



REPUBLIC OF KENYA



Wambui v Frann Investment Limited & 2 others (Environment and Land Miscellaneous Application E038 of 2025) [2025] KEELC 5573 (KLR) (22 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5573 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E038 OF 2025

JG KEMEI, J

JULY 22, 2025

BETWEEN

JAMES MWANGI WAMBUI APPLICANT

AND

FRANN INVESTMENT LIMITED 1ST RESPONDENT

DAVID MWANGI WAHOME 2ND RESPONDENT

EDWARD KAGUME WAHOME 3RD RESPONDENT

RULING

1. This matter was commenced through the Notice of Motion dated 21/02/2025 in which the Applicant seeks substantively for orders; That this Honourable Court be pleased to grant an order for temporary injunction restraining the Respondents, their servants, officers, employees, agents and/or assigns from the unlawful eviction of the Applicant from the property known as Subdivision Nos. 3175 (Original No. 1063/2); 3176 (Original No.1063/3); 3177 (Original No.1063/4); 3178 (Original No. 1063/5) Section VI Mainland North situate in Changamwe, Mombasa County pending the hearing and determination of this suit. The Applicant also prayed for costs of the application.
2. The application is based on the grounds that the Applicant leased the suit property on 18/06/2014 for a term of 10 years and 3 months with a promise of automatic renewal of the Lease so as to recover his investment by one of the 1st Respondent's Shareholder who is now deceased. The Applicant asserts that ever since she took possession, he has not enjoyed peaceful occupation of the suit property as the 2nd and 3rd Respondents would demand that rent be paid directly to them. That contrary to the terms of the Lease Agreement, the 2nd and 3rd Respondents have threatened to evict the Applicant from the suit property by issuing him with a Notice to vacate and a Notice of Re-entry of premises dated 16/12/2024 contrary to the doctrines of equity. The application is further supported by the Affidavit of James Mwangi Wambui.



Respondents' Preliminary Objection

3. The Respondent's opposed the application vide the Notice of Preliminary Objection dated 4/03/2025. The Respondents argue that the application is fatally defective and an abuse of the Court process hence ought to be dismissed with costs on the grounds that;
 - a. The Honourable Court lacks jurisdiction to hear and determine the issues raised in the application.
 - b. There is no suit properly filed before this Court for determination
 - c. The application offends the provisions of Section 19 of the Civil Procedure Act on institution of suit. That the application has been commenced through unprocedural means as it seeks substantive orders which cannot be granted in a Miscellaneous Application.
 - d. The Respondents argue that an order of injunction ought to be anchored on a suit as provided under Order 40 Rule 1 of the Civil Procedure Rules.
 - e. That based on the location of the suit property, the application ought to have been filed in Mombasa pursuant to Section 12 of the Civil Procedure Act.
 - f. The Respondents accuse the Applicant of forum shopping.
4. The objection was canvassed by way of Written Submissions. Parties complied. The Respondent/ Objector's submissions are dated 26/5/2025 whereas the Applicant's submissions are dated 21/03/2025.

Respondent/Objector's submissions

5. The Respondents submit that the Preliminary Objection is merited as there is no suit properly filed before this Court for determination. That in the absence of a Plaintiff, the application offends the provisions of Section 19 of the Civil Procedure Act. The Respondents cite the case of Rajab Kosgei Magut –vs- Nuru Jepleting Choge (2020) e KLR where it was held that as a general rule, a suit can only be instituted by way of a Plaintiff. Petition or an Originating Summons. A Notice of Motion can only be filed within a properly instituted suit.
6. The Respondents argue that this Court lacks the jurisdiction to hear and determine this matter. First, that the suit property is located in Mombasa hence the ELC Mombasa has territorial jurisdiction to hear and determine the matter. Secondly, that the application is sub judice as there is a matter pending before the Mombasa Business Premises and Rent Tribunal, which matter is slated for Ruling. As such, that the Court should down its tools for lack of jurisdiction.
7. As to whether the Application is an abuse of the Court process, the Respondents aver that the application is an abuse of the Court's process for lack of disclosure of material facts. That the Applicant has not disclosed the existence of another suit lodged in Mombasa BPRT /E078/ 2025 in which similar reliefs are sought therein. Consequently, they pray that the matter be dismissed with costs.

