

# PRELIMINARY OBJECTIONS CONCEPT



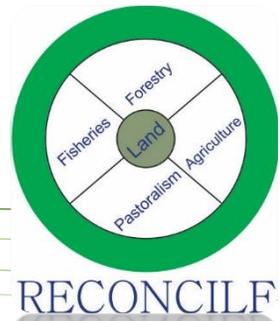
- A preliminary objection is a statement indicating disagreement with a judge's ruling.
- It has also been defined as a formal attestation or declaration of disapproval concerning a specific point of law or procedure during the course of a trial
- Black's Law Dictionary: 'an object if upheld would render further proceedings before the tribunal impossible or unnecessary'.
- Order 51 rule 14 of the Civil Procedure rules 2010 provides grounds of opposition to an application in the High Court.

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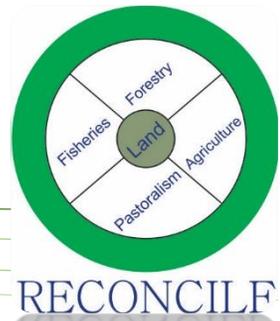
- Rule 14 states that any respondent who wishes to oppose any application may file any one or a combination of the following documents;-
  - ❖ A notice preliminary objection; and/or
  - ❖ Replying affidavit; and/or
  - ❖ A statement of grounds of opposition;
- A list of documents if any is to be filed and served on the applicant not less than three clear days before the date of hearing.

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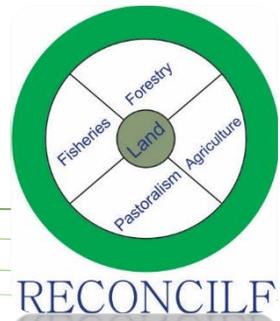
- The preliminary objection is to be raised in the memorandum of appeal under part 7 section 76(1) of the Civil Procedure Act.
- The section states any error, defect or irregularity in any order affecting the decision of a case may be set forth as a ground of objection in the memorandum of appeal.
- Section 76 specifically provides as follows:-(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

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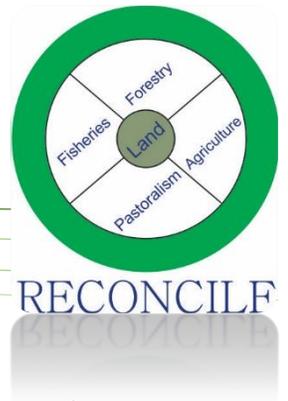
- It was stated in the case of Mukisa Biscuit Manufacturing Company Ltd Vs West End Distribution (1969 E.A 696 at page70) that a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
- The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and occasion confuse the issues.

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- It was observed in **Mukisa's case** and further affirmed by various decisions of both the High Court and Court of Appeal that preliminary objections are grounds are as follows:-
  - ❖ Purely based on points of law;
  - ❖ If upheld they are able to dispose of the proceedings within which they are raised;
  - ❖ They do not require evidence to establish them;
  - ❖ They should be raised at the earliest opportunity possible though they may be raised at any stage of the proceedings. It is advisable to raise them at the earliest available opportunity.

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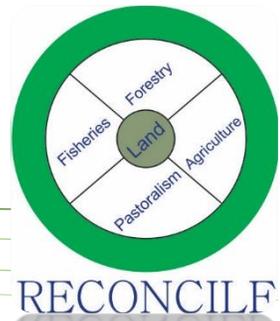


- This are just a few of the cases that have followed the holding in that case:

John Giciru Ndegwa v Alfred Warui Ndegwa [2010]Eklr the High Court affirmed the decision the Mukisa's case in relation to *locus standi* as well as the limitation of time with regards to instituting a suit. A preliminary objection had been raised on this two issues and a ruling was delivered the entire suit be dismissed.

United Insurance co ltd v Scholastica Odera Kisumu HC Civil Appeal 6/05 Warsarme J held that “a P.O must be based on a point of law which is clear and beyond doubt.

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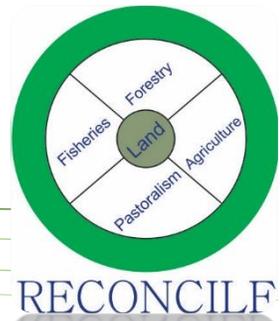


P.Os that is premised on facts which are disputed cannot be used in determining the whole matter as the facts must be precise and clear and need not be contested”.

Oraro v Mbaya [2005] 1KLR 141 Ojwang J opined that “P.O is a point of law which must not be blinded with factual details liable to be contested and in any event to be proved through the process of evidence”.

- In criminal cases there is no procedure outlined under the Criminal Procedure Code Cap 75 this position was confirmed by the High Court in R v Godfrey Muiruri [2009]eKLR defence counsel had raised an objection regarding the duration

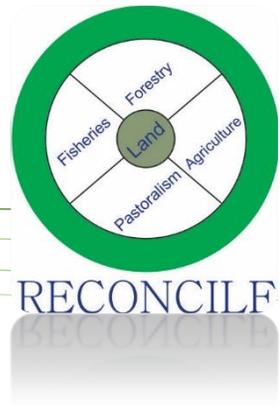
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the accused had been held in custody he came to raise it after he had taken plea and to be precise on the hearing date. The court further observed that it should be raised at the earliest time possible and should be on a point of law. It also referred to Mukisa's case

- The practice has been to raise objections during the trial or at times they are raised before the trial.
- In most instances objections are raised in relation to violation of Fundamental rights.
- Instances when a preliminary objection may be taken are;
  - ❖ The jurisdiction of the particular court or tribunal to hear the case is lacking.
  - ❖ The suit discloses no cause of action.

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- ❖ The suit is time-barred by limitation.
- ❖ The relief claimed by the claimant in the suit cannot be granted by the court.
- ❖ The doctrine of Res Sub Judice. In other words, another suit by the same claimant against the same cause of action, is pending before another court.
- ❖ Lack of capacity to sue.
- ❖ Insufficient specificity in a pleading.
- The aim of a preliminary objection is to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily.