



Obura (Suing as the Personal Representative of the Estate of Edward Nyaika Sule) v County Government of Kisumu & 3 others (Environment and Land Case E002 of 2024) [2025] KEELC 5035 (KLR) (3 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5035 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE E002 OF 2024
SO OKONG'O, J
JULY 3, 2025**

BETWEEN

KILLION OBURA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWARD NYAIKA SULE) PLAINTIFF

AND

**COUNTY GOVERNMENT OF KISUMU 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT
THE LAND REGISTRAR, KISUMU 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. The Plaintiff brought this suit against the Defendants on 4th February 2024. The Plaintiff averred that his deceased father, Edward Nyaika Sule [hereinafter referred to as “the deceased”], was at all material times the owner of the parcel of land which, after adjudication in 1979, was registered as Kisumu/Kasule/488 [hereinafter referred to as “the suit property”]. The Plaintiff averred that the suit property was ancestral land and that his family had inherited it from the deceased. The Plaintiff averred that during the construction of the Kisumu-Nairobi road in 1963, the 1st Defendant’s predecessor, the Municipal Council of Kisumu [hereinafter referred to as “the 1st Defendant” where the context so admits] requested the deceased to allow it to excavate murrum soil from the suit property for use in the road construction. The Plaintiff averred that the deceased granted the 1st Defendant’s request on condition that after it was through with the murrum extraction, it would surrender the suit property to the deceased. The Plaintiff averred that the 1st Defendant excavated the murrum soil and left a big hole at the site, which accumulated water and rendered the suit property unusable.



2. The Plaintiff averred that he conducted a search on the suit property in 2022, which revealed that the suit property was registered in the name of the 1st Defendant. The Plaintiff averred that the suit property was fraudulently and illegally registered in the name of the 1st Defendant because the consent of the deceased's family was not obtained. The Plaintiff averred in the alternative that the deceased had donated the suit property for a specific purpose and that the property was intended to be surrendered to the deceased upon completion of the purpose. The Plaintiff averred that the procedure for compulsory acquisition of land was not followed in respect of the suit property. The Plaintiff averred that the registration of the suit property in the name of the 1st Defendant amounted to illegal compulsory acquisition of the property. The Plaintiff averred that the 1st, 2nd and 3rd Defendants colluded to deprive the deceased of the suit property.
3. The Plaintiff sought judgment against the Defendants for; a declaration that the Plaintiff was the lawful owner of the suit property, a declaration that the 1st Defendant acquired the suit property fraudulently, damages for fraud, an order for the rectification of the register of the suit property by the cancellation of the registration of the 1st Defendant as the owner of the property and substitution thereof with the Plaintiff, and a permanent injunction restraining the 1st and 2nd Defendants from remaining on, occupying, continuing to occupy, constructing structures on, trespassing, encroaching and in any other manner interfering with the suit property.
4. The 1st Defendant filed a statement of defence dated 29th January 2025. The 1st Defendant denied that the Plaintiff's deceased father was the owner of the suit property. The 1st Defendant averred that the Plaintiff had not produced any evidence in proof of this claim. The 1st Defendant averred that the Adjudication Record showed that the 1st Defendant was the first registered owner of the suit property. The 1st Defendant denied that it had requested the Plaintiff's father's permission to excavate murram soil from the suit property. The 1st Defendant averred that the suit property had been reserved for public use since 1982. The 1st Defendant averred that the Plaintiff's suit was time-barred since the cause of action arose more than 36 years ago. The 1st Defendant averred that fraud was raised merely to extend the limitation period. The 1st Defendant urged the court to strike out the suit with costs.
5. The 2nd Defendant filed a defence dated 6th August 2024. The 2nd Defendant denied the Plaintiff's claim against it. The 2nd Defendant denied that the suit property was compulsorily acquired. The 2nd Defendant averred that the Plaintiff's suit as against it was misconceived and baseless and urged the court to dismiss the same with costs.
6. The 3rd and 4th Defendants filed their statement of defence dated 12th March 2024, in which they denied the Plaintiff's claim in its entirety and prayed that the suit be dismissed with costs.
7. The Plaintiff filed an application by way of a Notice of Motion dated 4th November 2024 seeking a temporary injunction restraining the Defendants from entering, constructing on, remaining on, occupying, continuing to occupy, or trespassing on the suit property pending the hearing and determination of the suit. The application, which was supported by the affidavit of the Plaintiff sworn on 4th November 2024, was brought on the grounds that the Plaintiff's father was the proprietor of the suit property, Title No. Kisumu/Kasule/488, and that the 1st Defendant had, without the Plaintiff's consent or any reasonable cause, brought people to clear the property. The Plaintiff averred that his family and he had been using the suit property, which the 1st Defendant claimed to own, for several years. The Plaintiff averred that the activities of the 1st Defendant on the suit property had interfered with his plans to develop the property.



8. The application was opposed by the 1st Defendant through a replying affidavit sworn by Fredrick Misigo on 3rd February 2025 and a Notice of Preliminary Objection dated 31st January 2025. In the affidavit, the 1st Defendant averred that the Plaintiff had not substantiated his claim that the 1st Defendant acquired the suit property fraudulently. The 1st Defendant averred that the Plaintiff attached to his supporting affidavit an official search showing that the suit property was registered in the name of the County Council of Kisumu and was reserved for a public well. The 1st Defendant averred that it had proprietary rights over the suit property and, as such, had the right to deal with the land as it wished, including entering and carrying out construction thereon. The 1st Defendant denied that it had trespassed on the suit property. The 1st Defendant averred that there was no reason disclosed why it should be deprived of its rights over the suit property.
9. In its Notice of Preliminary Objection, the 1st Defendant averred that the Plaintiff's claim was time-barred under Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya. The 1st Defendant averred further that the value of the suit property did not exceed Kshs. 20,000,000/- and as such, the suit should have been filed in the lower court. The 1st Defendant urged the court to strike out the suit for being defective, incompetent and an abuse of the process of the court.
10. The Plaintiff's application and the 1st Defendant's Preliminary Objection were heard together by way of written submissions. The Plaintiff filed separate submissions both dated 7th March 2025 in support of his application and in opposition to the Preliminary Objection. The 1st Defendant also filed separate submissions both dated 23rd March 2025 in support of its Preliminary Objection and in opposition to the Plaintiff's application.

