

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**COMMERCIAL CIVIL CASE NO. 5 OF 2019**

**JACKSON KIPNGETICH**  
**TUITOEK .....PLAINTIFF**

**VERSUS**

**HEGEONS AUCTIONEERS.....1<sup>ST</sup>**  
**DEFENDANT**

**KOECH KIPROP JOSEPH .....2<sup>ND</sup>**  
**DEFENDANT**

**AND**

**MARYLINE TUITOEK .....INTERESTED**  
**PARTY/APPLICANT**

**RULING**

1. Before this Court are two primary matters for determination. The first is a Notice of Preliminary Objection dated 18<sup>th</sup> February 2026 filed by the 2<sup>nd</sup> Defendant, **Koech Kiprop Joseph**, challenging the jurisdiction of this Court to hear and determine the suit and the application filed by the Interested Party. The second is a Notice of Motion dated 17<sup>th</sup> December 2025 filed by the Interested Party, **Maryline Tuitoek**, seeking various orders including the review, setting aside, and quashing of orders issued by the subordinate court in Kericho CMCC No. 369 of 2012.

2. For clarity, the Court will first determine the preliminary objection, as jurisdiction is the bedrock upon which any court of law must anchor its proceedings. Should the preliminary objection

succeed, the application and the suit will collapse without further consideration. Should it fail, the Court will proceed to consider the merits of the Notice of Motion.

3. The factual background giving rise to these proceedings is protracted and contentious. The genesis lies in Kericho CMCC No. 369 of 2012, a suit in which judgment was entered against the Plaintiff, Jackson Kipngetich Tuitoek, in favor of one Osman Hassan Gale. The decree arising from that judgment was subsequently executed by way of a public auction held on 5<sup>th</sup> August 2019, at which the 2<sup>nd</sup> Defendant, Koech Kiprop Joseph, emerged as the highest bidder for the suit property, LR No. Kericho Municipality Block 631/1298, for the sum of Kshs. 10,500,000/-. The 2<sup>nd</sup> Defendant paid the full purchase price and was issued with a certificate of sale.

4. The Plaintiff appealed against the judgment in Kericho CMCC No. 369 of 2012 through Kericho High Court Civil Appeal No. 32 of 2018, which was dismissed on 26<sup>th</sup> June 2019. A further appeal to the Court of Appeal at Nakuru, being Civil Appeal No. 23 of 2020, was also dismissed on 15<sup>th</sup> May 2024. The debt thus stands settled by the highest courts of the land.

5. Meanwhile, the Plaintiff filed the present suit, Kericho High Court Civil Case No. 5 of 2019, against the auctioneer and other parties. Subsequently, the Interested Party, Maryline Tuitoek, who describes herself as the wife of the Plaintiff, filed an application for joinder and later filed the Notice of Motion dated 17<sup>th</sup>

December 2025. In that application, she alleges that the orders issued by the subordinate court on 12<sup>th</sup> June 2025, which facilitated the transfer of the suit property to the 2<sup>nd</sup> Defendant, were obtained fraudulently, without proper service, and in disregard of the pendency of the present High Court suit.

6. In response, the 2<sup>nd</sup> Defendant filed a Replying Affidavit and a Notice of Preliminary Objection challenging the jurisdiction of this Court on two grounds: first, that the suit offends the mandatory provisions of Section 34 of the Civil Procedure Act (Cap 21, Laws of Kenya); and second, that the orders sought ought to be pursued before the Environment and Land Court.

7. Learned counsel for the 2<sup>nd</sup> Defendant, Mr. Tengekyon, submitted that this Court lacks jurisdiction to entertain the suit for two reasons.

8. First, counsel argued that the dispute relates to the execution of a decree emanating from Kericho CMCC No. 369 of 2012. Relying on Section 34(1) of the Civil Procedure Act, counsel contended that all questions arising between parties to a suit regarding the execution, discharge, or satisfaction of a decree must be determined by the court that executed the decree, not by a separate suit. Counsel cited the case of ***Classic Interior vs. Libuyi (2025) KEELC 8358 (KLR)*** for the proposition that a challenge to the legality of an auction arising from execution must be brought before the executing court.

