



**Ethics and Anti-Corruption Commission v Mengech & 4 others (Environment and Land Case 265 of 2018) [2025] KEELC 5470 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5470 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE 265 OF 2018**

**MAO ODENY, J  
JULY 23, 2025**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**HAROUN NGENY KIPKEMBOI ARAP MENGECH ..... 1<sup>ST</sup> DEFENDANT**

**NOREEN SHARIFF CHOGE EVA CHEROGONY BYRON KIPNGETICH  
GAWON CHOGE (SUED AS ADMINISTRATORS OF THE ESTATE OF JIM  
CHOGE (DECEASED))..... 2<sup>ND</sup> DEFENDANT**

**NAKURU COSMETICS CENTRE LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**DIAMOND TRUST BANK ..... 4<sup>TH</sup> DEFENDANT**

**WILSON GACHANJA ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the 1<sup>st</sup> Defendant's Notice of Motion application dated 15<sup>th</sup> April 2025 and Preliminary Objection dated 30<sup>th</sup> April, 2025. The Notice of Motion application seeks the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. That the Honourable Court do upon hearing this instant Application relevant hereto, grant to the 1<sup>st</sup> Defendant leave to defend his alleged role in matters of this suit by him filing and serving his Defence in terms of the draft Statement of Defence annexed hereto. The Application



is based on the Supporting Affidavit of Prof. Haroun Ngeny Kipkemboi Arap Mengech, annexed hereto.

- e. That the Applicant be at liberty to apply for such other further orders as maybe necessary and as the Honourable Court may deem fit to grant.
  - f. That the costs of this Application be provided for.
2. The application is supported by the annexed affidavit of Harun Ngeny Kipkemboi Arap Mengech, the 1<sup>st</sup> Defendant/Applicant sworn on 14<sup>th</sup> April, 2025, where he deponed that his failure to file his statement of defence was not deliberate and blamed it on the law firm of Wachira Kirigo & Company Advocates, whom he had instructed soon after being served with summons.
  3. Brigid Maina filed a Replying Affidavit sworn on 20<sup>th</sup> June, 2025, and deponed that she is an Advocate of the High Court of Kenya instructed by the Plaintiff to oppose the 1<sup>st</sup> Defendant's application and preliminary objection. She deponed that the Plaintiff's case is not based on a contract of sale but involves serious allegations of fraud, illegality, corruption and breach of public trust in the acquisition of public land.
  4. Counsel deponed that the 1<sup>st</sup> Defendant was duly served with summons on 30<sup>th</sup> August, 2018 and his advocates Wachira Kirigo & Company entered appearance on 10<sup>th</sup> September, 2018, and filed Grounds of Opposition on 27<sup>th</sup> November, 2018, yet the matter has been pending for over six years without any diligent prosecution of his defence.
  5. The 1<sup>st</sup> Defendant's Notice of Preliminary Objection dated 30<sup>th</sup> April, 2025 is based on the following grounds:
    1. That the suit as filed by the Plaintiff against the 1<sup>st</sup> Defendant is fatally incompetent, defective, untenable, null and void, ab initio; for being contrary and violating the provisions of Section 3 of the Law of Contract Act (Chapter 23) of the Laws of Kenya: for want of a contract in writing between the 1<sup>st</sup> Defendant and any of the parties, herein, as required by Act, thus
    2. That no suit shall be brought upon a contract for disposition of an interest in land unless;
      - a. The contract upon which the suit is founded (i) is in writing (ii) is signed by all the parties thereto; and
      - b. The signature of each party signing has been attested by a witness who is present when the contract was signed by such a party. There is no contract between the 1<sup>st</sup> Defendant and one Jim Choge demonstrated.
    3. That the Plaintiff has failed demonstrate any document, in writing by the 1<sup>st</sup> Defendant, applying to the Government of the Republic of Kenya or any of the Government's Agency, requesting to be allocated and or to have alienated to him a portion of land in Nakuru Municipality Block 5 or for this matter a portion thereof being the parcel Number: Nakuru Municipality Block 5/144.
    4. That in any event, the subject Title Number: Nakuru Municipality 5/144 does not strictly bear the names of the 1<sup>st</sup> Defendant, which are, Haroun Ngeny Kipkemboi Arap Mengech. The Title was given and or issued to, or in the names of one, Harun Ngeny Kipnyango Mengech who is not one and the same person as the 1<sup>st</sup> Defendant, herein. The 1<sup>st</sup> Defendant has never had any interest in the suit land registered in his name.
    5. Any others.



