



**Menge v Ondoro & 2 others (Environment & Land Case  
1130 of 2016) [2025] KEELC 4392 (KLR) (11 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4392 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 1130 OF 2016**

**M SILA, J  
JUNE 11, 2025**

**BETWEEN**

**JOHNSTONE NYANYUKI MENGE ..... PLAINTIFF**

**AND**

**RHODA MONGINA ONDORO ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET ONDORO ..... 2<sup>ND</sup> DEFENDANT**

**THOMAS ONDORO ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

(Application for eviction; respondent having filed an Originating Summons for adverse possession which was dismissed; applicants, who were respondents in the Originating Summons, now seeking an order of eviction; no decree in favour of the applicants for eviction as the case for adverse possession was just dismissed without any order in favour of the applicants being made; application dismissed)

1. The application before me is that dated 9 December 2024 filed by the respondents in this suit, which suit was commenced by way of Originating Summons. The substantive prayer in the application is for an order of eviction, to evict the respondent (applicant in the Originating Summons) from 12 acres in the land parcel Gesima Settlement Scheme/337 and 2 acres in the land parcel Gesima Settlement Scheme/343. The applicants aver that the respondent commenced this suit seeking orders of adverse possession and his suit was dismissed in a judgment dated 9 October 2019. The respondent filed an appeal to the Court of Appeal which was not successful. He also filed another suit, Nyamira ELCLC No. E005 of 2023 which was dismissed in a judgment delivered on 21 November 2024. It is the position of the applicants that now that he has failed in his suits the applicants deserve the orders of eviction. In the supporting affidavit, sworn by Rhoda Mongina, all these decisions are annexed.



2. The respondent has opposed the motion by filing a preliminary objection and a replying affidavit. The preliminary objection is to effect that the application is incurably defective; that it offends Order 40 Rule 1; that the orders cannot lie; that the application is vexatious; and that it should be struck out. In his replying affidavit, the respondent has repeated the foregoing and added that the dispute is still pending in Kisii High Court Succession Case No.124 of 2005 Estate of Stanley Ondoro Boraya (deceased).
3. I have given the application due consideration. The application as drawn says that it is brought pursuant to Section 3 and 3A of the *Civil Procedure Act*, Order 22 Rule 29, Order 40 Rule 1,2,3,8 and 9, Order 51 Rule 1, and Article 159 of *the Constitution* and all other provisions of the law.
4. First, let me mention that whatever was said to be a preliminary objection is nothing close to one. They may be considered grounds for opposing the application, but there is certainly no point of law therein being raised that can be equated to a preliminary objection. There is mention of Order 40 Rule 1, by the respondents and argument that it does not lie, which is true, for Order 40 concerns itself with interlocutory injunctions and what I have before me is not an application for injunction but for eviction. I am at a complete loss as to why the applicants cite Order 40 in support of their application. I also do not see the applicability of Article 159 of *the Constitution*, and none was shown to me at the hearing of the application, nor in the submissions of Mr. Okenye, learned counsel for the applicants. Order 51 Rule 1 is a general rule providing the manner of filing applications and nothing specific turns out on it.
5. I have looked at Order 22 Rule 29 and it provides as follows :  
Order 22 Rule 29 : Decree for immovable property
  - (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.
  - (2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property.
  - (3) Where possession of any building or enclosure is to be delivered, and the person in possession being bound by the decree does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of her community to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.
6. Well, it is true that the respondent filed this suit seeking orders of adverse possession and his suit was dismissed by Mutungi J in his judgment of 9 October 2019. Principally, the suit was dismissed as the court was not persuaded that 12 years had been clocked before the suit was filed, so as to sustain a suit for adverse possession. The respondent then filed applications before this court and before the court of appeal seeking stay pending appeal but these were dismissed. What is not too clear to me is whether the appeal before the Court of Appeal was heard or not, but it doesn't matter. It is correct that the respondent filed the suit Nyamira ELCLC No. E005 of 2023, seeking orders of specific performance, for he had contended that he purchased the suit properties from the deceased husband of the 1<sup>st</sup> applicant. That suit was heard by Mugo J, who dismissed it in his judgment delivered on 21 November 2024. The suit was dismissed as the good judge found that the prayer for specific performance had been brought out of time.



7. While it is true that the respondent has failed in his quest to have the suit land, I have no decree in favour of the applicants for eviction which may be executed pursuant to Order 22 Rule 29 that I have already set out above. This was a suit for adverse possession by the respondent which failed. Nowhere in that judgment did Mutungi J give an order of eviction against the respondent. The case of adverse possession was simply dismissed. So too the judgment of Mugo J. What he did was simply dismiss the suit for specific performance and nowhere did the judge make an order for eviction. In essence there is no decree in favour of the applicants for eviction which they can seek to enforce pursuant to Order 22 Rule 29.
8. I am afraid that there being no decree for eviction against the respondent, I am not persuaded that the applicants can now come and seek eviction pursuant to Order 22 Rule 29 or at all in this suit.
9. For the reasons above, I find no merit in this application and it is hereby dismissed with costs.
10. Orders accordingly.

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF JUNE 2025**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII.**

Delivered in the presence of :

Mr. Okenye h/b for Mr. Zablon Mokuu for the applicants

Mr. Ongoro for the respondent

Court Assistant – Michael Oyuko

