



**Meso ((Suing as Administrators of the estate of Alfred Meso Nono (deceased)) v Okomo & 4 others (Being sued as Administrator of the Estate of the Jacob Awuor Akomo) (Environment & Land Case E036 of 2021) [2022] KEELC 108 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 108 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ENVIRONMENT & LAND CASE E036 OF 2021**

**A OMBWAYO, J**

**MAY 6, 2022**

**IN THE MATTER OF THE ESTATE OF THE LATE ALFRED MESO NONO (DECEASED)**

**BETWEEN**

**MARGARET VERONICA MESO AND ANDREW ISAAC MESO ... APPLICANT  
(SUING AS ADMINISTRATORS OF THE ESTATE OF ALFRED MESO NONO  
(DECEASED)**

**AND**

**GABRIEL ODHIAMBO OKOMO ..... 1<sup>ST</sup> RESPONDENT  
PASKAL OKWARO OMOKO ..... 2<sup>ND</sup> RESPONDENT  
CHIEF LAND REGISTRAR, KISUMU ..... 3<sup>RD</sup> RESPONDENT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
CYPRIAN AGUMBA ODENY ..... 5<sup>TH</sup> RESPONDENT  
BEING SUED AS ADMINISTRATOR OF THE ESTATE OF THE JACOB  
AWUOR AKOMO**

**RULING**

1. The Applicants came to court seeking orders that:
  1. A declaration that Alfred Meso Nono is the sole and legal owner of the suit property being LR No. East Kisumu/Kanyakwar 'B'/214 situate in Kisumu County, within the Republic of Kenya.



2. A declaration that the Alfred Meso Nono is the registered proprietor of the suit property being LR No. East Kisumu/Kanyakwar 'B'/214 situate in Kisumu County, within the Republic of Kenya.
  3. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents be served with this summons, all pleadings, orders/directions herein by way of registered post to their last known postal address or by substituted service in a widely circulated newspaper.
  4. A permanent injunction be and is hereby issued prohibiting the 1<sup>st</sup> and 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents jointly and severally, their employees, officer's agents and or servants, or anyone whatsoever claiming under them, from in any way interfering with the Applicants quiet use, possession, ownership and interest over the property known as LR No. East Kisumu/Kanyakwar 'B'/214 situate in Kisumu County, within the Republic of Kenya.
  5. A permanent injunction and prohibition restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents whether by themselves, their servants, agents, representatives and or employees or anyone claiming under them howsoever from transferring, charging, offering for sale or depositing off or alienating in any manner all that property known as LR No. East Kisumu/Kanyakwar 'B'/214 situate in Kisumu County, within the Republic of Kenya.
  6. A mandatory injunction compelling the 3<sup>rd</sup> Respondent at the Land Titles Registry in Kisumu to cancel all subsequent Title Deeds in relation to the suit property being LR No. East Kisumu/Kanyakwar 'B'/214 situate in Kisumu County, within the Republic of Kenya in favour of any person whomsoever, other than Alfred Meso Nono.
  7. Any other reliefs or orders that are just and equitable under the circumstances that this Honorable Court may deem appropriate and fit to grant so as to protect the proprietary interests of the Applicant.
2. The orders were sought in an Originating Summons dated 7/9/2021, filed under Order 37 Rule 1 of the [Civil Procedure Rules 2010](#).

Order 37 Rule 1 provides thus:

QUOTE

1. "Who may take out originating summons and in respect of what matters [Order 37, rule 1.]  
The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—
  - (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que// trust;
  - (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;



- (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;
  - (d) the payment into court of any money in the hands of the executors, administrators or trustees;
  - (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
  - (f) the approval of a sale, purchase, compromise or other transaction;
  - (g) the determination of any question arising directly out of the administration of the estate or trust.”
3. The 5<sup>th</sup> respondent has filed a Preliminary Objection dated 23/12/2021 seeking to strike out the Originating Summon for being incompetent.
  4. I have considered the rival submissions on the Preliminary Objection and do agree with the applicant’s counsel that the applicant has the capacity to take out the Originating Summon as she is the administratrix of the Estate of Alfred Meso Nono, however, I do not agree with counsel for the applicant that the issues raised fall within the question that can be determined under Order 37 rule 1.
  5. The applicant’s claim is principally based on forgery and fraud that is also leveled against the Land Registrar Kisumu and the Attorney General such claim based on fraud and forgery can’t be instituted by way of Originating Summons.
  6. I have read the authority cited by counsel for the applicant namely *Marion Gathoni Maina v Francis Muriith Mundia and another* 2014 eKLR and do find that it is not relevant because the issues raised by the respondent herein were not raised in that particular case. There was no preliminary objection raised by the respondent.
  7. In the case of *Mukesh Manchand Shah & another v Priyat Shah & Another* (2015), the issue was the interpretation of the will of Chandrakat Devchand Meshji Shah who died testate on u/8/2013 having appended his land will on 25/7/2011.
  8. Mukesh case can be distinguished from this case as in the case before me, the applicants are basically suing another administrator of an estate for fraud. This ought to be done by way of plaint.
  9. I do agree with Mr. P.D. Onyango that the Originating Summon raises serious questions that border of fraud and illegality and forgery and therefore not suitable for that matter.
  10. An Originating Summon was instituted for simple matters that can be settled by the court within serious expense.
  11. The issues raised herein are complex and contentious and therefore should be raised through the plaint.
  12. However, I do find that an originating summons can be converted to a plaint and the replying affidavit can be converted to a defence and parties be allowed to give viva voce evidence and therefore this matter cannot be determined by way of a preliminary objection because the court has a discretion to convert it as aforesaid to enable the applicant access justice.
  13. The upshot of the above is that the Preliminary Objection is dismissed and that the Originating Summons is converted into plaint and the replying affidavit is converted into defence. Hearing to be conducted viva voce. Costs in the cause.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 6<sup>th</sup> DAY OF MAY, 2022**



**ANTONY OMBWAYO**

**JUDGE**

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.