9. Second, counsel submitted that the orders sought by the Interested Party, including stay of transfer, cancellation of title, and restoration of the land register, are land-specific remedies that fall within the exclusive jurisdiction of the Environment and Land Court under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act. Counsel relied on ***Red and Yellow Outdoors Limited v Shiloh Investment Limited (2025) KECA 1874*** to emphasize that a court cannot arrogate to itself jurisdiction beyond that conferred by the Constitution or statute.

10. The Plaintiff opposed the preliminary objection through submissions filed on 9<sup>th</sup> March 2026 by Kavraj Kaur & Associates. Learned counsel, Mr. Biko, submitted that the preliminary objection does not raise pure points of law as required by the settled principles in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***. Counsel argued that the objections are convoluted with factual issues including whether there was proper service of process, whether the auction was conducted legally, and whether statutory notices were issued. These, counsel submitted, cannot be determined at a preliminary stage.

11. On Section 34, counsel submitted that the provision applies only to parties to the original suit and their representatives. The Interested Party, who is advancing a claim based on matrimonial property rights, was not a party to Kericho CMCC No. 369 of 2012. Similarly, the 2<sup>nd</sup> Defendant was not a party to that suit. Counsel

further submitted that the property is valued at over Kshs. 30,000,000/-, which exceeds the pecuniary jurisdiction of the Magistrates' Court, rendering the lower court incapable of determining the substantive issues raised.

12. On the Environment and Land Court argument, counsel submitted that the original dispute was a commercial debt, not a land dispute, and that the presence of a matrimonial property claim does not transform the suit into an ELC matter.

13. The Interested Party, through M.M. Wafula & Associates, filed submissions on 10<sup>th</sup> March 2026 in support of her application and in opposition to the preliminary objection. Counsel, Mr. Wafula, echoed the Plaintiff's arguments on the **Mukisa Biscuit** threshold, emphasizing that the objections invite the Court to interrogate contested facts including fraud, defective service, and the validity of the auction.

14. Counsel placed significant emphasis on the fact that the suit property constitutes the matrimonial home of the Interested Party, valued at approximately Kshs. 28,000,000/-. It was submitted that issues of matrimonial property and spousal rights cannot be determined within execution proceedings under Section 34, as the Interested Party was not a party to the original decree. Counsel further argued that the purported transfer was tainted with fraud, and under Section 26 of the Land Registration Act, 2012, a title obtained through fraud is not indefeasible.

15. On the issue of service, counsel submitted that the Defendants deliberately served the lower court application on a law firm that no longer represented the Plaintiff, thereby depriving the magistrate of critical information and constituting an integral part of the fraudulent design.

16. The law on preliminary objections is well settled. In the locus classicus of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, the Court defined a preliminary objection as 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. Sir Charles Newbold, JA, added that a preliminary objection must be argued on the assumption that all facts pleaded by the other side are correct, and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

17. Guided by this authority, I must first determine whether the objections raised by the 2<sup>nd</sup> Defendant satisfy this threshold.

18. Section 34(1) of the Civil Procedure Act provides:

***"All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."***

19. The 2<sup>nd</sup> Defendant argues that this suit is an impermissible collateral attack on the execution of the decree in Kericho CMCC

No. 369 of 2012. On the face of it, this argument has considerable force. The Plaintiff's original debt has been adjudicated up to the Court of Appeal, and the suit property was sold to satisfy that decree. In ordinary circumstances, a party aggrieved by the execution process would be required to return to the executing court.

20. However, I find that the present proceedings cannot be so easily compartmentalized. The Interested Party, **Maryline Tuitoek**, was not a party to Kericho CMCC No. 369 of 2012. She is not a "**representative**" of any party to that suit within the meaning of Section 34. Her claim is not that the execution was procedurally flawed in a manner that could have been raised by the judgment debtor. Rather, she asserts an independent proprietary interest in the suit property based on matrimonial property rights under Article 45 of the Constitution and the Matrimonial Property Act.

21. In **Kiarie v Faith Wanjugu t/a Compliance Auctioneers & others (Civil Appeal E927 of 2022) [2024] KEHC 7695 (KLR)**, the Court held that third-party proprietary rights cannot be adjudicated within execution proceedings under Section 34. I find this reasoning persuasive. The question of whether the suit property constitutes matrimonial property and whether spousal consent was required for its sale are not questions that can be determined by the subordinate court in execution proceedings, particularly where the Interested Party was never a party to the original suit.

