



**Katana v Estate of Mohamed Omar Shee (Environmental and Land Originating Summons E005 of 2020) [2025] KEELC 4030 (KLR) (14 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4030 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2020**

**EK MAKORI, J**

**MAY 14, 2025**

**BETWEEN**

**KATORE JOSEPH KATANA ..... PLAINTIFF**

**AND**

**ESTATE OF MOHAMED OMAR SHEE ..... DEFENDANT**

**JUDGMENT**

1. By an originating summons dated September 7, 2020, the Plaintiff seeks a determination of the following questions:
  - a. Whether the Plaintiff has acquired a section and/or portion of the parcel of land known as Kilifi Jimba Settlement Scheme Plot Kilifi/Jimba/146, which measures 2.06 hectares, where his homestead is situated, because of adverse possession following an uninterrupted period of occupation exceeding twelve (12) years (specifically, thirty-four (34) years).
  - b. Whether the Plaintiff is entitled to survey the parcel of land referred to as Kilifi Jimba Settlement Scheme Plot Kilifi/Jimba/146, measuring 2.06 hectares (approximately 5.1 acres), to determine the specific section and portion on which his homestead is located, to be excised therefrom to facilitate the subdivision of the land.
  - c. Whether the Plaintiff should be registered as the proprietor of a share of the section and/or portion of the parcel of land known as Kilifi Jimba Settlement Scheme Plot Kilifi/Jimba/146, measuring 2.06 hectares (approximately 5.1 acres), where his homestead is situated, having enjoyed open and peaceful occupation for a period exceeding twelve (12) years (specifically, thirty-four (34) years) prior to the presentation of the summons.
  - d. Whether the Defendant should execute a transfer and undertake all necessary actions to facilitate the subdivision of the parcel of land known as Kilifi Jimba Settlement Scheme Plot Kilifi/Jimba/146, measuring 2.06 hectares (approximately 5.1 acres), and subsequently convey



the said subdivided portion to the Plaintiff as the rightful proprietor, thus allowing him to be registered as such; and in default, the Deputy Registrar should be authorized to sign the relevant documents on behalf of the Respondent.

- e. Whether the Plaintiff is duly entitled to a permanent injunction restraining the Defendant, its servants, agents, or any individual claiming under or instructed by the Defendant, from evicting, selling, transferring, disposing, charging, leasing, subdividing, or in any manner interfering with the Plaintiff/applicant's quiet possession and enjoyment of the portion of land known as Kilifi Jimba Settlement Scheme Plot Kilifi/Jimba/146, which measures 2.06 hectares (approximately 5.1 acres) where his homestead is situated.
  - f. Whether the Plaintiff is entitled to recover the costs of the suit.
2. This Originating Summons is supported by the Supporting Affidavit of the Plaintiff, who averred that the property identified as Plot Kilifi/Jimba/146, measuring 5.2 hectares (approximately 15 acres) (hereinafter referred to as "the suit property"), was initially registered to Mohamed Omar Shehe, who subsequently surrendered it to the government in the year 1986. The Plaintiff stated that he took possession of the suit property in the same year, 1986, while it was in the custody of the Defendant. He further asserted that he has since constructed a semi-permanent house, a borehole, and a fish pond, and that his occupation has been open, continuous, peaceful, and notorious. He presented copies of photographs purporting to depict the current situation on the ground, a copy of a valuation report regarding the suit property, copies of reports from the land committee acknowledging his status as an occupant, a collection of correspondence, and a copy of an excerpt from a gazette notice dated February 2, 2019, which recommends that the Defendant consider the Plaintiff's position.
  3. In a statement of defense dated January 26, 2021, the Defendant asserted that the suit property was and continues to be registered in the name of Mohamed Omar Shehe. According to the Defendant, the Plaintiff has been attempting to dispossess the aforementioned Mohamed, even prior to his demise, yet all such efforts have proven futile. The Defendant asserted that the orders sought cannot be granted as they are predicated on misinformation.
  4. The Defendant and their counsel were not present at the hearing, so the Plaintiff testified as PW1. He incorporated his supporting affidavit into his primary evidence and reaffirmed its contents.
  5. Significantly, after the hearing, the Defendant submitted a notice of preliminary objection dated October 3, 2024, because it is not a legal entity capable of being sued without a legal representative.

### **The Plaintiff's submissions**

6. Counsel submitted that, in determining whether the Plaintiff is entitled to the reliefs sought, several requirements must be fulfilled for the Court to be satisfied that orders of adverse possession should be issued. These requirements were delineated in *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184 as referenced in *Agribina Ciakathia Munyi v James Muchachi 1* [2020] KEELC 2071 (KLR) as follows:

“...To be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition...”

