

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NUMBER E08 OF 2025 (O.S.)

**IN THE MATTER OF THE REGISTRATION OF TITLES ACT (CAP
281)**

AND

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CAP
22)**

AND

**IN THE MATTER OF LAND REFERENCE NUMBER SOUTH
SAKWA/WAWARE/233**

BETWEEN

ERICK OUMA ADONGO-----

PLAINTIFF

AND

JIM OLUOCH OGOLA-----

DEFENDANT

RULING

**(On whether the plaintiff's Originating Summons should
be dismissed for failure to annex an extract of title to the
originating summons)**

Introduction

1. The Plaintiff herein filed contemporaneously a Notice of Motion application under Certificate of Urgency and an Originating Summons, both dated 14th July, 2025. The gist of his suit is that he is entitled to be registered as the owner of **Land Parcel Registration Number South Sakwa/Waware/233**, his rights

to the said land having accrued by reason of adverse possession courtesy of his long peaceful, continuous, and exclusive occupation of the suit property since the year 2007.

2. On 21st July 2025, the Defendant herein filed a Notice of Preliminary Objection which is premised on the sole ground that the Originating Summons filed by the Plaintiff is incurable defective and incompetent for failure to annex a certified extract of title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure Rules. The Preliminary Objection came up for hearing and was canvassed by way of written submissions.
3. It is worth of note that parties are bound by their pleadings. Further, it is trite law that in determining preliminary objections, the courts will not trudge beyond the law as applied to the parties' pleadings since, to go beyond the pleadings and rely on facts would mean that the courts will be delving into the merits of the matter before that evidence is tested. So, the Court only needs to look at the pleadings and compare them with the provision(s) of law the pleadings are said to have fallen short of.

4. This Court has carefully perused the plaintiff's Originating and supporting Affidavit in support of his originating summons. I note that the plaintiff pleads that the Court is to determine whether he is entitled to be registered as owner by way of adverse possession to parcel number South Sakwa/Waware/233 measuring approximately 1.3 Ha. In support of his claim he has annexed the following copies of documents, namely, a copy of an official search of the suit property, a certificate of death of one OLERO AKUMU and several photographs of crops and trees that are said to have been planted on the suit property by the plaintiff. He did not annex a certified copy of an extract of title to the suit property.
5. To that end the Defendant raises the Preliminary Objection which I now determine.

Issues, Analysis and Determination

6. The sole issues that arises for determination herein is whether failure to annex a certified copy of an extract title renders the plaintiff's originating summons incurable defective. Attendant to it is who to bear the costs of the Objection and the suit if the Objection succeeds.

7. In the celebrated case of **Mukhisa Biscuits Manufacturing Limited v Westend Distributors (1969) EA 969** the court set out the threshold that must be met by a preliminary objection. Accordingly, the court held that:

“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. Example is 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 that used to be called 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. The defendant herein contends that the plaintiff's Originating Summons is incurably defective since the plaintiff did not annex a certified copy of an extract title to the affidavit is

support of his Originating Summons as mandated by Order 37 Rule 7 (2) of the Civil Procedure Rules. The instant objection fits within the test established in the **Mukhisa Biscuits case (supra)** because, if proved, it can dispose the plaintiff's suit at the preliminary stage. In any event the Defendant, through the Objection, calls on this Court to consider the provisions of Order 37 Rule 7 of the Rules, the pleadings to either agree or disagree with him.

9. Order 37 Rule 7 of the Civil Procedure Rules provides for the procedure for instituting proceedings under section 38 of the Limitations of Actions Act. Sub rules 1 and 2 thereof provide as follows:

(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.

10. It is a clear question and requirement of the law under Order 37 Rule 7(2) that at the time of filing an Originating Summons a

certified extract of title be annexed to the affidavit supporting the originating summons. This provision is couched in mandatory terms as has been observed in various decisions (see ***Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another, Malindi civil appeal no. 11 of 2014*** and ***Sarah Kimani v John Wanyoike Gerald, ELC case no. 791 of 2023 (OS)*** and ***Teresa Wachuka Gachira v Joseph Mwangi Gachira, Civil Appeal no. 325 of 2003***).

11. As earlier observed, the plaintiff did not annex a certified copy of an extract of title of the suit property. However, the Plaintiff annexed a copy of an official search to the suit property. The question that arises then, is whether, the copy of certificate of official search annexed to the Supporting Affidavit can be considered in place of the certified extract of title.

12. The requirement on a certified copy of an extract of title to land being claimed by virtue of adverse possession has been expounded in various precedents. In ***Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another (supra)***, the Court of Appeal held that:

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old Civil Procedure Act and the rules made thereunder that when taking out an O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application.

13. In **Sarah Kimani v John Wanyoike Gerald (supra)**, the court determined that:

The purpose of annexing an extract of the title is to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a

means to the court to ascertain the existence and proprietorship of the suit land. See Symon Gatutu & 587 others v E.A. Portland Cement (2011) eKLR. It is therefore not a technicality as submitted by the Plaintiff, but a mandatory requirement in a claim of adverse possession (emphasis added).

14. Having ascertained that the purpose of the certified copy of the extract of title is to ascertain the ownership of the land, the question this court should seek to answer is whether an official search would suffice in the instant circumstances? This question was addressed by the Court of Appeal in **Johnson Kinyua v Simon Gitura Rumuri, Civil Appeal no. 265 of 2005**. The court held that:

On our part, we have weighed the submissions made on behalf of the parties. Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the

certificate. Thus section 36(2) of the Registered Land Act provides:

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration, we think a search certificate meets the requirements of the relevant law.

15. The plaintiff annexed a copy of a certificate of official
indicating that on the 5th March 2025, OLERO AKUMU

(deceased) was the registered proprietor of the suit property. This certificate of search is duly signed by the Land Registrar. Accordingly, the same suffices for purposes of determining the proprietorship of the land the plaintiff now claims by virtue of adverse possession. For that reason, I now once again turn to the holding in the Sarah Kimani case (supra). In it the Court held,

“The purpose of annexing an extract of the title is to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietorship of the suit land.”

16. The question that begs an answer in the instant case is, has the Plaintiff annexed an extract of title or certificate of official search, showing that the Respondent/ Defendant is the holder of the suit land in question? He has not. This, in my humble view, is the crux of the Plaintiff’s Objection. Thus, to sustain the claim while such a glaring omission exists is to act contrary to the requirement of the law. The upshot of the foregoing is that

the defendant's Notice of Preliminary Objection succeeds and is hereby allowed. The plaintiff's suit is dismissed.

17. The Preliminary Objection having succeeded, the Defendant shall have the costs of both the application and suit, pursuant to the provisions of section 27 of the Civil Procedure Act.

18. Orders accordingly.

RULING Dated, Signed and **Delivered Virtually** via the **Teams Platform** this **18th** day of **September,2025**.

**HON. DR. IUR NYAGAKA,
JUDGE.**

From 14:13 hours to 14:18 hours, in the presence of

Ms. Lola (Court Assistant)

Adingo for Advocate for the Plaintiff

Ezra Awino Advocate for the Defendant