

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC MISCELLANEOUS APPLICATION NO E029 OF 2025

JAMES OPIYO AMOLLO
(Suing as the administrator
Of the estate of Joseph Olale
Amolo-Deceased).....
APPLICANT

VERSUS

TOBIAS	OGUTU	OLALE.....	1ST
RESPONDENT			
ELIZABETH	ATIENO	NYABERA.....	2ND
RESPONDENT			
FREDRICK	ODHIAMBO	OTIENO.....	3RD
RESPONDENT			
WYCLIFF	OCHIENG	OTIENO.....	4TH
RESPONDENT			
BERNARD	ONYANGO	OTIENO.....	5TH
RESPONDENT			
THE LAND	REGISTRAR	MIGORI DISTRICT.....	6TH
RESPONDENT			

RULING

- 1.** What is pending before this Court is the 2nd, 3rd and 4th Respondents' Notice of Preliminary Objection dated 12th November 2025 premised on the following grounds;
 - 1) That the Application is misconceived, bad in law and is an abuse of the due process of this Honourable Court.**
 - 2) That there is no suit properly filed before this court for determination.**

3) That the Miscellaneous application offends the provisions of Order 3 Rule 1 and Order 37 Rule 5 of the Civil Procedure Rules 2010.

4) That this Honourable Court lacks jurisdiction, to hear and determine the suit and doing so offends Section 73(1) and 78[1] of the Land Registration Act 2012.

5) That the Honourable Court lacks jurisdiction to hear and determine this Application as it offends the various provisions of law cited hereinbefore and the same ought to be dismissed with costs to the Respondents.

2. The parties filed submissions on the Preliminary Objection.

Respondents' submissions

3. Counsel for the respondents cited *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 on what constitutes a preliminary objection and urged that the Supreme Court has reaffirmed this principle in the case of *Hassan Joho & another v Suleiman Said Shahbal & 2 others* [2013] KECA 283 (KLR).

4. Counsel submitted that in the present matter, the Preliminary Objection arises from a pure point of law. That the pleadings as brought before this Court are inconsistent with Sections 73(1) and 78(1) of the Land Registration Act, 2012 as well as Order 3 Rule 1 and Order 37 Rule 5 of the Civil Procedure Rules, 2010. He cited *Kyule v Gitaari* [2024] KEHC 5819 (KLR) in this regard, and urged that the Preliminary Objection is sustainable should be upheld.

5. Counsel submitted that it is settled law that a caution may only be withdrawn by the cautioner or removed by the Registrar upon application in the prescribed manner. That in the present matter, no application for removal has been submitted to the Land Registrar, rendering the current application premature and procedurally defective. He cited Section 73 of the Land Registration Act Cap. 300 on the removal of a caution and urged that no such application has been made, rendering the current application premature.
6. He cited Section 78 Land Registration Act Cap. 300 and cited *Mwangi Rukwaro & another v Land Registrar, Nyeri* [2019] KEELC 3985 (KLR) and reiterated that the application is premature, incompetent, and should not be entertained at this stage.
7. Counsel posited that the Miscellaneous application offends the provisions of Order 3 Rule 1 and Order 37 Rule 5 of the Civil Procedure Rules 2010 as a suit can only be instituted by way of a Plaint, Petition or an Originating summons. The general rule therefore is that a Notice of Motion is not legally recognized as an originating process and can only be filed within a properly instituted suit. Further, that Order 3 Rule 1 of the Civil Procedure Rules prescribes the manner in which suits should be instituted. He additionally submitted that in regard to filing the correct documents to institute a suit he relied on *Mwangi Rukwaro & another v Land Registrar, Nyeri* [2019] KEELC 3985 (KLR).
8. Counsel cited Order 37 Rule 8 of the Civil Procedure Rules and the cases of *Joseph Kibowen Chemjor v William C Kisera*

[2013] KEELC 140 (KLR) and Chebon v Land Registrar & another [2023] KEELC 22223 (KLR), urging that this Preliminary Objection is based on the foregoing point of law and if this Honourable court were to determine the suit on merit, it must down its tools. Further, that the Applicant cannot violate the clear procedural requirements under the Civil Procedure Rules and then seek refuge under Article 159(2) (d) of the Constitution. He cited Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KECA 782 (KLR) in this regard.

