



**Sile & another v Onsembe & 2 others (Enviromental and Land Originating Summons E015 of 2024) [2025] KEELC 3647 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3647 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2024**

**MN MWANYALE, J**

**MAY 8, 2025**

**BETWEEN**

**JACOB OLE SILE ..... 1<sup>ST</sup> APPLICANT**

**NDISHA BENJAMIN ARUSAT ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JACKSON ONDORA ONSEMBE ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, TRANSMARA ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This Ruling relates to the Notice of Preliminary Objections dated 7/01/2025 filed by the 1<sup>st</sup> Defendant in respect of the Originating Summons suit and the Notice of Motion Application dated 2<sup>nd</sup> December 2024. The P/O is premised on the following grounds that:
  - i. The Plaintiff/s/Applicants claim is time incompetent and time barred in view of sections 4(2) & 7 as read together with sections 37 and 38 of the Limitation of Actions Act cap 22 laws of Kenya.
  - ii. The Original and sole registered owner of the suit land TRANSMARA/MOYOI /3X3 Mr. Jason Ondora Onsembe has been visiting the suit property save for the last quarter of the year 2023 due to the demise of a neighbouring owner and brother in law, the late Sospeter Manyisa Orwenyo the owner of Transmara/ Moyoi/3X4. the first Respondent was fully aware of grazing of animals from the owners of the neighbouring parcels alongside wild animals, but this never amounted to possession.
  - iii. the proprietor of the suit property, Mr. Jason Ondora Onsembe, was made aware of the fraudulent dealings resulting in the sale of the suit parcel on 14<sup>th</sup> April 2023 vide a title



by imposters and further disposed vide succession case number E030/2023 in paragraph 13 of the originating summons on 29<sup>th</sup> January 2024 while carrying out routine visits and he immediately lodged a complaint with the DCI Lolgorian Police station and at headquarters Nairobi.

- iv. The botched succession cause and the sale Agreement dated 14<sup>th</sup> April 2023 were nullified but the plaintiffs herein still lodged an appeal to the High Court vide HCCA E013 OF 2024 claiming s beneficiaries concurrently with the instant ELC suit claiming adverse possession
  - v. the 1<sup>st</sup> defendant and the Plaintiffs visited the suit parcel alongside the DCI officers and none of the alleged structures were present on site and the sale agreement , although void ab initio was entered into less than a year before the 1<sup>st</sup> Defendant took note of the fraudulent dealings thus his resolve to revoke and nullify the grant, successfully so
  - vi. The Plaintiffs cannot with one hand claim adverse possession while on the other hand maintain a tight grasp onto succession, which succession was declared n absolute nullity . Adverse possession requires the lapse of 12 years from default of contact or taking possession with knowledge of the owner ending with the petitioning of the court vide an originating summons as provided by law.
  - vii. the suit filed on 2<sup>nd</sup> December 2024 is premature, apure fishing expedition aimed at enhancing the ends of fraudulent dealings. it is an afterthought upon the declaration of the 1<sup>st</sup> respondent / defendant as the rightful owner thereby time barred
  - viii. the suit is incompetent and part of the wide scheme to deprive and defraud the first respondent of his rightful ownership, it should be struck out
2. The hearing of the P/O was directed to be by way of oral submissions which was slated initially for the 24/2/2025 however on the said date the parties had filed submissions on the preliminary objection as well as list of authorities which the court has considered

### **Issues For Determination.**

3. Having analysed the Notice of preliminary objection as well as the rival submissions by the parties,the authorities cited by the parties the court frames the sole issue for determination as follows,
- Whether the Preliminary objection before court meets the threshold of a Preliminary Objection capable of determining the suit in limine?

### **Analysis And Determination.**

4. The first ground of the P/O that the suit is time barred is undoubtedly a point of law based on section 4 and 7 of the Limitation of Action Act and it has the potential of determining this matter summarily, however the other grounds of the preliminary objection are factual narrations which should have formed either grounds of objection or depositions in the Replying affidavit.
5. The Court shall now consider whether the Preliminary objection as filed in this Matter meets the threshold of Preliminary Objections as was observed in the decision in the case of In Mukisa Biscuit Manufacturer Limited vs Westend Distributors Limited; the Court held in respect of a preliminary objection, that “so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as 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 acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”

6. Similarly in the decision in the case of Omondi vs National Bank of Kenya Limited and 2 others; as quoted in the decision of J. N. and 5 others vs Board of Management St. G. School Nairobi and Another where it was held that; “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.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
7. From the above excerpts a Preliminary Objection must no deal with issues of ascertainment of the facts and evidence. The issues of the nullification of the Grant as well as the fraudulent agreement for sale are factual issues and not legal issues which requires examination of facts and evidence to be availed before court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence. It follows therefrom as drawn the preliminary objection fails to meet the threshold of a preliminary objection as this P/O involves ascertainment of facts through the rules of evidence and the P/O as drawn must therefore fail, as it hereby does, and the court shall not dwell on its merits or otherwise.
8. The court shall consider the issue of the suit being time barred raised as ground 1 in the Preliminary Objection as part of the response to the application dated 2.12.2024., that way it shall be possible to ascertain the facts and evidence lending credence or otherwise to the claim of statute bar to the suit as pleaded.
9. The upshot is that the preliminary objection dated January 7, 2025 is hereby struck out with costs in the cause.

**DATED AND DELIVERED AT KILGORIS THIS 8<sup>TH</sup> DAY OF MAY 2025.**

**HON. M.N. MWANYALE**

**JUDGE.**