## 1<sup>st</sup> Defendant's/applicant's Submissions

6. Counsel for the 1<sup>st</sup> Defendant filed submissions dated 30<sup>th</sup> May, 2025 and identified the following issues for determination:
  - a. Whether the Preliminary Objection filed meets the fundamental threshold of a Preliminary Objection?
  - b. Whether the Applicant has a defense on the merits raising triable issues?
  - c. Whether the Respondent herein would be prejudiced if the defence is not allowed or extension of time is not granted?
  - d. Whether the mistakes of an Advocate or Counsel shall be visited upon the 1<sup>st</sup> Defendant?
7. On the first issue, counsel submitted in the affirmative and submitted that the suit violates provisions of Section 3 (3) of the Law of Contract Act (Cap 23) and relied on the case of Mukisa Biscuit Manufacturing Company Limited vs West Ends Distributors Ltd (1969) EA 696.
8. On the second issue, counsel submitted that the Applicant should not be condemned unheard and relied on the cases of Giciem Construction Limited vs Amalgamated Trade & Services LLR No 103 CAK, Job Kiloch vs Nation Media Group Limited, Salaba Agencies Limited & Michael Rioro (2015) eKLR, Egal Mohamed Osman vs Inspector General of Police & 3 others (2015) eKLR, Judicial Service Commission vs Gladys Boss Shollei & Another (2014) eKLR and Baker vs Canada (Minister of Citizenship & Immigration) 2 SCR 8176. Counsel also relied on Articles 47 and 50 of the Constitution of Kenya and Section 4 of the Fair Administrative Action Act.
9. On the third issue, counsel submitted that the Respondents would not be prejudiced if the orders sought are granted and urged the court to allow the application as prayed.

## Plaintiff's Submissions

10. Counsel for the Plaintiff filed submissions dated 20<sup>th</sup> June, 2025 and submitted that the 1<sup>st</sup> Defendant's application for extension of time is not merited and the proffered explanation of change in legal representation is factually implausible. Counsel further stated that the 1<sup>st</sup> Defendant's advocates were served with summons on 30<sup>th</sup> August, 2018, his advocates entered appearance on 10<sup>th</sup> September, 2018, and filed Grounds of Opposition on 27<sup>th</sup> November, 2018, and the matter remained dormant for seven years until April 2025 when he suddenly sought extension of time. Counsel relied on the cases of Nicholas Kiptoo Korir Arap Salat vs IEBC & 7 others [2014] eKLR and CFC Stanbic Limited vs John Maina Githaiga & Another [2013] eKLR.
11. Ms. Maina also submitted that the 1<sup>st</sup> Defendant's Preliminary Objection fails the test established in Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696 as it requires extensive factual determination regarding the nature of the Plaintiff's claim and the circumstances surrounding the alleged fraudulent acquisition of public property. Counsel urged the court to dismiss the Application and the preliminary objection with costs and allow the matter to proceed for trial.

## 3<sup>rd</sup> Defendant's Submissions

12. Counsel for the 3<sup>rd</sup> Defendant filed submissions dated 13<sup>th</sup> June, 2025 and identified the following issues for determination:



- a. Whether the notice of preliminary objection is meritorious?
  - b. Whether costs should issue?
13. On the first issue, counsel submitted that the Preliminary objection raises a pure point of law, namely, the absence of a written and duly executed contract for the disposition of land as required under Section 3 (3) of the *Law of Contract Act*. Counsel submitted that the Plaintiff has failed to demonstrate the existence of any valid and enforceable contract between the 1<sup>st</sup> Defendant and the individual known as Jim Choge.
  14. It was counsel's further submission that the 3<sup>rd</sup> Defendant is an innocent purchaser who acquired the suit property for valuable consideration and relied on the cases of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd [1969] EA 696 and Kabogo vs Gitau (Civil Appeal 82 of 2019) [2025] KECA 193.
  15. On the second issue, counsel relied on Section 27 of the *Civil Procedure Act* and asked the court to award the Defendants costs.

