.2023 to allow leave of 14 days from applicant to file substantive suit within 14 days of this order; failure of which stay and demolition shall both vacate and

rightful owner (s) of parcel with possession continue user and enjoyment of suit parcel.'

Parties Submissions

6. The appeal was canvassed by way of written submissions. The appellants submissions are dated 20/08/2025 and filed on 15/09/2025. The respondents' submissions were not on the e-filing platform at the time of writing this judgement despite the respondent having been in court when Ms. Onsongo held the brief of Mr. Omondi counsel for the respondent when directions were issued.
7. The appellant raised three issues for determination 1) whether or not the preliminary objection dated 1/9/2023 raises a pure point of law 2) whether or not a miscellaneous application is the proper way of initiating a suit seeking substantive orders and final orders and 3) Whether or not parties were bound by their pleadings. I will refer to the arguments raised in support of the issues latter in this judgement.

ANALYSIS AND DETERMINATION

8. From the grounds of appeal, the written submissions as well as the law, I take the view that the main issue for determination is whether this appeal is merited. In answering this question, I will address the following questions; -
 - 1) Whether the preliminary objection was properly raised
 - 2) Whether the proceedings commenced by the Respondent were properly before the trial court
 - 3) What orders as to costs should commend as to the appeal.

9. This is a first appeal and as rightly stated by counsel for the appellant is to re-evaluate the evidence presented before the trial court. in this regard I will be guided by the case of **Selle Vs. Associated Motor Boat Co. (EA.123)** that the court must reconsider the evidence, evaluate it itself and draw its own conclusions

10. The duty of an appellate court is stipulated under Section 78 of the Civil Procedure Act which states as follows

“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;

(a)to determine a case finally;

(b)to remand a case;

(c)to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2,) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

Whether the preliminary objection was properly raised

11. Based on the submissions in the trial court, the respondents in their submissions maintained that the preliminary objection was not properly raised. This was for failure to raise pure point of law. The court has been

referred and rightly so to the case of **Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors [1969] E.A. 696.** Justice Newbold stated that;-

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion"

12. My understanding of the gist of the preliminary objection was that the suit was defective to the extent that it was commenced by way of a miscellaneous application and not a substantive suit. This in my view resonated with the point that the entire suit as commenced is absolutely against the statute. Argued successfully the preliminary objection was capable of resolving the matter without going into the merits of the case and therefore it was properly raised.

Were the proceedings properly before court?

13. But firstly I think the main issue was whether the proceedings were properly before the trial court for purposes of the orders sought in the trial court proceedings. It has been urged that applicant sought orders of injunction and demolition. That the law that governs such applications for injunction is premised under order 40 rule 1 the Civil Procedure Rules.

14. Order 40 Reads as follows;-

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b)..... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

15. It has been submitted that arising from the foregoing provisions any application for injunction must be anchored in a suit. That there was no plaint or an originating summons.
16. It is imperative based on the above argument to look at the definition of a suit.
17. Section 2 of the Civil Procedure Act defines a suit thus - ‘**means all civil proceedings commenced in any manner prescribed**’

Section 19 of the Civil Procedure Act is on institution of suits and provides that- ‘**Every suit shall be instituted in such manner as may be prescribed by rules.**’

Order 3 rule 1 of the Civil Procedure Rules provides that: -
"Every suit shall be instituted by presenting a plaint

to the court or in such other manner as may be prescribed"

18. My review of the provisions of order 40 Rule 1 in my view do not specify any mode of the suit contemplated under the said provisions. I therefore respectfully disagree with the contention that orders for injunction must be anchored on a plaint or an originating summons.
19. But having stated the above it is imperative that I must look at the reliefs that were sought in the suit as commenced. The prayers sought have already been highlighted elsewhere in this judgement. Prayer No. 3 has caught my attention for the reasons that it seeks substantive orders of demolition of structures erected on a disputed property. Further the entire prayers seem to impute that the defendants are trespassers on the property LR. NO. NORTH UGENYA/SEGA/274. The question of whether the defendants are trespassers can only be determined upon a substantive suit where parties can be properly heard on its merits. I would respectfully agree that once the Notice of Motion application was heard interpartes that would be the end of the matter and there would be no opportunity for hearing on merits.
20. The court is emboldened by the following holding in **Waimiri v Muhoro & 2 others [2025] KEHC 280 (KLR)** the court had this to state;-

12..' In Rockland Kenya Limited v Commissioner General of the Kenya Revenue Authority & another [2020] eKLR, W. A.

Okwany stated as doth:“12.Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted by Limo J. in *Witmore Investment Limited v 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.”

13. Similarly in *Nairobi West Hospital Limited V Joseph Kariha & Another* [2018] eKLR it was held:-“.....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”

21. Moreover, my review of the ruling rendered by the trial court reveals that the learned Magistrate allowed '*leave of 14 days to applicant to file substantive suit within 14 days of this order*'. This order in my considered view cannot be accorded any other explanation except the finding that the proceedings were not properly before the trial court.
22. Having made the above finding it was incumbent upon the trial court to strike out the suit. The invocation of the provisions of article 159 of the Constitution was misplaced and I'm in agreement with the finding of the Court of Appeal in **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2010] eKLR** where the court held that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure. The discretion was wrongly exercised.
23. The conclusion I have thus reached is that the appeal is merited. It is allowed with the consequence that the ruling and order dated 3/10/2023 is set aside. In its place, the court hereby substitutes an order dismissing Ukwala MCELC MISC NO. E004 OF 2023 and the Notice of Motion dated 20/07/2023.
24. Since the award of costs is also discretionary as explained in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, no party**, in the instant case based on the pleadings, I note that parties seem to be related and hence I will make no orders as to costs.

**Delivered and Dated at Siaya This 30th Day of January
2026**

**HON. LADY JUSTICE A.E. DENA
JUDGE**

30/01/2026

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

Mr. Odera for the Appellant

N/A for the Respondent

Court Assistant: Ishmael Orwa