



**Simpiri v Nakuru Teachers Housing Co-operative Society Limited &
another (Environmental and Land Originating Summons E001 of 2025)
[2025] KEELC 4767 (KLR) (Environment and Land) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4767 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2025
MC OUNDO, J
JUNE 26, 2025
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP 22)
AND
IN THE MATTER OF THE LAND REGISTRATION ACT O 2012, SECTION
28, LAWS OF KENYA
AND
IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION ON LOT NO.
999 NAKURU TEACHERS HOUSIMG GILGIL B PROJECT**

BETWEEN

SIMON KIPOEPOE SIMPIRI PLAINTIFF

AND

**NAKURU TEACHERS HOUSING CO-OPERATIVE SOCIETY
LIMITED 1ST DEFENDANT**

SAMUEL KAMAU 2ND DEFENDANT

RULING

1. Vide an Originating Summons dated 6th February, 2025 the Plaintiff/Applicant herein sought to be declared and registered as the proprietor of approximately 0.044 Hectares of that piece of land known as Plot No. 999 Nakuru Teachers Housing Gilgil B Project situated in Nakuru County having acquired the same by way of Adverse possession. Simultaneously with the Originating Summons, the Plaintiff filed a Notice of Motion Application dated 6th February, 2025 seeking an injunction order barring



- the 1st Defendant/Respondent from carrying out an illegal eviction, entering, trespassing, and or interfering with the Plaintiff/Applicant's occupation of Plot No. No. 999 Nakuru Teachers Housing Gilgil B Project situated in Gilgil, Nakuru County.
2. In response, the 1st Defendant/Respondent filed a Notice of Preliminary Objection dated 25th February 2025 to the effect that the suit was bad in law for failure to comply with the provisions of Order 37[7] [2] of the Civil Procedure Rules to which the court directed that the same be disposed of in the first instance since it sought to dispose of the entire suit.
 3. Subsequently, the Preliminary Objection was disposed of by way of written submissions wherein the 1st Defendant/Respondent vide its submissions dated 13th March 2025, placed its reliance on the provisions of Order 37 [7] [1] and [2] of the Civil Procedure Rules to submit that a person filling a claim for adverse possession must annex a certified extract of the title. That however, in the instant case, no such certified copy of the register had been annexed hence it urged the court to strike out the suit. Further reliance was placed on the decisions in the case of *Musa Kipkoskei Labatt v Laban Kipkebut Barkoton* [2019] eKLR, *Ishmael Busolo Watuku v Joseph Busolo & 3 Others* [2013] eKLR where the Court had cited the Court of Appeal's decision in *Kyeyu v Omuto* [1990] KLR 709 and *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another* [2015] KECA 728 [KLR].
 4. That in any case, from the annexed title document, the 1st Defendant/Respondent had become the registered owner of the parcel Gilgil/Karunga Block 18/999 on 30th September 2022. That subsequently, from the date that the 1st Defendant/Respondent had obtained the title, 12 years had not lapsed to enable the Plaintiff claim adverse possession of the suit premises.
 5. In conclusion, it urged the court to be guided by the Court of Appeal decisions herein cited and also persuaded by the cited decisions of the courts of concurrent jurisdiction to dismiss the entire suit filed for offending the provisions of Order 37 Rule 7[2] of the Civil Procedure Rules which were couched in mandatory terms.
 6. In opposition to the Preliminary Objection, the Plaintiff/Applicant vide his written submissions dated 24th April 2025, framed one issue for determination to wit; whether the 1st Defendant's Preliminary Objection was merited or otherwise.
 7. He placed reliance in the Indian Supreme court decision in *Karnataka Board of Wakf v. Government of India*, [2004] 10 SCC 779, to submit that this being a claim of adverse possession, it was important that the court appreciates the peculiar facts of the instance case as the claim of adverse possession should not be predicated on the 'black letter alone'. That indeed, in his Supporting Affidavit dated 6th February 2025, he had deponed that he had been in adverse possession of approximately 0.044 Hectares of that piece of land known as Plot No. 999 Nakuru Teachers Housing Gilgil B Project situated in Gilgil Nakuru County [suit property] for over 12 years prior to the filing of these proceedings. That he had taken possession of the suit property in the year 2000 and proceeded to establish a home with his children who had also erected homes on the said land. That further, his cattle had also been grazing on the subject land.
 8. That subsequently, he had been having an open, notorious, exclusive, continuous and un interrupted use of the suit property for a period of more than 12 years which was a non-permissive, hostile or adverse use of the said 0.044 Hectares portion of the suit property. He placed reliance in the Karnataka Board of Wakf Case [supra] to submit that a plea of adverse possession was not a pure question of law but a blended one of fact and law and that for a just resolution of the matter herein, it was imperative that the same proceeds to trial to establish whether the factual basis of a claim for adverse possession had been proved.