Applicant's Submissions

8. The Applicant submits that the Preliminary Objection herein raises contentious matters with factual issues hence falling outside the spheres of a Preliminary Objection. That the determination on whether the suit has been un-procedurally filed and the domicile of the Respondents require the introduction of factual evidence to proof.



9. On the issue as to whether the Court has jurisdiction to hear and determine the issues raised in the application, the Applicant submits that the *Civil Procedure Act* provides that every suit shall be instituted in a Court within the local limits of where the Defendant at the time of commencement of the suit actually and voluntarily resides or carries on business. That this protects the Defendant from costs of litigating the suit. The Applicant cites the provisions of Sections 11, 12, 13, 14 and 15 of the *Civil Procedure Act* in support of her assertion. She argues that the territorial jurisdiction of a subject matter is not the only determining factor of jurisdiction. That the 2nd and 3rd Respondents being Directors of the 1st Respondent currently residing in Nairobi, then this Court has jurisdiction to hear and determine the matter.
10. The other issue identified by the Applicant for determination is whether the suit was properly filed; contrary to the Court record, the Applicant submits that what is before Court is an Originating Summons. That pursuant to Order 37 Rule 3 of the Civil Procedure Rules, the application seeks to determine an already established fact of law being that the Respondents are estopped from acting contrary to the contract and that they cannot evict him since the 1st Respondent is indebted to him as per the Judgment delivered in Mombasa.
11. Finally, on whether technicalities can fatally invalidate the substance of a credible suit, the Applicant submits that the application was erroneously indicated as a Miscellaneous Application instead of an Originating Summons hence the suit should not be struck out on a mere clerical mishap. The Applicant cites the overriding objectives and the provisions of Article 159 (2) of *the Constitution* in support of this proposition. The Applicant urges the Court to dismiss the Preliminary Objection with costs.

Analysis and Determination

12. I have considered the preliminary objection raised and the submissions filed together with the authorities relied on. The main issues for determination are;
 - a. Whether the Preliminary Objection raises pure points of law
 - b. Whether a Miscellaneous Application is the proper way of initiating a suit as the instant one seeking substantive and final orders.
 - c. Whether this Honourable Court lacks jurisdiction to hear and determine the Miscellaneous Application as filed.
 - d. Whether the instant application is sub judice and amounts to an abuse of the process of Court in view of the existence of in Mombasa BPRT /E078/ 2025.
 - e. Whether the objection is merited

Whether the Preliminary Objection Raises Pure Points of Law

13. The starting point is to define what a preliminary objection is. On what constitutes a Preliminary Objection, in the case of Hassan Ali Joho & Another -vs- Suleiman Said Shabal & 2 Others SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case Mukisa Biscuit Manufacturers Ltd -vs- West End Distributors Ltd (1969) E.A where the Court of Appeal said that:

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

14. This Court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the Court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu HCCC No.22 of 1999*, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

15. Having looked at what constitutes a preliminary objection, I am satisfied that the instant preliminary objection raises a pure point of law.

Whether a Miscellaneous Application is the Proper Way of Initiating a Suit as the Instant One Seeking Substantive and Final Orders.

16. Section 19 of the *Civil Procedure Act* provides that: - “Every suit shall be instituted in such manner as may be prescribed by rules.”

17. Order 3 rule 1 of the Civil Procedure Rules 2010 prescribes the form and manner of institution of a suit.

18. In the case *Kenya Assemblies of God Trustees & Another –vs- Daniel Obuya & Another*, Nrb ELC Misc. App No. E014 of 2023, this Court while deciding on a miscellaneous application that had sought substantive and final orders made reference to the case of *Rockland Kenya Ltd. –vs- Commissioner General of KRA & Another (2020) eKLR*, where the Court held that substantive orders cannot be issued in miscellaneous applications. The Court had in turn cited with approval the decision in *Witmore Investment Ltd. –vs- County Government of Kirinyaga & 3 Others (2016) eKLR* where Limo J had stated that;

“.....where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this Court for a final resolution of the issues in controversy, raised in the application, it should have moved this Court properly in the manner provided by the law.”

19. The Court in the case of *Nairobi West Hospital Ltd –vs- Joseph Karina & Another (2018) eKLR*, made a similar finding that a substantive order cannot be issued through a miscellaneous application.

