



**Kamau v Chege & another (Environment and Land Case
173 of 2004) [2025] KEELC 5575 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 173 OF 2004**

JA MOGENI, J

JULY 23, 2025

BETWEEN

STEPHEN MBUGUA KAMAU PLAINTIFF

AND

WATIRI CHEGE 1ST DEFENDANT

GIDEON KAUMBUTHU MENYE 2ND DEFENDANT

RULING

1. The Plaintiff/Applicant filed an Application dated 5/06/2024 seeking eviction orders against the 1st Defendant from parcel registered as Dagorreti/Riruta/3519. Before the Application could be heard the 1st Defendant/Respondent filed a Preliminary Objection dated 3/07/2024 objecting to the jurisdiction of the Court to determine the Application for the reason that the 1st Defendant/Respondent has not been served with a Decree in this matter since the Judgment required that the 1st Defendant/Respondent be served with the Decree.
2. That the Judgment required that the 1st Defendant/Respondent be served with the Decree and therefore the time mentioned in the Judgment has therefore not started running. This being the case that the Application is incompetent and it is also premature.
3. It is the Objector's contention that the Application fails to comply with mandatory provisions of law particularly Order 45 Rule 1 of the *Civil Procedure Rules, 2010*.
4. Thus, the Application is fatally defective, hopeless, misconceived and totally devoid of merits and is an abuse of the Court process.
5. The brief history is that the Plaintiff filed a Plaint on 17/09/2003 and amended the Plaint on 17/02/2021 and sued the Defendant and sought for the following orders:



- i. A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing occupation of the property known as Dagoretti/Riruta/3519.
 - ii. Eviction of the Defendants their agents and or servants from the property known as Dagoretti/Riruta/3519.
 - iii. General damages for breach of contract.
 - iv. Mense profits at Kshs 50,000 per annum from the year 1997 and delivery of vacant possession.
 - v. Costs of this suit and interest thereon at Court rates.
6. The Court found in favour of the Plaintiff issuing the following orders:
- a. A permanent injunction restraining the Defendants whether by themselves or their servants or agents or otherwise howsoever from remaining on or continuing occupation of the property known as Dagoretti/Riruta/3519.
 - b. General damages at a nominal award of Kshs 50,000.
 - c. The 1st Defendant is hereby ordered to vacate the suit property within 30 days from the date of service of the Decree herein upon them failing which the Plaintiff may apply for an eviction order from the property known as Dagoretti/Riruta/3519.
 - d. Costs of this suit to be borne by the 1st Defendant.
7. Nothing much seems to have happened to the case until the Notice of Motion Application was filed dated 5/06/2024, seeking orders of eviction of the Defendant from the suit land. A Preliminary Objection was raised on the point that the Application offends the provisions of Order 45 Rule 1 and that the Court has no jurisdiction to determine the Application since it is premature. The Defendant contends that the Plaintiff has never extracted and served the Decree yet the Judgment was predicated on that particular condition.
8. It is not clear why the Objector referred to Order 45 Rule 1 in his Application. Order 45 Rule 1 outlines the conditions under which a party can apply for a review of a Court's Decree or Order. This can be done if there's a newly discovered important matter, a mistake on the record, or for any other sufficient reason, provided the Application is made without unreasonable delay.
9. In the Preliminary Objection the Court has not been invited to review its order due to discovery of new and important information. I will therefore take it that the Objector thought it wise to "cast his net wide" hoping to catch some "fish" even if it is simply the small dagaa fish.
10. From my scrutiny of the Application the Objector did not need to go that direction. I leave it at that.
11. The *Black's Law Dictionary* defines a Preliminary Objection as:-
- “... An objection that, if upheld, would render further proceedings before the tribunal unnecessary.”



12. It goes on to list an objection to the Court's jurisdiction as an example of a Preliminary Objection. In the now famous case of *Mukisa Biscuits Manufacturers Ltd v West End Distributors Ltd* (1969) EA 696, the Court defined a Preliminary Objection as follows:-

“ ... 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 to refer the dispute to arbitration.”
13. By inference, a Preliminary Objection can only be raised purely on a point of law and not to question the truthfulness of a fact in a case because then it would be a breach of rules of procedure and ought not be entertained by Courts of law.
14. Therefore, a Preliminary Objection must be raised on the assumption that all facts pleaded by the adverse party are correct. It must not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. No Preliminary Objection can be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
15. The Objector also raised the issue of jurisdiction. In the now famous case of *Owners of the Motor Vessel 'Lillian' (S) v Caltex Oil (Kenya) Ltd* [1989] KLR 1, the Court held that:-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ...’
16. The Objector has stated that this Court cannot entertain the Application for eviction because service of the Decree has not been executed. A Preliminary Objection on the service of a Decree is a point of law. Since the service of a Decree is deemed not to have been done, it is on a point of law and it can be raised as a Preliminary Objection.
17. It follows that the issue of jurisdiction as stated above is also a pure point of law and it is proper that it has been raised as a Preliminary Objection.
18. Thus, a Preliminary Objection challenging the Court's jurisdiction based on the failure to extract and serve the Decree in an Application for implementation of a Judgment is a valid legal argument. It essentially argues that the Court cannot proceed with execution until the formal Decree, which outlines the specific terms of the Judgment, has been officially drawn up and served on the relevant party.
19. Given the preliminary points of law raised, even if the Objector is aware that there is a Decree the requirement that it must extract and serve is a legal requirement that must be fulfilled. The responsibility of service of a Decree lies with the Decree Holder otherwise the Defendant may not vacate the suit land like in the instant suit. In absence of proof that the Decree has been served upon the Defendant, I am persuaded to find that the Preliminary Objection raises a pure point of law and I find that the Preliminary Objection is merited.
20. Orders accordingly.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS
23RD DAY OF JULY 2025.**

.....

MOGENI J

JUDGE

In the presence of:-

Ms. Wamaitha for the Plaintiff

1st and 2nd Defendants – Absent

Melita – Court Assistant