9. That whereas he had been alive to the fact that the provisions of Order 37 Rule 7[2] of the Civil Procedure Rules required that an extract of the register, or green card, be annexed to the Originating Summons for purposes of acquiring land by Adverse Possession, he had issued a Notice to Produce dated 21st February 2025 [pursuant to the provisions of Section 69 of the *Evidence Act*] for the 1st Defendant to produce and show to the Court at the first hearing of the instant suit the following documents in relation to Plot No. 999 Nakuru Teachers Housing Gilgil B Project:
- i. List of allottees in respect of Nakuru Teachers Housing Gilgil B Project as at 6th February 2025.
 - ii. Share certificate for Plot No 999 Nakuru Teachers Housing Gilgil B Project.
 - iii. Ballot Card Plot No 999 Nakuru Teachers Housing Gilgil B Project.
 - iv. Receipt for Plot No 999 Nakuru Teachers Housing Gilgil B Project.
 - v. Copy of the green card over Plot No 999 Nakuru Teachers Housing Gilgil B Project.
10. It was his submission that the very purpose of the said Notice to Produce was for the Plaintiff to comply with Order 37 Rule 7[2] of the Civil Procedure Rules noting that the said registration documents were in the custody of the 1st Defendant. That in any case, the Plaintiff was the Proprietor of Plot No. 998 Nakuru Teachers Housing Gilgil B Project, a parcel adjacent to the suit property herein hence he had been under the impression that the said parcels of land had not been registered with the Land Registry and that the only registration documents that had been available were the ones as listed in the Notice to Produce dated 21st February 2025.
11. He submitted that the decision that had been cited by the 1st Defendant in Musa Kipkoskei Labbat's case [supra] was distinguishable from the facts in the instant suit in that the learned Judge in the said case having been alive to the provision of Order 37 Rule 7[2] of the Civil Procedure Rules, as could be noted from paragraph 4 of the decision, had granted more time to the Plaintiff to comply with the said provision but the Plaintiff had failed to so comply. That however, in the instant case, the Plaintiff had not been granted time to regularize his claim even though he had the intention to do so as evidenced by the Notice to produce dated 21st February 2025. That similarly, in the cited case of Ishmael Busolo Watuko [supra] the learned judge had equally granted more time to the Applicant to file their documents so as to comply with the Order 37 Rule 7[2] and that it was only after the Applicant had failed to comply that their claim had been dismissed.
12. That further, in the Court of Appeal decision in Wilson Kazungu Katana's case [supra] [cited by the 1st Defendant] a reading of the said decision had revealed that the matter did proceed to trial even though the Applicant had not complied with Order 37 Rule 7[2] and was dismissed partly because the requirement for peaceful and exclusive possession had not been proved. It was thus his submission that in Wilson Kazungu Katana case [supra], the trial court had appreciated that a plea of adverse possession was not a pure question of law but a blended one of fact and law hence the viva voce evidence to prove the claim.
13. That since from the aforementioned cited decisions all the Applicants had either been given a chance to regularize their originating summons by complying with Order 37 Rule 7[2] or the suit had proceeded to trial so as to appreciate the factual grounds for a claim of adverse possession, in the pursuit of substantive justice, the Plaintiff be afforded an opportunity to rectify any procedural deficiencies and, crucially, to present their case fully on its merits. That in any case, the Defendants stood to suffer no prejudice should the matter herein proceed to a full trial. That nonetheless, should the Plaintiff be summarily denied the opportunity to ventilate their case, they would be sent away from the seat of justice.