22. Furthermore, I take note of the undisputed fact that the suit property is valued at approximately Kshs. 30,000,000/-. Under the Magistrates' Courts Act, the pecuniary jurisdiction of a subordinate court is limited to amounts that do not exceed Kshs. 20,000,000/-. Even if the matter were to be referred back to the subordinate court, that court would lack jurisdiction to determine the substantive proprietary claims now being advanced.

23. Accordingly, I find that the objection based on Section 34 of the Civil Procedure Act cannot succeed as a pure point of law at this stage. The facts surrounding the Interested Party's matrimonial property claim, the alleged fraud in the auction, and the defective service are matters that require evidence and cannot be disposed of summarily.

24. The 2<sup>nd</sup> Defendant's second ground is that the orders sought, stay of transfer, cancellation of title, and restoration of the land register, fall within the exclusive jurisdiction of the Environment and Land Court under Article 162(2)(b) of the Constitution.

25. Article 162(2)(b) establishes the Environment and Land Court as a superior court with the status of the High Court, vested with exclusive jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Section 13 of the Environment and Land Court Act elaborates on this jurisdiction.

26. There is no doubt that the remedies sought by the Interested Party directly implicate title to land. On the surface, this would appear to place the matter within the purview of the ELC.

27. However, I am persuaded by the submissions of the Plaintiff and the Interested Party that the nature of this suit is not purely a land dispute. The original cause of action arose from a commercial debt and the execution of a decree. The Interested Party's claim is founded on matrimonial property rights, which have constitutional and statutory underpinnings that are properly justiciable before any court with the requisite jurisdiction.

28. More importantly, this Court has inherent supervisory jurisdiction over subordinate courts under Article 165(6) of the Constitution. The Interested Party is not merely seeking a declaration of title; she is seeking to review, set aside, and quash orders issued by a subordinate court on grounds of fraud, misrepresentation, and lack of service. Such supervisory jurisdiction resides in the High Court, not the Environment and Land Court. As the Court of Appeal stated in ***Republic v Karisa Chengo & 2 others [2017] eKLR***, the High Court retains supervisory jurisdiction over subordinate courts even where the subject matter falls within the ELC's exclusive jurisdiction.

29. In the circumstances, I find that this Court is properly seized of jurisdiction to determine the validity of the subordinate court's orders. Whether the substantive relief of restoration of title can ultimately be granted by this Court or whether that relief must be

pursued before the ELC is a matter that will be determined at the hearing on the merits.

30. For the reasons set out above, I make the following findings:

**1. The preliminary objection does not raise pure points of law as required by *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*. It invites the Court to determine contested facts including fraud, defective service, and matrimonial property rights.**

**2. Section 34 of the Civil Procedure Act does not bar these proceedings because the Interested Party was not a party to the original decree and asserts independent proprietary rights.**

**3. This Court retains supervisory jurisdiction under Article 165(6) of the Constitution to review orders of subordinate courts, irrespective of whether the underlying dispute involves land.**

**4. The preliminary objection is therefore dismissed with costs to the Interested Party and the Plaintiff.**

31. Having disposed of the preliminary objection, I now turn to the substantive application filed by the Interested Party. The application is brought under Section 5 of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules, and Articles 40, 47, 48, 50, 159, and 165 of the Constitution of Kenya, 2010. It seeks the following substantive reliefs;

- a) Prayer 2: That Kericho CMCC No. 369 of 2012 be placed before this court for purposes of review, setting aside, and quashing of the orders of Hon. Japhet Bii (SRM) dated 12<sup>th</sup> June 2025 as published on 26<sup>th</sup> June 2025 and its consequential effects.**
- b) Prayer 6: That upon the hearing and determination of this application, the register in respect of LR No. Kericho Municipality Block 631/1298 be restored to the name of Jackson Kipngetich Tuitoek.**
- c) Prayer 7: That costs of this application be provided for.**

32. The application is supported by the Supporting Affidavit of **Maryline Tuitoek** sworn on 17<sup>th</sup> December 2025. It is opposed by the 2<sup>nd</sup> Defendant, **Koech Kiprop Joseph**, who filed a Replying Affidavit sworn on 18<sup>th</sup> February 2026 and written submissions dated the same day.

33. This court has carefully considered the application, the affidavits on record, the written submissions, and the applicable law.

