



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC L. MISC E035/2025

FRANCIS M. MBUVI T/a MAMBU
AUCTIONEERSAPPLICANT

VERSUS

SOLOMON MUATHE MITAU & 787 OTHERS.....
RESPONDENTS

RULING

1. Before this court for determination is the applicant’s notice of motion dated 15 August 2024, which is said to have been brought under **Sections 1A, 1B** and **3A** of the **Civil Procedure Act, CAP 21**, Laws of Kenya, **Rule 9** of the **Auctioneer Rules**, and all other enabling provisions of law. He seeks the following orders from this court:

a) Spent.

- b) THAT this Honourable Court be pleased to issue break-in orders to the premises of Solomon Muathe Mitau & 787 Others at Ikutha District (In Nguni Ranch).**
- c) THAT this Honourable Court be pleased to order police assistance to the auctioneer, namely Francis M. Mbuvi T/A Mambu Auctioneers, to gain access to the premises/homes and proclaim and attach the goods at the premises/homes of Solomon Muathe Mitau & 787 Others at Ikutha District (In Nguni Ranch).**
- d) THAT the Officer Commanding Station (OCS) Ikutha Police Station or any duly authorised officer above the rank of an Assistant Inspector do supervise the exercise of the auctioneers to gain access to the premises/homes to proclaim and attach the respondent's moveable properties and provide security for purposes of maintaining law and order as pointed out by the plaintiff.**
- e) THAT the cost of this application be provided for.**

2. The motion is grounded on the apparent facts on its face and the applicant's supporting affidavit, sworn on 15 August 2024 and chiefly, he informs the court that the applicant received

instructions on 25 July 2024 from **Ms. J.K Mwalimu & Co. Advocates** to collect and execute warrants of attachment and sale of movable properties, which he received on or about 25 July 2024. However, the respondent has been hostile, has chased the applicant, and has resisted the proclamation and attachment by locking the premises during the day, thereby making it impossible for him, as the auctioneer, to proclaim the properties. As a result of the continued denial of entry to the respondent's premises, the decree holder is unable to enjoy the fruits of the judgment.

3. The motion is challenged through the respondents' notice of preliminary objection dated 22 October 2025, whereby the following points of law are raised: -

a) THAT this Honourable Court lacks territorial jurisdiction to entertain and/or determine this matter as the subject property, known as Nguni Ranch, is situated within Kitui County, which falls outside the territorial jurisdiction of this Court.

b) THAT the motion is fatally defective, misconceived, incompetent and an abuse of the court process and therefore is unsustainable in obtaining the orders sought in the circumstances.

4. Notwithstanding the court's directives, only the applicant representing himself filed his written submissions dated 24 November 2025. In these submissions, three issues for determination were outlined: (a) whether the court possesses jurisdiction to hear and decide on the motion; (b) whether the motion has merit; and (c) who should be responsible for the costs associated with the motion. In consequence, should the respondents choose to file their submissions, they shall be deemed to have filed them out of time and shall be automatically struck out.

5. Accordingly, having thoroughly reviewed the motion, affidavit, annexures, and the applicant's submissions, the distilled issues for determination are **(a) whether the grounds of the PO meet the legal threshold and are merited, (b) whether it was permissible for the auctioneer to file a separate case instead of filing this application in the main suit, and (c) whether the motion is merited.** And these issues shall be dealt with sequentially.

a) Whether the grounds of the PO meet the legal threshold and are merited

6. Regarding the law and jurisprudence, the law is settled. In [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#)

[\[2020\] KESC 54 \(KLR\)](#), the Supreme Court of Kenya endorsed the precedent-setting case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696**, which has long settled the principles of POs and what constitutes it in the following manner:

“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 a 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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. As stated in **paragraph 21** of the Supreme Court of Kenya's decision in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)**, a PO serves two primary purposes:

first, to protect the party objecting to wasting excessive time and resources; second, to save valuable judicial time by ensuring it is reserved for cases that genuinely merit resolution. Therefore, using POs as a strategy to win a case rather than resolving disputes on their merits through proper judicial processes is inappropriate.

8. Three tests are to be applied: first, whether the PO raises a pure point of law; second, whether there is evidence that all the facts alleged by the opposing side are correct; and third, whether the facts need not be ascertained. Having considered the first point of law on jurisdiction, this court finds that it is capable of disposing of the motion, the facts are uncontested, and it raises a pure point of law. As for the second ground, this court is constrained to consider it for reasons that, in this court's humble view, such sweeping grounds would necessitate an assessment of the factual circumstances, which this court cannot undertake, as POs should concern only pure points of law. Put another way, the PO lacks specificity. Guidance on this drawn from the Court of Appeal decision of **Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others [2014] KECA 707 (KLR)**, which stated thus:

“We are in full agreement with the sentiments expressed by the High Court in RANGAL LEMEIGURAN & 3 OTHERS Vs. ATTORNEY

GENERAL & 3 OTHERS, High Court Misc, Appl. No. 305 of 2004;

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that ‘the Application is bad in law’ without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged.”