7. Counsel also relied on the case of *Siparo & another v Siparo & 2 others* (Environmental and Land Originating Summons E005 of 2024) [2025] KEELC 553 (KLR). He submitted that, as evidenced



in the pleadings and during the hearing of this suit, the Plaintiff has engaged in non-permissive or non-consensual actual, open, notorious, and exclusive adverse possession and use of the suit properties against the Defendant for the statutorily prescribed period without interruption. He therefore urged the court to grant the claim in its entirety.

8. Regarding the preliminary objection, counsel argued that it has been filed irregularly and constitutes an abuse of the Court process, as questions arise about who instructed the advocates to represent the deceased (Mohamed Omar). He contended that filing a Notice of Appointment of Advocates here and the ensuing Pleadings, including the Notice of Preliminary Objection, are all void, and thus the PO should be dismissed. To support his arguments, counsel relied on the case of Manyange (Deceased) v TG (*Minor suing through her mother and next friend WMG*) (Civil Appeal E005 of 2022) [2024] KEHC 1083 (KLR) (7 February 2024) (Ruling).

#### **The Defendant's submissions.**

9. Counsel representing the Defendant submitted three documents dated January 16, 2024, November 26, 2024, and March 7, 2025. Citing the case of Ali Oshan & Others v Mrs. Catherine Kaswii Nyiha & Others [2004] KEHC 554 (KLR)
10. Counsel asserted that a preliminary objection may be raised at any stage of the proceedings. He maintained that it is the party initiating a lawsuit's responsibility to ascertain the party's identity against whom they are bringing a claim, as discussed in the case of Mkullu v Hassan & another [2023] KEELC 18306 (KLR).
11. According to legal counsel, the lawsuit presents a significant obstacle, as adverse possession does not constitute a claim of title but rather a claim of possession. Counsel argued that the Plaintiff's pleadings indicate a claim to a specific section of the disputed property rather than the entirety of it, and further noted the Plaintiff's omission of the exact acreage occupied, which is a requisite for a valid claim of adverse possession. To substantiate his argument, counsel referenced the case of Daniel Kimani Ruchine & others v Swift, Rutherford Co Ltd & another [1977] KEHC 30 KLR. Moreover, counsel emphasized that parties are bound by their pleadings, asserting that the Plaintiff's failure to specify and demonstrate the precise acreage occupied significantly undermines his case.

#### **Analysis and determination**

12. The text above summarizes the pleadings presented herein, the available evidence and exhibits submitted in support thereof, the competing written submissions, and the cited authorities, all of which this court has diligently reviewed and considered. The issues that I frame as warranting the determination of this court are:
  - i. Consideration of the merits of the preliminary objection.
  - ii. Evaluation of whether the Plaintiff has satisfied the requisite threshold for issuing orders concerning adverse possession.
  - iii. Determination of costs.
13. In evaluating whether the issues presented in the notice of preliminary objection qualify as a preliminary objection, I follow the decision in Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Limited (1969) E. A 696, where it was held that:

“ 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 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.”

14. The court further stated that:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”

15. Section 79 of the *Law of Succession Act* provides as follows:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

16. Limited Grant of Letters of Administration ad litem is typically employed when the estate of a deceased individual must be represented in judicial proceedings. This grant authorizes an individual to represent or defend the deceased's estate. In the present matter, it is undisputed that the owner of the property in question, Mohamed Omar Shee, passed away in 2018, before initiating this lawsuit. In these proceedings, the defendant has been designated as the “estate of Mohamed Omar Shee.”

17. It is a well-established principle that an estate does not constitute a juristic person and cannot initiate or defend legal proceedings in its name. An estate embodies the collective rights, liabilities, and properties that a deceased individual bequeaths. It is not a legal entity capable of independent existence within the framework of law. Consequently, when a cause of action arises against a deceased individual, the appropriate party to initiate or respond to legal actions on behalf of an estate is the legal representative of the deceased individual's estate, serving either as an executor under a will or as an administrator appointed under a grant of letters of administration pursuant to the Laws of Succession Act, Cap 160.

18. In the present case, no grant of representation has been submitted to demonstrate that a legal representative has been appointed and properly joined as a party to these proceedings. Consequently, the “estate of Mohamed Omar Shee” currently lacks locus standi to be sued. Without a properly constituted defendant, this suit is fundamentally defective.

19. Therefore, I hereby allow the Preliminary Objection. In light of the aforementioned statements, the Plaintiffs’ suit cannot be sustained; thus, the originating summons dated July 9, 2020, is hereby struck out. However, it is essential to note that the court does not anticipate that the deceased’s beneficiaries can undertake any eviction or other action regarding the deceased's estate against the Plaintiff without obtaining a grant. There shall be no orders as to costs.

**DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 14<sup>TH</sup> DAY OF MAY 2025.**

**E. K. MAKORI**

**JUDGE**

In the presence of:

Ms. Katana for the Plaintiff

Ms. Zulekha for the Defendant

Happy: Court assistant