9. Counsel urged the court to dismiss the application and further, that the suit be struck out with costs.

Applicants' submissions

10. Learned Counsel for the Applicants submitted that it is trite law that a Preliminary Objection can only be taken on a point of law and that the same cannot stand if any fact has to be ascertained or if what is sought is the exercise of judicial discretion, citing Mukisa Biscuit Manufacturing Co. Ltd - versus- West End Distributors Ltd (1969) EA 696.
11. Counsel posited that the only question for determination is whether the Preliminary Objection as filed meets the test set out in Mukisa Biscuits (Supra). On the contention that the Application offends Order 3 Rule 1 and Order 37 Rule 5 of the Civil Procedure Rules, to the extent that there is no proper suit before the court, Counsel urged that section 19 of the Civil Procedure Act provides that every suit shall be instituted in such manner as may be prescribed by rules, while 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. He stated that a simple reading of the above cited provisions points to one clear fact, that the Civil Procedure Rules does not bar the institution of suits through other mechanisms provided that the same is anchored on the relevant statutory provisions. That Section 19 of the Act simply makes reference to "rules" but does not monopolize the same to mean only the Civil Procedure Rules. As such, the mechanism to be used to initiate proceedings in court will depend on the enabling statute.

- 12.** Counsel cited *Abdi Abdullahi Somo versus Ben Chikamai, Ahmed Qureshi and Director of Public Prosecutions (2016) KEHC 4283 KLR* and urged that the law on the removal of cautions is Section 73(1) of the Land Registration Act, which does not provide for the procedure by which the court may be moved. In the circumstances, any person aggrieved by the existence of the caution may move the Court either through a plaint or through an originating motion, especially where no substantive issues are raised as is the case herein.
- 13.** Counsel submitted that there is no requirement under the Land Registration Act that proceedings of this nature must be initiated by way of a plaint as the Objectors seem to suggest. Further, that in their view, this Court has jurisdiction to entertain the instant Application irrespective of the manner in which the proceedings were commenced because the enabling statute does not expressly bar the institution of

proceedings of this nature by way of a miscellaneous Application.

- 14.** Counsel cited Section 3 of the Civil Procedure Act and urged that it is apparent that Section 19, as well as Order 3 Rule 1 of the Civil Procedure Rules cannot stop this Court from exercising the jurisdiction conferred upon it under the Land Registration Act. In any event, any defect in the Application is easily curable under Section 3A of the Civil Procedure Act and Article 159 (2) (d) of the Constitution. He cited *Ngaah versus Musolo & 2 others* (2024) KELC 836 (KLR) in this regard.
- 15.** Counsel submitted that Order 37 Rule 5 requires that an Application under Section 71 of the Land Registration Act (cap 300) be initiated by way of Originating Summons, unless there is a pending suit in which case the Application shall be made by Summons in that suit. That Section 71 of the Land Registration Act relates to lodging of cautions and not withdrawal thereof. That by all accounts, Order 37 Rule 5 cannot be stretched beyond that which it relates to.
- 16.** Counsel submitted that the Preliminary Objection on this point is unsustainable because it is founded on a non-applicable provision of the law. That the Objectors are inviting this honourable court to extend the reach of Order 37 Rule 5 beyond what is contemplated in the Statute. Counsel invited the court to reject that invitation because had the framers of the Rules or the Land Registration Act intended that Order 37 Rule 5 be applicable to withdrawal of cautions, they could have expressly stated so. Counsel urged

that to entertain the Preliminary Objection on this point would be tantamount to the honourable Court arrogating to itself the roles of the Legislature and the Rules Committee.

