



REPUBLIC OF KENYA



**Tombo v Chunga & 4 others (Environment & Land Case E006 of 2023)
[2024] KEELC 13594 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAAYA
ENVIRONMENT & LAND CASE E006 OF 2023
AY KOROSS, J
DECEMBER 5, 2024**

BETWEEN

MESHACK OUMA TOMBO PLAINTIFF

AND

PHILLIP BONYO CHUNGA 1ST DEFENDANT

WILLIAM ODHOCH CHUNGA 2ND DEFENDANT

GEORGE ODHIAMBO CHUNGA 3RD DEFENDANT

CAREN AWINO OTIENO 4TH DEFENDANT

PHILIP MANGO CHUNGA 5TH DEFENDANT

RULING

Preliminary Objection (PO)

1. The subject matter for this court's determination is the defendants' PO dated 19/04/2024 which is against the main suit and raises the following points of law: -
 - a. Contrary to Section 7 of the *Limitation of Actions Act*, the sale agreement dated 9/06/1982 and the claim premised upon the agreement is statute-barred.
 - b. The suit commenced by a notice of motion is fatally defective, invalid, null, and void under Order 3 Rule 1 of the Civil Procedure Rules.
 - c. The plaintiff's claim is therefore invalid, null, and void ab initio.
2. Thus, the defendants urged this court to strike out the suit with costs to the plaintiff. It appears the word "plaintiff" is erroneous and probably they meant the defendants.



Parties' submissions

3. The court directed parties to canvass the PO by brief written submissions. The defendant's law firm on record M/s. Achola Jaoko & Co. Advocates filed their written submissions dated 20/05/2024. The submissions argued the grounds of the PO.
4. The plaintiff's law firm on record Ms. Peres Odoyo & Co. Advocates filed their written submissions dated 7/10/2024 and framed 1 issue for determination- whether considering the doctrine of adverse possession, the plaintiff's claim was statute-barred.
5. Upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsel's arguments on the particular issue it identifies for determination and also bear in mind the judicial precedents that they have both relied upon to buttress their respective arguments.

Issues for determination

6. Accordingly, having carefully considered the grounds of the PO, and rival submissions together with authorities relied upon, it is the considered view of this court that the following issues which shall be dealt with consecutively commend themselves for determination: -
 - a. Whether the PO has met the legal threshold.
 - b. What grounds of the PO have met the legal threshold and are they merited?
 - c. What orders should this court issue including an order as to costs?

a. Whether the PO has met the legal threshold.

7. None of the counsels addressed me on this issue. The decision of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696 has long settled the tests that a PO has to meet and, in this decision, the court held thus: -

“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 the 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 the exercise of judicial discretion.”

8. From this decision, it is deduced that for a PO to succeed, it must meet 3 tests which are, it raises a pure point of law, on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In addition, the PO should be capable of disposing of a suit.
9. Turning to the PO, although I am contented they raise pure points of law, the plaintiff's counsel has submitted that ground (a) of the PO has misapprehended the plaintiff's suit as the plaintiff's claim was on adverse possession. In other words, the facts were incorrect and had to be ascertained from the record.



10. On this, I must agree with the plaintiff's counsel that these were disputed facts. I have also had an opportunity to read the plaintiff's claim which is erroneously headed as "notice of motion" and it is clear that his claim is on adverse possession and constructive trust. I find ground (a) of the PO does not meet the legal threshold.

b. What grounds of the PO have met the legal threshold and are they merited?

11. In light of the findings on the ground (a), the only grounds arising for consideration on this issue are the consolidated grounds (b) and (c).

12. The plaintiff's counsel did not address the court on this issue but the defendants' counsel submitted that Order 3 Rule 1(1) of the Civil Procedure Rules (CPR) provided that suits shall proceed by a plaint whereas Order 37 (1) of the CPR states that certain claims can be commenced by an Originating Summons (OS).

13. According to the defence counsel, the plaintiff has commenced suit through a notice of motion which was not tenable as such an application was not a suit. To buttress his argument, the defence counsel relied on the persuasive decision of *Rajab Kosgei Magut v Nuru Jepleting Choge* [2020] KEELC 526 (KLR) which stated:

“Order 3 Rule (i) (ii) provides that every suit shall be instituted by way of a Plaint or in such other manner that may be prescribed. As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit.”

14. This court agrees with the defendants' counsel's arguments however, had the counsel closely read the "notice of motion", he would have realized that the words "notice of motion" is a typographical error that is curable by Article 159(2) (d) of *the Constitution*.

15. It is evident from the header of the "notice of motion" that the court was moved under several provisions of law including Order 37 Rule 1 (a) (g), and Rules 15 to 20 of the Civil Procedure Rules. These provisions deal with originating summons (OS) which is one of the ways of instituting a suit of a special nature.

16. Order 37 Rule 7 thereof provides that a claim of adverse possession shall be instituted by an OS and this provision of law reads: -

- “(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.
- (3) The court shall direct on whom and in what manner the summons shall be served.”

17. Having carefully considered the plaintiff's claim as filed including the structure, the reliefs sought, and provisions of law relied upon, I do not entertain in my mind that the plaintiff has commenced the suit by an OS and the word "notice motion" is a typographical error.



18. When faced with a similar scenario as this case, this court in the case of Amolo & 3 others v Chunga & 4 others [2023] KEELC 729 (KLR) had this to say:-

“I must deal with the manner in which the plaintiffs have moved this court in their pleadings; the header of their pleadings reads “notice of motion” instead of “originating summons”. Parties have throughout the entire proceedings referred to them as “originating summons”. The manner in which the “notice of motion” was crafted leaves no shadow of doubt that the court was moved by way an “originating summons” save for a typographical error. Blunders will often be made and it is my considered view that this was a technical error that did not go to the root of the issues for determination and it is curable by Article 159(2) (d) of *the Constitution*. In any case, the ‘originating summons’ was converted into a plaint by this court and likewise the replying affidavit was deemed a defence.

19. The defendants appreciated the word “notice of motion” is a typographical error and have since filed a defence and counterclaim dated 20/04/2024. I need not say more. Consequently, I find the word “notice of motion” in the plaintiff’s claim dated 14/02/2023 a typographical error. I find the grounds of the PO are not merited.

20. In the end and for the foregoing reasons, and in addressing issue (c), I hereby dismiss the grounds of the PO in its entirety. It is trite law costs follow the event and costs shall be in the cause. I therefore issue the following final disposal orders.

- a. The grounds of the preliminary objection dated 19/04/2024 are hereby dismissed.
- b. Costs shall be in the cause.
- c. The matter shall proceed for pretrial directions before the Deputy Registrar on 4/03/2025.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 5TH DAY OF DECEMBER 2024.

HON. A. Y. KOROSS

JUDGE

5/12/2024

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

Mr. Oriero h/b for Miss. Peres Odoyo for the plaintiff

Mr. Jaoko for the defendants

...for the respondent

Court assistant: Ishmael Orwa