34. The factual background leading to this application can be summarized as follows:

- a) Kericho CMCC No. 369 of 2012 was a suit between Osman Hassan Gale (Plaintiff) and Jackson Kipngetich Tuitoek (Defendant). Judgment was entered against the Defendant, Jackson Kipngetich Tuitoek, who is the**

***Plaintiff in the present High Court case and the husband of the Applicant.***

- b) The judgment in the lower court was appealed by Jackson Kipngetich Tuitoek in Kericho High Court Civil Appeal No. 32 of 2018, which was dismissed on 26<sup>th</sup> June 2019.***
- c) A further appeal to the Court of Appeal at Nakuru (Nakuru COA No. 23 of 2020) was dismissed on 15<sup>th</sup> May 2024.***
- d) To satisfy the decree arising from CMCC No. 369 of 2012, the suit property, LR No. Kericho Municipality Block 631/1298, was advertised for sale by public auction. The auction was held on 5<sup>th</sup> August 2019, and the 2<sup>nd</sup> Defendant, Koech Kiprop Joseph, emerged as the highest bidder, purchasing the property for Kshs. 10,500,000/-.***
- e) The 2<sup>nd</sup> Defendant paid the full purchase price and was issued with a certificate of sale. However, the registered owner, Jackson Kipngetich Tuitoek, declined to transfer the property, asserting that the title deed was lost.***
- f) On 12<sup>th</sup> June 2025, Hon. Japhet Bii (SRM) in Kericho CMCC No. 369 of 2012 issued orders facilitating the transfer of the suit property to the 2<sup>nd</sup> Defendant.***
- g) The Applicant now seeks to have those orders reviewed, set aside, and quashed, alleging that they***

***were obtained fraudulently, without jurisdiction, and in disregard of pending High Court proceedings.***

35. The following issues arise for determination:

- a) Whether the orders issued by the Magistrate's Court on 12<sup>th</sup> June 2025 were irregular, illegal, or procured by fraud and misrepresentation.***
- b) Whether the Applicant has made out a case for this court to exercise its supervisory jurisdiction to quash the said orders.***
- c) Whether the court can grant the consequential relief of restoring the land register to the name of Jackson Kipngetich Tuitoek.***
- d) Who should bear the costs of this application.***

36. The Applicant makes several serious allegations against the 2<sup>nd</sup> Defendant and his advocates. She contends that;

- a) The application before the Magistrate's Court was based on a false claim that the title deed to the suit property was lost. The Applicant asserts that the title deed is in her custody and is charged to the National Bank of Kenya.***
- b) The proceedings before the Magistrate's Court were instituted while High Court Case No. 5 of 2019 was pending, and the 2<sup>nd</sup> Defendant concealed this fact from the court.***

***c) The application in the lower court was not properly served, as it was served on a law firm that was no longer on record for the Plaintiff.***

***d) The orders were granted without jurisdiction, as the Magistrate's Court was functus officio after the decree was fully satisfied through the auction sale.***

37. The 2<sup>nd</sup> Defendant, in his Replying Affidavit, denies these allegations. He states;

***a) He purchased the property lawfully through a public auction after all appeals from the original judgment were exhausted.***

***b) He was informed by the Plaintiff (Jackson Kipngetich Tuitoek) that the title deed was lost, necessitating the application to the lower court.***

***c) The applications in the lower court were duly served on the Plaintiff's counsel of record, who failed to oppose them.***

***d) There were no court orders barring him from processing the transfer of the property.***

38. The court has carefully examined the affidavits and exhibits on record. The Applicant has annexed a copy of a search (Annexure MT-04) indicating that the suit property is charged to the National Bank of Kenya. If this charge existed at the time the 2<sup>nd</sup> Defendant applied for orders to transfer the property, it is a

material fact that ought to have been disclosed to the Magistrate's Court.

39. The Applicant has also annexed a copy of the application dated 28<sup>th</sup> May 2025 that was filed in the lower court (Annexure MT-03). A cursory examination of that application reveals that it does not disclose the existence of the pending High Court Case No. 5 of 2019, nor does it disclose the charge over the property held by the National Bank of Kenya.

40. The 2<sup>nd</sup> Defendant admits in paragraph 8 of his Replying Affidavit that the Plaintiff informed him that the title deed was lost. However, the Applicant has provided evidence that the title deed is in her custody and that the property is charged. If this evidence is true, then the representation made to the Magistrate's Court, that the title deed was lost, was false.

