



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Salim & 4 others v Allan George Njogu Residences Limited & another (Environmental and Land Originating Summons E008 of 2024) [2025] KEELC 3428 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3428 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2024
FM NJOROGE, J
APRIL 29, 2025

BETWEEN

SHABAN MWAZANI SALIM 1ST PLAINTIFF
LAZIMA JUMA KIWAI 2ND PLAINTIFF
JUMA KARISA UNGWARE 3RD PLAINTIFF
MWANAISHA HASSAN CHIVATSI 4TH PLAINTIFF
ATHUMAN JUMA TSOLA 5TH PLAINTIFF

AND

ALLAN GEORGE NJOGU RESIDENCES LIMITED 1ST DEFENDANT
REGISTRAR OF TITLES 2ND DEFENDANT

RULING

1. This ruling is in respect of the 1st Defendant's Notice of Preliminary Objection dated 29/1/2025, wherein the 1st Defendant urges the Court to strike out the suit on the ground that: -
 1. ...the Plaintiff's originating summons is incompetent, null, void and an abuse of the court process of this court ab initio for failing to comply with the mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010 as no extract of title or a search to the suit property has been annexed to an affidavit in support of the said Originating Summons.
 2. The preliminary objection was canvassed by way of written submissions summarized hereinunder.



1st Defendant's Submissions

3. Mr. Kamau, counsel for the 1st Defendant, submitted that a preliminary objection can only be raised on a pure point of law and not where the facts of a case are in contention. To this effect, he relied on the case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* 1969 EA 696. He argued that the Plaintiff's summons is incompetent for failing to annex a certified extract of title as required under Order 37 Rule 7 of the Civil Procedure Rules, and for that reason, the court lacks jurisdiction to entertain the Plaintiffs' suit. To underscore the importance of the issue of a court's jurisdiction, counsel cited *Motor Vessel "Lilian S" V Caltex Oil (Kenya) Limited* 1989 and *Phoenix of EA Assurance Company Limited v S.M Thiga t/a Newspaper Service* [2019] eKLR.
4. Counsel further submitted that courts have numerous held that failure to follow the prescribed procedure is fatal to a claim under the doctrine of adverse possession and it cannot be said to be a procedural technicality. To him, the Plaintiff's breach goes to the root of a claim for adverse possession. To demonstrate this, he relied on the case of *Mtana Lewa v Kabindi Ngala Mwagandi* Civil Appeal No. 56 of 2014.

2nd Defendant's Submissions

5. In the submissions dated 24/2/2025, filed by Mr. Munga, counsel for the 2nd defendant, the definition of what constitutes a preliminary objection was stated to be as defined in the case of *Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* 1969 EA 696. Counsel argued that the requirement to annex a certified extract of the title under Order 37 Rule 7 is couched in mandatory terms, and failure to do so is fatal. He urged the court to allow the preliminary objection. To support his arguments, counsel relied on the case of *Johnson Kinyua v Simon Gitura Rumuri* [2011] eKLR and *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] KECA 532 (KLR).

Plaintiffs' Submissions

6. According to Ms. Musyoki, counsel for the Plaintiffs, the Plaintiffs may not have annexed an extract of the title, but they have exhibited a Gazette Notice on reconstruction of lost or destroyed land register to the suit property, which is sufficient proof that the title to the suit property exists as described and that the 1st Defendant is the registered proprietor. Counsel attributed the Plaintiffs' failure to annex an extract of the title or search certificate, to the allegation that the suit property's register was missing at the land's registry.
7. To counsel, the requirement under Order 37 Rule 7 is purely to ensure that the Plaintiffs demonstrate that they have sued the right title holder and that the land claimed exists as described. To this end, counsel relied on *Sammy & 4 Others v Daystar University & 4 Others* (ELC OS E002 of 2024) [2024] KEELC 6926 (KLR).
8. Counsel further submitted that striking out the Plaintiff's summons at this juncture would be a draconian measure that would prejudice the Plaintiffs, bearing in mind that the reason for the failure to annex a copy of title or search was occasioned by the missing file/register at the land's registry. To support this view, she relied on the case of *Nancy Wanjiru Ngahu v Jane Wambui Wanjege & 2 Others* [2013] eKLR.

ANALYSIS AND DETERMINATION

9. I have duly considered the preliminary objection, the originating summons, and the submissions filed by the parties. At this stage there is only one issue for determination, which is whether the Originating



- Summons is incurably defective and whether it should be struck out on the ground of preliminary objection.
10. Through the Originating Summons dated 22/3/2024, the Plaintiffs' claim is for the portion of land identified as Mainland North/Section III/2064 (CR 27721) comprising of subdivisions MN/III/3494, 3495, 3496, 3497 and 3498. They claim that ownership had accrued by way of adverse possession by dint of Section 7 and 38 of the *Limitation of Actions Act*, Cap 22.
 11. The preliminary objection is anchored on Order 37 Rule 7 of the Civil Procedure Rules, 2010 which reads:
 - “7. Adverse possession [Order 37, rule 7]
 - (1) An application under section 38 of the *Limitation of Actions Act* (Cap. 22) shall be made by originating summons.
 - (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
 12. The term “Title” referred to under the said legal provisions, is defined in the *Black’s Law Dictionary, 10th Edition* at page 1712 infra:

“Legal evidence of a person’s ownership rights in property, an instrument (such as a deed) that constitutes such evidence.”
 13. In *Serah Muthoni Kimani -v- John Wanyoike Gerald* [NRB ELC NO. 791 OF 2013 (OS) it was held that: -

“The purpose of annexing an extract of the title is so as to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietors of the suit land.”
 14. The issue that begs address in order that parties do not bog down the court with semantics is whether the court can with precision determine the parcel the subject of the instant proceedings and the proprietor thereof. This is why in some instances a certificate of official search is primarily sufficient in such matters.
 15. It has emerged from the material availed to this court that the 1st defendant’s title to the suit property is not in issue. The 1st Defendant acknowledges that it is the owner of the suit property. It exhibited copies of a deed plan showing the area and location comprising the suit property. The Plaintiffs annexed a copy of a Gazette Notice dated 11/6/2021 establishing that the 1st Defendant was the registered owner of the suit property, and as at that time, his title was reported lost and destroyed. In the circumstances, I am of the view that the defect in the proceedings is curable. The upshot is that the notice of preliminary objection is devoid of merit and it is hereby dismissed with no orders as to costs. This matter shall be listed for mention on 4/6/25 for confirmation of compliance and issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29TH DAY OF APRIL 2025

MWANGI NJOROGE

JUDGE, ELC, MALINDI

