

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

SUCCESSION CAUSE NO. E013 OF 2022

**JOSEPH AGUNGA ANAYA.....1ST
APPLICANT**

**ROSELINE AKELO ANAYA.....2ND
APPLICANT**

**BILDAD MISOKE OUMA.....3RD
APPLICANT**

VERSUS

**PATRICK A. JALENY.....
RESPONDENT**

RULING

Before this Court is a **Preliminary Objection dated 4th November 2025** filed by the Administrator of the estate of the late *Titus Jaleny Ombima* challenging the competence of the Applicants' Notice of Motion dated 28th October 2025.

The Applicants who are proprietors of land parcel **KANYAMKAGO/KAJULU/101** filed the impugned application seeking stay of execution, setting aside of ex parte orders issued on 22nd September 2025, and orders restraining the cutting and/or felling of trees alleged to be on a disputed boundary between their land and **KANYAMKAGO/KAJULU/40**, the estate property.

The Administrator objects to the application on the grounds that the Applicants were not parties to the succession proceedings, did not seek leave to be enjoined, and therefore lack locus to move the court within these proceedings.

The objection is premised on **Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and **Order 1 Rule 10 of the Civil Procedure Rules, 2010**.

The Court directed the Preliminary Objection to be disposed of through written submissions.

From the record and supporting affidavit of *Roseline Akelo Anaya*, the Applicants state that they are registered proprietors of **KANYAMKAGO/KAJULU/101**, adjoining **KANYAMKAGO/KAJULU/40**.

That they were never served with the Respondent's application dated 19th September 2025 which resulted in the ex parte order of 22nd September 2025 authorizing the harvesting of trees. That a survey and boundary determination was conducted by the Land Registrar and County Surveyor on 2nd September 2025 in their absence, contrary to Section 19 of the Land Registration Act.

That the boundary determination was allegedly skewed, relying on identifiers pointed out by members of the estate;

That the Respondent has now obtained an order to harvest mature trees planted by the Applicants, posing irreversible damage.

That they contend that they are necessary parties as the ex parte orders directly affect their proprietary interests and they cannot be condemned unheard.

The Administrator's position and argument is that the instant proceedings are a succession cause, and the Applicants are strangers to it.

That under **Order 1 Rule 10** and **Rule 7 of the Mutunga Rules** (2013), a person wishing to join proceedings must seek leave of the Court and that the Applicants did not seek leave and instead filed an application as if they were already parties, even altering the cause title.

The Administrator cited the holding in The Supreme Court in **Muruatetu** which set mandatory criteria for joinder of interested parties which the Applicants did not satisfy.

That the Applicants have been aware of the boundary issues and survey process and cannot now claim to be strangers to the cause.

That the Notice of Motion is incompetent and should be struck out.

Analysis and Determination

From the objection and submissions, the following issues arise:

1. **Whether the Preliminary Objection meets the threshold in Mukisa Biscuit.**
2. **Whether failure to seek leave for joinder renders the Applicants' application incompetent.**
3. **Whether a procedural lapse relating to joinder can justify striking out the application in the circumstances.**

Whether the Preliminary Objection Meets the Mukisa Biscuit Threshold,

In **Mukisa Biscuit Manufacturing Co. v West End Distributors (1969)**, it was held that a Preliminary Objection must raise a pure point of law; be argued on the assumption that all facts pleaded are

true; and not call for ascertainment of facts or the exercise of discretion.

The objection is that the Applicants filed a substantive application without leave to join proceedings. Whether or not leave was required is indeed a point of law. However, determining whether the Applicants are directly affected persons, the ex parte orders touched their proprietary rights and natural justice demands their being heard requires factual appreciation of the nature and effect of the impugned orders. It therefore means that the objection is intertwined with factual considerations on the impact of the orders of this court, service and the Applicants proximity to the subject matter. A preliminary objection that requires the Court to interrogate such facts does not qualify as a pure point of law. The finding of this court is therefore that the objection partly meets, but does not fully satisfy, the Mukisa standard. It falls short because resolution requires factual examination. On this ground alone, it is improperly taken.

Whether Failure to Seek Leave for Joinder Renders the Application Incompetent, the Administrator has relied on **Order 1 Rule 10 CPR**, and **Rule 7 of the Mutunga Rules (2013)** which provisions require an intended Interested Party to seek leave before being joined. However, two important legal considerations arise namely that the Applicants are persons directly affected by orders of the Court and under Article 40 and 50 of the Constitution they need not await formal joinder before seeking variation or stay of orders where their rights to fair hearing and proprietary rights are concerned and/or are threatened with violation.

Further failure to seek leave is a curable procedural lapse and Order 1 Rule 10(2) empowers the Court to add parties at any stage of the proceedings.

It does not mandate striking out applications filed before joinder, especially where the omission does not prejudice other parties, and the applicant is a necessary party.

In consideration of the discretionary powers bestowed on this court by Article 159(2)(d) of the Constitution this court finds that the omission does not render the application fatally incompetent. It is curable and given the gravity of the Applicants interest the proper approach would be to regularize their participation and not to punish them for the procedural omission. The justice of the case demands that the Applicants be heard.

Having considered that the Applicant's are necessary parties whose rights are affected by an ex parte order which authorized the harvesting of trees the Applicants are laying claim upon, and boundary determination affecting their land was done in their absence, striking out their application would have injustice as its outcome.

The Preliminary Objection is therefore dismissed with no orders as to costs.

The Interested Parties are hereby granted leave to be joined to the suit as necessary parties. The application dated 28th October 2025 is hereby deemed as properly filed and should proceed for hearing and determination by way of written submissions unless parties deem otherwise. Parties are granted 21 days each to file and serve submissions starting with the Interested parties and subsequently the Administrator to the subject estate.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 5TH DAY OF
MARCH, 2026**

.....

**HON. ANNE ADWERA- ONG'INJO
JUDGE**

In the Presence of:

Victor - Court Assistant