9. Reverting to the first ground of the PO, it is unfortunate that this court did not benefit from the respondents' submissions, which could have facilitated a proper appreciation of the basis of their arguments. Nonetheless, it is undisputed that the decree subject to enforcement emanated from this court in **Machakos Environment and Land Court (ELC) Civil Case No. 109 of 2001, between Solomon Muathe Mitau and 787 others versus Nguni Group Ranch**. It is further uncontested that, by a decree issued on 18 February 2020, the respondents were ordered to pay the sum of Kshs. 275,055/- to the Nguni Group Ranch. At the time of concluding the matter and rendering the decree, the Kitui Environment and Land Court had not yet been established, thereby vesting this Court with territorial jurisdiction over matters within Kitui. As the court which passed the decree, **Section 30** of the **Civil Procedure Act** and **Order 22, Rule 6** of the **Civil Procedure Rules** permit the decree holder who wishes to execute it to apply to this court for such execution. This court concurs with the applicant that the first ground of the PO is groundless and lacks merit, as this court has jurisdiction to entertain matters pertaining to the execution of the decree in the primary suit. This court so finds.

b) Whether it was permissible for the auctioneer to file a separate case instead of filing this application in the main suit

10. In addressing this issue, it is essential to emphasise the legal and jurisprudential framework in force. In this regard, **Section 34** of the **Civil Procedure Act** stipulates that all questions arising between the parties to the suit in which the decree was issued, or their representatives, concerning the execution, discharge, or satisfaction of the decree, shall be determined by the court executing the decree and not through a separate suit.
11. This provision of the law has been subject to legal interpretation, particularly in cases where auctioneers have initiated parallel proceedings, as in the case herein, and to highlight a few:

In **Kennedy Ooko Jacob t/a Ssebo Intel. Co. Auctioneer v John Abich Ochanda [2021] KEHC 8899 (KLR)**, the court stated: -

“The above decisions have clarified the meaning and purport of Section 34 (1) of the Civil Procedure Act. The appellant’s proceedings seek to determine issues arising from execution and Section 34 Civil Procedure Act clearly provides the procedure by which the appellant should move the court. He should have brought the application the mother file in CMCC 82/2018.”

Similarly, in **SOUTH NYANZA SUGAR COMPANY LIMITED v ALFRED SAGWA MDEIZI T/A PAVE AUCTIONEERS [2010] KEHC 929 (KLR)**, the court held: -

“Section 34 of the Civil Procedure Act strictly bars the filing of separate proceedings to determine issues that emanate or arise from execution of decrees in a suit. Without obvious regard to these mandatory provisions of the law the learned magistrate held that the appellant, if he sought to recover any monies from any of the parties to the application had to bring or initiate independent proceedings. In the face of the clear provisions of Section 34 of the Civil Procedure Act, this conclusion was clearly erroneous.”

12. According to the record, the applicant, who is an auctioneer, acts as the representative of the defendant in **Machakos Environment and Land Court (ELC) Civil Case No. 109 of 2001, between Solomon Muathe Mitau and 787 others versus Nguni Group Ranch**. It is sufficient to note that the parties involved herein are, in essence, the principal parties in the main suit. Consequently, in accordance with **Section 34** of the **Civil Procedure Act**, as read with **Order 22** of the **Civil Procedure Rules**, which governs the execution of decrees and

orders, the applicant is prohibited from instituting the present application as a separate cause.

13. Hence, the applicant contravened **Section 34(1)** of the **Civil Procedure Act** by initiating these proceedings to execute the decree in **Machakos Environment and Land Court (ELC) Civil Case No. 109 of 2001, involving Solomon Muathe Mitau and 787 others versus Nguni Group Ranch**, as there was no necessity to institute a separate lawsuit. Therefore, guided by the law and precedents, this court finds the application lacking competence and null and void. It is also deemed unnecessary to consider the final issue. It is well established in law that costs follow the event, and given that neither party was successful in their respective applications, each shall bear their own costs. Consequently, for the above reasons and findings, the following final orders are hereby issued:

a) The notice of preliminary objection dated 22 October 2025 is hereby dismissed.

b) The application dated 15 August 2024 is hereby struck out.

c) Liberty applies to the applicant.

d) Each party shall bear their respective costs.

e) File effectively marked as closed.

Orders accordingly.

Delivered and Dated at Machakos this 24th day of March, 2026.

**HON. A. Y. KOROSS
JUDGE
24.03.2026**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

No appearance for parties.