



**Lutta v Mohamed & another (Sued jointly and severally); Chief Land Registrar (Mombasa District) & another (Interested Parties) (Environment & Land Case E012 of 2024) [2025] KEELC 312 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 312 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E012 OF 2024**

**LL NAIKUNI, J**

**JANUARY 31, 2025**

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT**

**-AND-**

**IN THE MATTER OF: THE LAND REGISTRATION  
ACT OF 2012. SECTION 28, LAWS OF KENYA**

**-AND-**

**IN THE MATTER OF: CLAIM FOR ADVERSE  
POSSESSION ON MOMBASA/MWEMBELEGEZA/1403**

**BETWEEN**

**PERIS PHELIGONA LUTTA ..... APPLICANT**

**AND**

**RAJAB KITHUSI MOHAMED ..... 1<sup>ST</sup> RESPONDENT**

**MOHAMED KHALID MOHAMED ..... 2<sup>ND</sup> RESPONDENT**

**SUED JOINTLY AND SEVERALLY**

**AND**

**THE CHIEF LAND REGISTRAR (MOMBASA DISTRICT) .... INTERESTED  
PARTY**

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICE**

**(MOMBASA) ..... INTERESTED PARTY**



## RULING

### I. Introduction

1. This Honorable Court is tasked to make a determination over the Notice of Motion application dated 10<sup>th</sup> June, 2024. It was filed by Peris Pheligona Lutta, the Applicant herein and brought under the provision of Sections 3 (2) of the High Court (Practice and Procedure) Rules and Section 3A of the Civil Procedure Act Cap. 21; Order 40 Rules 1, 2, 3 (3) and 4; Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. Upon service of the application to the Respondents, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent responded through a Notice of Preliminary Objection dated 19<sup>th</sup> June, 2024 to the said application and and the Originating Summons dated the same day.

### II. The Applicant case

3. The Applicant sought for the following orders:-
  - a. Spent.
  - b. That the Honourable Court do issue an order of inhibition restraining any dealings and developments whatsoever with Land Parcel MOMBASA/MWEMBELEGEZA/1403 pending the hearing and determination of this application and suit or until further orders of this court.
  - c. That a temporary injunction be hereby granted restraining the Respondents (jointly and severally) by themselves, their servants, assignees, legal representatives or any other persons acting on their instructions directly or indirectly from excavating, constructing, disposing, alienating and/or in any other manner from dealing with the property known as MOMBASA/MWEMBELEGEZA/1403 and/or demolishing the Applicant's items or doing any other thing whatsoever which is meant to prevent the Applicant's peaceful occupation, possession and/or use of the said portion of land pending the hearing and determination of the application and suit herein.
  - d. That the Honourable Court do issue an order compelling the Officer Commanding Station (OCS) (Bamburi Police Station) to assist in the enforcement and implementation of the orders sought herein once granted.
  - e. That costs be borne by the Respondents.
4. The application was premised on the grounds, testimonial facts and averments made out under the 15 Paragraphed Supporting Affidavit of –PERIS PHELIGONA LUTTA, the Applicant herein sworn and dated on the same day as the Application with Eleven (11) annexures marked as ‘PPL-1 to 11’. The Applicant averred that:
  - a. She had been in open, exclusive, continuous and uninterrupted occupation of the suit property since the year 1995. Hence had developed a beneficial interest thereto under the doctrine of Land adverse possession.
  - b. Historically, she was one of the beneficiaries of the Mwembe Legeza Scheme having acquired title known as MOMBASA/MWEMBELEGEZA/20 which was adjacent to the disputed parcel. Annexed in the affidavit a copy of title marked as exhibit as “PPL – 2”.