20. In the case of *Scope Telematics International Sales Ltd –vs- Stoic Company Ltd & Another [2017] eKLR*, the Court of Appeal held that:

“The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, overlooking a statutory imperative and the above authorities, the learned judge cannot be said to have exercised his discretion property. There can be no other interpretation of rule 2. The application should have been anchored as a suit. It was not about what prejudice the appellant or and 2nd Respondent would suffer or what purpose the suit would have served. The discretion cannot be used to override a mandatory statutory



provision. For these reasons, we are in agreement with the submissions of the appellant that the application was totally incurably defective.”

21. From the emphatic pronouncement of the Court of Appeal in the above cited matter, the manner of initiating a suit is not a mere technicality; it is actually the basis of jurisdiction. The import is that it is matter that is so critical that the Court can raise it on its own motion without being moved by any party.
22. In the instant case, the Applicant seeks an injunction pending determination of the suit. The law that governs applications for injunction is premised under Order 40 Rule 1 of the Civil Procedure Rules which provides as follows: -
 1. Where in any suit it is proved by affidavit or otherwise-
 - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree, or
 - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.”
23. A reading of the above provision of the law points to the fact that any application for injunction ought to be anchored in a suit. Unfortunately, this is not the case before me. The applicant moved the Court through a miscellaneous application and not accompanied by a Plaint or otherwise.
24. As it is, the Notice of Motion application dated 04/03/2025 has no legs to stand on. On that ground alone, the Miscellaneous Application is a candidate for dismissal. I will however proceed and determine the other issues raised herein.

Whether the Plaintiff/ Applicant has exhausted the existing Dispute Resolution Mechanisms before invoking the Jurisdiction of the Court.
25. It is an elementary principle in law that a Court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the Court is derived from *the Constitution* or Statute. If a Court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. This position was stated by the Supreme Court in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR.
26. Jurisdiction of this Court flows from Article 162(2)(b) of *the Constitution* of Kenya which establishes the Environment and Land Court, a Court of equal status with the High Court and empowered to hear and determine disputes relating to the environment and the use and occupation of, and title to land.
27. In giving effect to Article 162(2)(b) of *the Constitution* of Kenya, Parliament enacted the *Environment and Land Court Act* which provides as follows under Section 13 (2) that;
 2. In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes;



- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.”
28. Regarding the doctrine of exhaustion, the Supreme Court of Kenya explained the importance of the doctrine in the case of *Benard Murage -vs- Fine Serve Africa Limited & 3 Others* [2015] eKLR in the following words:
- “Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”
29. Further, the apex Court stated in *NGOs Co-ordination Board -vs- EG & 4 Others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR), made the following pronouncement on the doctrine of exhaustion:
- “87. This is further firmly rooted in Article 159 of *the Constitution* which requires the Courts to promote alternative Dispute Resolution Mechanisms. The moment a storm begins to brew; Courts should not be the first port of call but rather the final resort. Before using the Court’s jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the Courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.”
30. The Apex Court in the case of *Benson Ambuti Adegwa –vs- Kibos Distillers Ltd & 5 Others* [2020] eKLR emphasized that, where appropriate, the superior Courts should remit the dispute to the relevant bodies for adjudication. These decisions from the superior Court are undoubtedly binding on this Court.
31. It is evident from the record that the Applicant is a Tenant in the Respondents’ premises. It is also evident that the Applicant’s cause of action is the eviction notice and the notice for re-entry issued to the Applicant by the Respondent.
32. Section 2(1) of the *Landlord and Tenant (shops, Hotels and Catering Establishments) Act*, (cap 301) which provides that a tenancy agreement or arrangement that is not in writing is a controlled tenancy. A person with a complaint or grievance relating to or surrounding such tenancy is duty-bound to go to the tribunal set up under the Act. This Court is not one such tribunal.
33. The Tribunal’s jurisdiction is circumscribed in Section 12 of the said Act which provides under sub rule (4) provides:



4. In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or the tenant, and may make such order thereon as it deems fit... (emphasis mine)
34. See the case of *Re Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195 in which they Learned Judges dealt in extenso with the said provision.
35. The broad appellate jurisdiction of this Court is set out in Section 13(4) of the *Environment and Land Court Act* which provides as follows:
13. Jurisdiction of the Court
4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of Subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
36. The Court's specific jurisdiction in relation to the determinations and orders made in a reference are set out in Section 15 (1) of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act. It provides as follows:
1. Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within thirty days after the date of such determination or order, appeal to the High Court (read Environment and Land Court):
- Provided that the High Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.
37. In matters of controlled tenancy, the first port of call is not this Court. In the case of *Leo Investment Limited t/a Mara Concord Game Lodge – Versus - Samson Ololmaitai & Another* [2020] eKLR that:
- “... I find that the Plaintiff/Applicant suit is entirely premised on a tenant landlord relationship between the Applicant and respondent... the operating statute under which this relationship is premised in the Landlord Tenant (shop, Hotels and catering establishment) Act and by extension therefore the provisions of Section 6 of the Act directs the jurisdiction of this Court to hear and determine the dispute herein.”
38. From the above, it is evident that the Tribunal and not this Honorable Court that is vested with jurisdiction to preside over the subject matter. In view of the foregoing, this Court lacks jurisdiction to determine the dispute even if the Applicant was to file a proper suit before.
39. I also note that the Respondents have also argued that this Court lacks the jurisdiction to hear and determine this matter on the basis that the suit property is located in Mombasa hence the ELC Mombasa has territorial jurisdiction to hear and determine the matter.
40. Section 12 of the *Civil Procedure Act* restricts the filing of suits for recovery, partition, foreclosure, sale, compensation or determination of any rights or interest in immovable property to the Court within the local limits of whose jurisdiction the property is situate. The suit property herein; Subdivision Nos. 3175 (Original No. 1063/2); 3176 (Original No.1063/3); 3177 (Original No.1063/4); 3178 (Original No. 1063/5) Section VI Mainland North is situated in Changamwe, Mombasa County. That is within the jurisdiction of the Environment and Land Court, Mombasa.
41. However, under Sections 3 and 26 of the *Environment and Land Court Act* this Court has powers to transfer a suit pending before it to another ELC if it can be conveniently and expeditiously determined in that other ELC Court. In the case of *Hangzhou Agrochemicals Industries Ltd VIA Panda Flowers*



Ltd (2012) eKLR the Court addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus;

“...In my view, which view I gather from authorities and from the law, the Court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.”

42. From the above provisions, it is evident that territorial jurisdiction cannot be the basis of striking out a suit. Any ELC Court has powers to hear and determine any dispute falling under the Court’s jurisdiction from anywhere in the Country. However, ELC Act empowers the Court to transfer a matter to a specific ELC Court with territorial jurisdiction if it deems fit in the interest of justice. Therefore, the prayer that the suit be struck out on the basis of territorial jurisdiction is not merited.

Whether the instant application is sub judice and amounts to an abuse of the process of Court in view of the existence of in Mombasa BPRT /E078/ 2025.

43. The Applicant has also argued that the application is sub judice as there is a matter pending before the Mombasa Business Premises and Rent Tribunal being Mombasa BPRT /E078/ 2025, which matter is slated for Ruling. As such, that the Court should down its tools for lack of jurisdiction.

44. Section 6 of the *Civil Procedure Act* provides that: -

“No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”

45. To determine whether the application is sub judice, the Court will have to analyze and determine whether the issues raised in the application are the same as those raised in the application pending in Mombasa BPRT /E078/ 2025.

46. I agree with the decision in Henry Wanyama Khaemba –vs- Standard Chartered Bank Ltd & Another (2014) eKLR, where the Court pronounced itself as follows: -

“The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of jurisdiction on Preliminary Objections.”

47. I am further persuaded by the Court’s holding in the case of Margaret Wachu Karuri –vs- John Waweru Ribiro (2021) eKLR, where the Court was faced with a similar question whether sub-judice can be raised as a preliminary point and held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this Court’s considered view that it will have to ascertain facts and



probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this Court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

48. It is my finding that the issue of sub judice as raised by the Respondents would have been better ventilated through a normal Application to the Court. The Court needs more information than what is currently provided to enable it make a proper determination.

Whether the Preliminary Objection is Merited

49. Based on the foregoing, it is my finding that the Respondents' Preliminary Objection is merited.
50. Consequently, the Notice of Motion dated 4/3/2025 is dismissed with costs to the Respondents.
51. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the Presence of:

Mr. Odango HB for Mr. Gachie for the Applicant

Mr. Ogutu HB for Mr. Wairoto for the 1st and 2nd Respondents.

NA for the 3rd Respondent

CA- Ms. Yvette Njoroge