14. He thus invited the court to issues the following directions:
 - i. To dismiss the 1st Defendant's Preliminary Objection dated 25th February 2025.
 - ii. To issue directions on the Plaintiff's Notice to produce dated 21st February 2025.
 - iii. To issues pre-trial directions.

Determination.

15. I have considered the Notice of preliminary objection herein dated the 25th February 2025, the submissions and the authorities cited for and against the same thereof and the applicable law. The instant matter arose as a result of an Originating Summons dated 6th February, 2025 filed by the Plaintiff herein who sought to be declared and registered as the proprietor of approximately 0.044 Hectares of that piece of land known as Plot No. 999 Nakuru Teachers Housing Gilgil B Project, situated in Nakuru County having acquired the same by way of Adverse possession. In response, the 1st Defendant filed a Notice of Preliminary Objection dated 25th February, 2025 opposing the Originating Summons to the effect that the same was bad in law for failure to comply with the provisions of Order 37[7] [2] of the Civil Procedure Rules
16. Subsequently, I find one [1] issue as standing out for my determination, to wit; whether the Preliminary Objection raised is sustainable.
17. The law relating to Preliminary Objections in our jurisdiction has been settled since the land mark decision of the Court of Appeal for East Africa in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited [1969] EA. 696 where Law JA had held as follows:

“So far as I am 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.”
18. In the same case, Sir Charles Newbold, P. had stated 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....”
19. The core of the Preliminary Objection herein is that the Plaintiff's Originating Summons is bad in law for failure to comply with the provisions of Order 37 Rule 7[2] of the Civil Procedure Rules which provides as follows:

“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”
20. In the present case, the Plaintiff/Applicant does actually concede that he did not comply with the said rule and has shifted the blame and/or burden of failure to so attach the extract of a title of the suit land to the 1st Defendant through his Notice to produce, which is contrary to the provisions of Order 37 Rule 7[2] of the Civil Procedure Rules. Indeed, a perusal of the Originating Summons and the



Affidavit in support of the same shows that a certified extract of the title to the suit property was not annexed.

21. The Court of Appeal's decision in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] KECA 728 [KLR] herein cited by the parties had held as follows;

“Indeed, the then Order XXXVI Rule 3D[2] specifically provided:

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

That requirement no doubt was couched in mandatory terms failing which it would render the O. S. incompetent. We have perused the entire O. S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission.” [Emphasis supplied]

22. The Court of Appeal in this matter had emphasized that lack of an extract of the title to the suit property was fatal. Order 37 Rule 7[2] of the Civil Procedure Rules makes it mandatory that the extract of the register, or green card, be annexed to the Originating Summons and for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land that is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.

23. However, the provisions of Order 37 Rule 18 also provide as follows:

“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.”

24. From the above caption provisions of the law it is clear that the court has discretion 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.

25. In this regard thereof, I will give the Applicant a chance to comply with Order 37 Rule 7 [2] as he is obliged to under the provisions of the law as the fact that the 1st Defendant may have annexed his Title, does not relieve him [the Plaintiff/Applicant] of his obligation under the provisions of Order 37 Rule 7[2] of the Act. A certified copy of the register of title can be obtained from the custodian of the title register who is the Land Registrar.

26. The Preliminary Objection dated 25th February 2025 is herein dismissed with cost on the following orders:

- i. The Plaintiff/Applicant shall file and serve within thirty [30] days from the date of delivery of this ruling a Supplementary Affidavit with a certified extract of the title to the suit parcel of land.



- ii. In default of compliance this suit shall stand struck out with costs to the 1st Defendant/ Respondent.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 26TH DAY OF JUNE 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