- c. Further during the original adjudication and sub-division of the parcels under the scheme, the now disputed parcel was identified as Plot No 24. Annexed in the affidavit an excerpt copy of the Registry Index Map marked as exhibit “PPL – 3”.
- d. From the recent registry index map, the Plot No . 24 had since been re-parceled and issued Plot No 1403. Annexed in the affidavit a copy of current Registry index Map marked as exhibit “PPL – 4”.
- e. She informed her advocates on record to conduct further investigations and from the records obtained from the County Government of Mombasa for purposes of payment of necessary rates show that the property was registered in the names of the Respondents (Annexed in the affidavit a copy of the Statement from the County Government of Mombasa marked as exhibit “PPL -5”.
- f. For avoidance of doubt, she had made developments on the suit property to wit, built semi-permanent houses, planted trees, does cattle and chicken farming, build a fence and gated and generally developed the parcel of land unhindered. Annexed in the affidavit picture evidence of the various activities marked as exhibit “PPL -6” being boundary fence, “PPL – 7” being indigenous trees and “PPL – 8” being business shed.
- g. On 17<sup>th</sup> May, 2024 unknown people accompanied by the police, area chief and other officials who claimed to be from the Ministry of Lands entered the disputed property and forcefully placed beacons. Annexed in the affidavit, pictures of the alleged beacons marked as exhibit as “PPL – 9”.
- h. Further on 7<sup>th</sup> June, 2024 a group of many young men came to the disputed property under the instructions of the Respondents and by use of force, threats and intimidations to dig trenches and proceed to erect a boundary wall to seal off the property this despite her protestation on their alleged actions. Annexed in the affidavit, pictures of the now erected boundary wall marked as exhibit as “PPL – 10”.
- i. She reported the matter to Bamburi Police Station in a bid to find help but regrettably was not helped as the concerned authorities showed little or no concern at all. Annexed in the affidavit is a copy of the Police OB number marked as exhibit “PPL – 11”.
- j. The disputed property was a source of livelihood to her and if compromised through illegal means she would be rendered destitute and any interference will occasion irreparable loss.
- k. She maintained that the Respondents had by crook or design aided by various authorities acquired unlawful possession of the disputed parcel of land and are now in active activity to kick her out of the property despite having accumulated legitimate legal interest under adverse possession.
- l. Due to the volatile nature of the circumstances, she had instructed her advocates on record to conduct further due diligence at the land registry to unmask the details of the respondents and the same shall be provided accordingly to the Honourable court.
- m. Neither the Respondent nor any other person has ever come to claim the property ever since the adjudication exercise and she had been the only person in use and occupation.



### III. The objection by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent responded to the Application through filing of a 3 Paragraphed Notice of Preliminary objection dated 19<sup>th</sup> June, 2024. They were on the following grounds:-
  - a. There was non-compliance of the provision of Order 37 Rule 7 (2) of the [Civil Procedure Rules, 2010](#) which is mandatory at the time of filing suit.
  - b. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' title to the suit land was obtained on 15<sup>th</sup> December 2023 and at that by the time the originating summons was filed on 10<sup>th</sup> June 2024, the Defendants' title was only 6 months and hence the Plaintiff's claim cannot come under the ambit of Sections 7,13, 37 and 38 of the [Limitation of Action Act](#), Cap. 22 that prescribes a period of 12 year.
  - c. The land under jurisdiction of the Settlement Fund Transfer (SFT) is Government Land and the 1<sup>st</sup> proprietor is the Government whilst the 2<sup>nd</sup> proprietor are the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and hence:
    - i. Section 41 of the [Limitation of Actions Act](#), Cap 22 provides that government land cannot be acquired by adverse possession.
    - ii. There was no title which could have been extinguished by virtue of Section 17 of the [Limitation of Actions Act](#), Cap. 22 to give rise to a claim of Land adverse possession.
    - iii. The process of acquisition of the title by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had not been completed until the issuance of the title deed on the 15<sup>th</sup> December 2023.

### IV. Submissions

6. On 25<sup>th</sup> July, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 10<sup>th</sup> June, 2024 and Notice of Preliminary objection be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling the Honourable Court had not been able to access the written submissions. Nonetheless, the Court reserved to deliver the Ruling on 31<sup>st</sup> January, 2025 on its own merit accordingly.