- 17.** On the contention that the Application is in violation of Section 73(1) and 78(1) of the Land Registration Act, for the reason that no application was made to the 6th Respondent prior to the institution of the instant proceedings, Counsel urged that this is a factual issue that requires the court to interrogate the Application. Further, that this is not a pure point of law and the Objection is thus not sustainable on this limb. He cited *Aviation & Allied Workers Union versus Kenya Airways Ltd & 3 others*. Application No. 50 of 2014 (2015) eKLR in this regard.
- 18.** Counsel cited Section 73 and urged that the three ways stated therein are not sequential and construing them as such would only create an unnecessary bottle neck to the administration of justice. He cited *Republic versus Chief Land Registrar: Ex Parte: Mary Wamaita Kaitany* (2021) eKLR in this regard. Counsel urged that failing to approach the Land Registrar before moving the Court does not extinguish the Court's jurisdiction to hear and determine an Application for removal of caution, because what the Act seeks to do through the two methods is to accord the Cautioner the right to be heard on the caution.
- 19.** Counsel urged that the decision in *Mwangi Rukwaro & Another versus Land Registrar, Nyeri* (2019) KEELC 3985 (KLR) which the Objectors have relied upon on this limb is distinguishable for the reason that in that case, the

Cautioner was not joined in the Application and was therefore never accorded an opportunity to be heard. In the instant case, all the Cautioners are parties to the Application and will undoubtedly have proper opportunity to advance their case on why the caution should remain in force.

- 20.** Counsel urged that the Applicant, an elder citizen, visited the offices of the 6th Respondent severally and each time, he was informed that the Cautions can only be removed pursuant to an Order of the Court. What more was he to do other than to approach the seat of justice as he has rightly done? He urged the court to dismiss the Preliminary Objection with costs.

Analysis and Determination

- 21.** The sole issue for determination is; **Whether the Preliminary Objection is merited, and who to bear costs of the objection and application if any.**
- 22.** Turning to the merits of the application, in the famous **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the Court of Appeal for Eastern Africa, stated (Law JA) in part that:

"So far as I'm aware, 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."

23. Sir Charles Newbold President of the Court in the Mukisa case went on to state;

“a Preliminary Objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Page 710).

24. The bone of contention is the institution of the suit vide a Miscellaneous Application, by way of Notice of Motion, where the Applicant seeks the removal of a caution. The Applicant does not dispute that it filed said application and contends that the same is provided for under law.

25. Lodging of Cautions is governed by Section 71 of the Land Act which provides as follows;

A person who-

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has made an application for a bankruptcy order against the proprietor of any registered land, lease or charge.

26. Order 3 Rule 1 of the Civil procedure Rules provide;

(1) Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

27. Order 37 Rule 5 of the Civil Procedure Rules provides;

An application under section 71 of the Land Registration Act (Cap. 300) shall be made by

Originating summons unless there is pending a suit involving the same lands when the application may be made by summons in that suit.

28. Additionally, **Section 73(1)** of the Land Act provides as follows;

A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.

29. Faced with a similar situation in the case of **Joseph Kibowen Chemjor vs William C Kiseru (2013) eKLR** the court held that;

“It is therefore my considered view that an action for the removal of a caution needs to be commenced by way of a plaint in which suit the plaintiff needs to prove on a balance of probabilities why the defendant has no right to place the caution on his title and why the caution placed by the defendant needs to be removed.”

30. In **Ngoah v Musolo & 2 others [Environment and Land Appeal E023 of 2022] [2024] KEELC 836 [KLR]**, the court held that:-

“Further, in exceptional cases, a suit can be commenced by a notice motion as the 1st respondent did on condition that there is a particular statute governing the procedure of moving the court in such a manner [see **Abdi Abdullahi Somo -v- Ben Chikamai & 2 Others [2016] eKLR]. In addition, where a statute does not**

provide a procedure for a particular proceeding, the court can be moved by an originating motion. [See Saint Benoist Plantations Ltd v Jean Emile Adrien Felix [CA No 25 of 1954].”

- 31.** The Applicant correctly submitted that the Civil Procedure Rules do not bar institution of suits through other mechanisms provided that the same is anchored on relevant statutory provisions. However, given that the relevant statutory provisions have been clearly elucidated above, to wit; the provisions of Section 71 of the Land Registration Act, it follows that the Preliminary Objection is merited.
- 32.** The upshot of the foregoing is that the Notice of Motion Application dated 24th August 2025 is struck out with costs to the Respondent who raised the parties of who raised the Preliminary Objection.
- 33.** Orders accordingly.

Ruling dated, signed and delivered virtually via the Teams Platform this 13th day of May 2026.

**HON. DR. IUR NYAGAKA
JUDGE**

In the presence

C. Osumba for the Applicant

1st Respondent in Court

Mr. Ogola for 2nd Respondent