### **Analysis And Determination**

16. The issues for determination are as follows:
  - a. Whether the Notice of preliminary objection dated 30<sup>th</sup> April, 2025 has merit?
  - b. Whether the 1<sup>st</sup> Defendant should be granted leave to file a statement of defence?
17. The nature and scope of a "preliminary issue" is defined in the statement of Law J.A., in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 at 700:
 

“So far as I am 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 or to refer the dispute to litigation.”
18. To ascertain whether or not there was a contact as submitted by the 1<sup>st</sup> Defendant, it is necessary to examine the evidence, which can only be done through trial of the main suit.
19. From the averments and submission by counsel, it is evident that the Applicant's assertion that the Plaintiff has not proved that he entered into any valid or enforceable agreement with one individual known as Jim Choge. These are points that are factual where parties need to give evidence to either dispute or affirm the facts. This cannot be done through a preliminary objection.
20. I find that the preliminary objection raised by the 1<sup>st</sup> Defendant does not squarely fall within the principles enunciated in the Mukisa Biscuits' case. The same is hereby dismissed
21. Having dismissed the preliminary objection by the 1<sup>st</sup> Defendant, the second issue is whether the 1<sup>st</sup> Defendant's application to be allowed to file a defence out of time should be allowed.
22. It is on record that the 1<sup>st</sup> Defendant was served with Summons to enter Appearance on 30<sup>th</sup> August 2018, filed a Memorandum of Appearance vide the firm of Wachira Kirigo & Company Advocates on 10<sup>th</sup> September 2018, and grounds of Opposition on 27<sup>th</sup> November 2018. The 1<sup>st</sup> Defendant has not disputed this information. He only blames his previous Advocates for not filing a Defence after 8 years.



23. Cases belong to parties and not Advocates on record. It is the duty of a party in a case to follow up his/her matter so that all documents are filed within the stipulated timelines. The 1<sup>st</sup> Defendant has filed an application to be allowed to defend the case and a preliminary objection that this suit does not disclose any cause of action against him as the Plaintiff has not proven that he signed a contract as provided for under Section 3 of the Contract Act and that the name used does not belong to him.
24. It seems the 1<sup>st</sup> Defendant deliberately did not file any defence in this matter as he did not take it seriously from the submissions about whether the suit should be sustained against him or struck out. He cannot be blowing hot and cold and submit that he should not be punished unheard and blame his previous advocate for not filing a defence. Why did counsel file a Memorandum of Appearance together with grounds of opposition and fail to file a defence?
25. The 1<sup>st</sup> Defendant woke up in a deep slumber after 8 years when the case had already begun and parties testified. It seems he lost interest in the case having sold his interest in the suit land.
26. The court has discretion to allow parties to file documents out of time but the party must give sufficient explanation why such documents were never filed within the stipulated time, the application should be filed timeously and the same should not cause any prejudice to the opposing parties.
27. In the Court of Appeal case of Thorn PLC v Macdonald cited by the Court in International Air Transport Association & another v Roskar Travel Limited & 3 others (Civil Case E457 of 2020) [2022] KEHC 200 (KLR) the court held that:
  - (i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
  - (ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
  - (iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
  - (iv) prejudice (or the absence of it) to the claimant also has to be taken into account.”
28. The period of 8 years has not been sufficiently explained by the Applicant and therefore find that the Application lacks merit, hence dismissed with costs. I therefore make the following specific orders:
  - a. The 1<sup>st</sup> Defendant’s Notice of Motion Application dated 15<sup>th</sup> April, 2025 is hereby dismissed with costs.
  - b. The 1<sup>st</sup> Defendant’s Preliminary Objection dated 30<sup>th</sup> April, 2025 is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 23<sup>RD</sup> DAY OF JULY 2025 .**

**M. A. ODENY**

**JUDGE**