### V. Analysis & Determination.

7. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant and the Grounds of Opposition, the relevant provisions of the [Constitution](#) of Kenya, 2010 and statutes.
8. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (2) framed issues for its determination. These are:-
  - a. Whether the objections by the Defendants/Applicants is merited?
  - b. Whether the Notice of Motion dated 10<sup>th</sup> June, 2024 meets threshold required of a temporary injunction under Order 40 Rules 1 of the Civil Procedures Rules, 2010?
  - c. Who bear the Costs of Notice of Motion application dated 10<sup>th</sup> June, 2024, the Notice of Preliminary objection dated 19<sup>th</sup> June, 2024 and the Originating summons dated 10<sup>th</sup> June, 2024.



**ISSUE No. a). Whether the objection by the Defendants/ Applicants is merited.**

9. Under this sub title we shall examine the merits of the preliminary objection. The law relating to preliminary objections in this region has been settled since the often-cited decision of the Court of Appeal for East Africa in the case of:- “*Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Ltd* (1969) EA 696” where Law JA stated as follows: -

“So far as I’m aware, 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.”

10. Sir. Charles Newbold, P. went on to state in the same case thus:-

“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 had to be ascertained or if what is sought is the exercise of judicial discretion. ...”

11. It follows therefore a matter in which the court has discretion cannot be the basis of a valid preliminary objection. The thrust of the preliminary object is that there is non-compliance with the provision of Order 37 Rule 7 (2) of the [Civil Procedure Rules, 2010](#). The rule provides:

The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

12. The question that arises is whether non-compliance with the provision Order 37 Rule 7 (2) in the first instance should lead to an automatic striking out. A ready answer is found at Order 37 Rule 18 which provides:

At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the Judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.

13. It seems to me therefore that the court has discretion and power to remedy non-compliance with Order 37 Rule 7 (2) prior to trial. That is more so in the context of the provisions of Article 159 (2) (d) of the [Constitution](#) of Kenya and Section 19 of the [Environment and Land Court Act](#) which emphasize the overall mission of the court to do substantive justice. Consequently, the preliminary objection herein which is founded entirely on non-compliance with Order 37 Rule 7 (2) cannot succeed. In line with the mission of the court to do substantive justice, I will give the applicant a chance to comply. Adverse consequences will only follow in the event of failure to comply upon expiry of the period given.

14. On the other objection raised by the Defendants, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' title to the suit land was obtained on 15<sup>th</sup> December 2023 and at that by the time the originating summons was filed on 10<sup>th</sup> June 2024, the Defendants' title was only 6 months and hence the Plaintiff's claim cannot come under the ambit of the provision of Sections 7, 13, 37 and 38 of the [Limitation of Action Act](#), Cap.



22 that prescribes a period of 12 years. This Court has the discretion to invoke the overriding objective under the provision of Sections 1A and 1B of the *Civil Procedure Act*, Cap. 21 and/or Article 159 (2) (d) of the *Constitution* which enjoin the court to do substantive justice without being shackled by technicalities of procedure could save the suit arguing that procedural rules are an integral part of the overall administration of justice and cannot be ignored. Therefore the objection on that ground fails.

15. On the third ground, the Respondents have contended the subject property was a public property owned by the County Government and that adverse possession cannot run against property owned by the government. The *Limitation of Actions Act* Cap. 22 Laws of Kenya under the provision of Section 41 expressly excludes public land from the application of the provisions of the Act. This Court sitting in Nairobi in the case of “*Ravji Karsan Shanghani v Peter Gakumu* [2019] eKLR” considered whether adverse possession could apply to land owned by the Government and at paragraph 15 of the judgment stated as follows:-

“ 15. The Defendant was allocated the suit land on 23<sup>rd</sup> April 1986 following his application for allocation. At the time of allocation, the land was unsurveyed and it constituted part of Government land and that is how the Government could alienate it. It is trite law that adverse possession cannot accrue against land that is owned by the Government. The Plaintiff contended he occupied the suit land in 1979 and had since that time effected various developments thereon which demonstrated his occupation and possession was adverse to the rights and interests of the registered owner. Thus, even assuming the Plaintiff had during the period 1979 to 1986 occupied and possessed the land under circumstances that could amount to adverse possession, my view is the Plaintiff could not adversely possess the land against the Government such that the Government’s rights and interest over the land could be extinguished. The doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government. Section 41 of the Limitation of Actions Act excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