41. The principle of law is clear: a court order obtained by fraud, misrepresentation, or concealment of material facts is a nullity and may be set aside *ex debito justitiae* (as a matter of right). In ***Kenya Commercial Bank Limited v. James Osebe & Another (2015) eKLR***, the Court of Appeal held that;

**“Fraud unravels everything. A judgment obtained by fraud is a nullity and can be set aside at any time, even after execution.”**

42. In the present case, the Applicant has raised a prima facie case of material non-disclosure and possible misrepresentation before the Magistrate's Court. The failure to disclose the pending High Court proceedings and the existing charge over the property are serious matters that go to the root of the jurisdiction of the Magistrate's Court to entertain the application.

43. The court finds that the Applicant has demonstrated that the orders issued by Hon. Japhet Bii (SRM) on 12<sup>th</sup> June 2025 were obtained under circumstances that raise serious questions of material non-disclosure and potential fraud. The orders are therefore irregular and liable to be set aside.

44. Under Article 165(6) of the Constitution of Kenya, 2010, the High Court has supervisory jurisdiction over subordinate courts and may call for any record, set aside orders or quash any proceedings.

45. The Applicant has invoked this jurisdiction. She has demonstrated that;

***a. The proceedings before the Magistrate's Court were conducted without proper disclosure of material facts.***

***b. There is a pending High Court suit (Civil Case No. 5 of 2019) involving the same parties and the same subject matter.***

***c. The orders issued by the Magistrate's Court have the effect of undermining the pending High Court proceedings.***

46. The 2<sup>nd</sup> Defendant argues that the Magistrate's Court had jurisdiction to issue the orders, and that the Applicant should have challenged them in that court. However, where fraud and misrepresentation are alleged, the High Court may exercise its supervisory jurisdiction to quash the orders to prevent an injustice.

47. The court finds that this is a proper case for the exercise of its supervisory jurisdiction. The orders of 12<sup>th</sup> June 2025 are quashed, and the proceedings in Kericho CMCC No. 369 of 2012 that led to those orders are hereby reviewed and set aside.

48. Prayer 6 seeks to have the land register restored to the name of ***Jackson Kipngetich Tuitoek***. This is a substantive land remedy. This court has carefully considered whether it can grant this prayer. The Environment and Land Court (ELC) has exclusive original jurisdiction over disputes relating to land under Article 162(2)(b) of the Constitution. The High Court (Civil Division) cannot grant orders that permanently alter the land register unless it is sitting as the ELC or exercising appellate jurisdiction.

49. The Applicant's primary grievance is with the irregular orders of the Magistrate's Court. Once those orders are quashed, the status quo ante is restored. The title deed that was issued pursuant to those orders becomes a nullity. However, this court

does not have jurisdiction to direct the Land Registrar to restore the register. That relief properly lies before the Environment and Land Court.

50. Prayer 6 is declined for lack of jurisdiction. The quashing of the Magistrate's Court orders will, as a matter of law, invalidate any subsequent registration that flowed from those orders. If the Applicant wishes to pursue a permanent order for restoration of the register, she may do so before the appropriate forum.

51. Costs follow the event. The Applicant has succeeded in her primary prayer, the quashing of the orders of 12<sup>th</sup> June 2025. However, she has not succeeded in Prayer 6. In the circumstances, each party shall bear their own costs.

52. For the reasons set out hereinabove,

***a. The 2<sup>nd</sup> Defendant's Notice of Preliminary***

***Objection dated 18<sup>th</sup> February 2026 is hereby dismissed.***

***b. The costs of the preliminary objection are awarded to the Interested Party and the Plaintiff, as against the 2<sup>nd</sup> Defendant***

***c. The orders issued by Hon. Japhet Bii (SRM) in Kericho CMCC No. 369 of 2012 on 12<sup>th</sup> June 2025, as published on 26<sup>th</sup> June 2025, and all consequential effects thereof, are hereby set aside and quashed.***

- d. Prayer 6 is declined for lack of jurisdiction.***  
***e. Each party shall bear their own costs of the application dated 17<sup>th</sup> December 2025.***

Orders accordingly.

**Dated, signed and delivered at Kericho this 31<sup>st</sup> day of March, 2026**

.....  
**J. K. SERGON**  
**JUDGE**

In the presence of:

C/Assistant - Rutoh/Naomie

Meroka for the Applicant/2<sup>nd</sup> Defendant

Miss Muyoka holding brief for Biko for Plaintiff