Analysis and determination

11. I have considered the Plaintiff's application, the 1st Defendant's Notice of Preliminary Objection and the submissions by the advocates for the parties together with the various authorities cited in support thereof. I will first consider the 1st Defendant's Preliminary Objection because if it succeeds, it would not be necessary to consider the Plaintiff's application. In *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others* [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors* [1969] EA 696.

12. ‘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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...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 has to be ascertained or if what is sought is exercise of judicial discretion.’”

In *Oraro v Mbaja*[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”



13. It is on the foregoing principles that the 1st Defendant's Notice of Preliminary Objection falls for consideration. I agree with the Plaintiff that the 1st Defendant's preliminary objection to the suit before the court has no merit. It is not disputed that the suit property was registered in the name of the County Council of Kisumu, the 1st Defendant's predecessor, on 13th March 1988. The Plaintiff has pleaded that the registration of the suit property in the name of the 1st Defendant's predecessor, the County Council of Kisumu, was fraudulent as the property belonged to the Plaintiff's deceased father, Edward Nyaika Sule. The Plaintiff pleaded that it was not until 2022 when he did a search on the title of the suit property that he discovered the alleged fraudulent registration of the suit property in the name of the 1st Defendant's predecessor, the County Council of Kisumu. I agree with the 1st Defendant that the suit is for the recovery of land and, as such, should have been brought within 12 years from the date of the cause of action. However, Section 26 of the Limitation of Actions Act provides that where the claim is based on fraud or mistake the limitation period does not run until the fraud or mistake is discovered. The Plaintiff has claimed that the registration of the suit property in the name of the 1st Defendant's predecessor in title was fraudulently effected. The Plaintiff has pleaded that he discovered the fraud in January 2022 and filed the present suit on 4th February 2024. The issue of whether or not the suit property was registered in the name of the County Council of Kisumu fraudulently, and when the Plaintiff discovered the fraud, can only be determined at the trial and not through a Preliminary Objection. If the Plaintiff proves at the trial that he did not discover the alleged fraud until January 2022, the time for the purposes of the 12-year limitation period would start running in January 2022. The Plaintiff's suit, which was filed in 2024, would therefore not be time-barred. For the foregoing reasons, I overrule the limb of the 1st Defendant's objection based on time bar.
14. The second limb of the objection was on the jurisdiction of the court. I did not quite understand this objection. This court has jurisdiction to hear and determine this suit. The fact that the lower court may also have jurisdiction to hear the matter does not oust the jurisdiction of this court. In any event, the 1st Defendant placed no evidence before the court showing that the value of the suit property is below Kshs. 20,000,000/-. This suit is therefore not incompetent for want of jurisdiction as alleged by the 1st Defendant. The second limb of the Preliminary Objection also fails.
15. Having disposed of the Preliminary Objection, I will now proceed to consider the Plaintiff's application for injunction. The Plaintiff has sought a temporary injunction restraining the 1st Defendant from dealing with the suit property pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, an applicant for a temporary injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others*[2014]eKLR, the Court of Appeal adopted the definition of a prima facie case given in *Mrao Limited v First American Bank of Kenya Limited & 2 Others*[2003]eKLR and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is



enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

16. I am not persuaded from the evidence placed before me by the Plaintiff that the Plaintiff has a prima facie case with a probability of success against the 1st Defendant or any of the other defendants. The Plaintiff has claimed that the suit property was owned by his deceased father. No evidence of whatsoever nature has been placed before the court in proof of this allegation. The 1st Defendant has placed on record a copy of the Adjudication Demarcation Register, which shows that the suit property was demarcated and recorded in the name of the County Council of Kisumu as the owner during the land adjudication process at Kasule Adjudication Section. There is no evidence that the said demarcation and recording of the suit property in the name of the County Council of Kisumu was fraudulent. I believe that if that was the case, the Plaintiff or his deceased father would have raised an objection under the *Land Adjudication Act*, Chapter 284 Laws of Kenya. There is no evidence that any such objection was raised. The Certificate of Official Search produced by the Plaintiff also shows that the suit property was registered in the name of the County Council of Kisumu on 13th March 1988. Again there is no evidence that the registration was fraudulent. For the foregoing reasons, it is my finding that the Plaintiff has not established a prima facie case with a probability of success against the Defendants and as such, the Plaintiff is not entitled to the injunction sought. It is not necessary for me, in the circumstances, to consider the other conditions for granting a temporary injunction.
17. The upshot of the foregoing is that I find no merit in the 1st Defendant's Preliminary Objection dated 31st January 2025 and the Plaintiff's application for injunction dated 4th November 2024. Both are dismissed with costs to be in the cause.

DELIVERED AND SIGNED AT KISUMU ON THIS 3RD DAY OF JULY 2025.

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwamu for the Plaintiff

N/A for the 1st Defendant

Ms. Jumba h/b for Ms. Khasoa for the 2nd Defendant

N/A for the 3rd and 4th Defendants

Mr. A.Lore-Court Assistant