41. Exclusion of public land

This Act does not -

- a. enable a person to acquire any title to, or any easement over -
  - i. Government land or land otherwise enjoyed by the Government;
  - ii. Mines or minerals as defined in the *Mining Act* (Cap. 306);
  - iii. Mineral oil as defined in the *Mineral Oil Act* (Cap. 307);
  - iv. Water vested in the Government by the *Water Act* (Cap. 372);
  - v. Land vested in the County Council (other than land vested in it by Section



120(8) of the *Registered Land Act* (Cap. 300)); or

vi. Land vested in the Trustees of the National Parks of Kenya; or

16. In the present matter there is no dispute that the suit property was registered in the name of the County Government of Mombasa after which it was allocated to the 1<sup>st</sup> Defendant who obtained a title recently less than a year ago. The provision under Article 62 (1) of the *Constitution* of Kenya, 2010 outlines the various categories of public land and under the provision Article 62 (1) (b) includes:-

“Land lawfully held, used or occupied by any state organ except any such land that is occupied by the state organ as lessee under a private lease.”

17. Article 62 (2) of the *Constitution* provides as follows:-

(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under

(a) clause (1) (a), (c), (d) or (e); and

(b) clause (1) (b), other than land held, used or occupied by a national State organ.

18. The subject property was public land within the public land under the Constitution upto 15<sup>th</sup> December, 2023 therefore the Plaintiff cannot claim to have adversely possessed the land from 1995 since the same was public land then. The Applicant’s occupation of any portion of land cannot entitle her to claim title by adverse possession. Her occupation, if at all, could only have been at the pleasure of the Respondents and the Respondents are entitled to give her notice to vacate at any time. Her possession however long could not operate to extinguish the title to the 1<sup>st</sup> Respondent.

19. The originating Summons by the Applicant is misconceived and is incompetent. The Originating Summons is not sustainable. I uphold the preliminary objection by the Respondents.

20. This being the foregoing the Court has no option but to pen down and strike out the originating summons dated 10<sup>th</sup> June, 2024. For avoidance of doubt that Honourable Court cannot proceed to examine the other issue in the ruling except for the costs.

**ISSUE No. c). Who will bear the Costs of Notice of Motion application dated 10<sup>th</sup> June, 2024, the Notice of Preliminary objection dated 19<sup>th</sup> June, 2024 and the Originating summons dated 10<sup>th</sup> June, 2024.**

21. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “*Jasbir Rai Singh v Tarchalan Singh*” eKLR (2014) and *Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited*, eKLR (2014).

22. In the case of “*Hussein Muhumed Sirat v Attorney General & Another* [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.



23. In this case, this Honourable Court has reserved its discretion to award the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents the costs of the Notice of Preliminary objection dated 19<sup>th</sup> June, 2024 and the struck - out Notice of Motion application and Originating summons dated 10<sup>th</sup> June, 2024.

**VI. Conclusion & Disposition**

24. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-
- a. That the Notice of Preliminary objection dated 19<sup>th</sup> June, 2024 be and is hereby found to have merit and the same is upheld as objection number 3 renders the Originating summons dated 10<sup>th</sup> June, 2024 unsuitable and misconceived.
  - b. That the Notice of Motion application dated 10<sup>th</sup> June, 2024 be and is hereby found to lack merit and the same is struck out.
  - c. That the Originating summons dated 10<sup>th</sup> June, 2024 is accordingly ordered struck out.
  - d. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Respondents shall have the costs of the Notice of Preliminary objection dated 19<sup>th</sup> June, 2024 and the struck out Notice of Motion and Originating summons dated 10<sup>th</sup> June, 2024.

It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY,2025.**

.....

**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiff/Applicant.
- c. Mr. Tindi Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents.
- d. No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties.

