



REPUBLIC OF KENYA



Bett & 2 others v Koech & another (Environmental and Land Originating Summons E010 of 2023) [2025] KEELC 6212 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6212 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2023
MN MWANYALE, J
SEPTEMBER 25, 2025**

BETWEEN

WILSON BETT 1ST PLAINTIFF

RECHO CHEPKWOGEN MARITIM 2ND PLAINTIFF

STANLEY KIPKEMBOI KIPKETUYI 3RD PLAINTIFF

AND

JOSEPH KIPRONOH KOECH 1ST DEFENDANT

KOILEKEN JEREMIAH 2ND DEFENDANT

RULING

1. This Ruling relates to the Notice of Preliminary Objections dated 30/05/2025 filed by the 1st Defendant and it is premised on the following grounds, to wit, that:
 - a. Amended Originating summons is defective and therefore a nullity by virtue of being supported by an amended Supporting affidavit contains deletions and additions on primary depositions that cannot in any way be termed technical in nature.
 - b. The Amended supporting affidavit is incompetent, bad in law and a nullity that should be struck out with costs to the Defendant/ Applicant. A supporting affidavit to a pleading is the cornerstone of any pleading. Since some of the amended parts of the affidavits form the sub strum of the Application, they cannot stand in law. An affidavit cannot be amended to support a pleading.
 - c. The Amended Originating Summons as drawn and filed is incompetent and fatally defective and therefore it should be struck out since it cannot stand without the supporting evidence



- d. the Amended Originating summons is tantamount to trifling with the court and is an abuse of the court process
 - e. That the Amended Originating summons and the Amended Supporting affidavit should be dismissed with costs to the defendant.
2. The hearing of the P/O was directed to be by way of oral submissions. At the hearing of the submissions Ms. Kiprotich learned counsel appeared for the 1st Defendant/ Respondent in the originating summons hence the Applicant in the P.O, Mr. Shira for the 2nd Respondent supported the Preliminary Objection while Ms. Kithinji learned counsel appeared for the Applicant in the Originating Summons hence Respondent in the P.O.
 3. In his submissions Ms. Kiprotich Learned counsel for the 1st Respondent submitted that the preliminary objection was based on the form and structure of the Supporting affidavit as a supporting affidavit cannot be amended and if a party wants to discard the original affidavit, they ought to have filed a further affidavit. That in the Amended affidavit they have deleted some paragraphs. He placed reliance on order 19 rules 3 and 4 of the Civil Procedure Rule, and concluded that where an affidavit is amended the substance is altered and the deponent cannot re ascertain and confirm the depositions thereof. Mr. Kiprotich filed a list of authorities which he relied on the decisions therein being the decision in the case of Omar & 161 others v National Land Commission and 4 others petition 19 of 2017 as well as the decision in the case of Mohamed Haji Hussein and 6 others v Mander Water and sewerage company and 2 others petition 1 of 2021.
 4. Mr. Shira learned counsel for the 2nd Respondent in the Originating summons supported the preliminary objection and submitted that as filed the Originating summons did not have a supporting affidavit as the one filed had been amended. He relied on the three decisions two of which were filed by Mr. Kiprotich being the Omar and 161 others case as well as the Mohamed Haji Hussein decision as well as an additional decision in the case of James Peter Maina Muriungi v Moses Maina Ngugi and another 2008 ekr. It was Mr. Shira's further submissions that if the P/O is upheld the Applicant in the O.S has an opportunity to file another O.S.
 5. On her part Mr. Kithinji Learned counsel were not pure points of law as there is no law that bars the Amendment of an affidavit, hence none was breached. She placed reliance on order 19 rules 3, and 7. In support of this proposition she placed reliance on the decision in the case of Swaleh Gaita v Commissioner of lands. It was her further submissions that order 4 rule I[2] of the Civil procedure rules relates to a verifying affidavit and not a supporting affidavit. She submitted that for a preliminary objection to succeed all principles in Mukhisa Biscuits decision must be present. Reliance was placed on the decision in the case of the Attorney General v Andrew Maina Githinji in this regard. Lastly it was submitted that directions under order 37 rule 16 had been issued converting the O.S into a plaint hence the supporting affidavit had been converted to a witness statement and that the application was thus not merited.
 6. In a brief rejoinder Mr. Kiprotich submitted that under order 37 rule 19 of the Civil Procedure Rules an amended originating summons ought to be accompanied by a further affidavit and that directions in relation to the O.S had not been issued in this matter.
 7. Before framing issues for determination, the court notes that direction in respect of this matter under order 37 rule 19 had not been issued, hence the O.S still remains an O.S having not been converted to Plaint. It is also not contested that the supporting affidavit to the Amended O.S has been Amended by additions of new paragraphs and deletions of others.



ISSUES FOR DETERMINATION

8. Having analyzed the Notice of preliminary objection as well as the rival submissions by the parties, the court frames the issues for determination as follows,
 - i. Whether the Preliminary objection before court meets the threshold of a Preliminary Objection capable of determining the suit in limine?
 - ii. whether the preliminary objection is merited?
 - iii. what reliefs ought to issue?
 - iv. Who bears the costs?

ANALYSIS AND DETERMINATION

9. The Court shall now consider the first issue, to wit, whether the Preliminary objection as filed in this Matter meets the threshold of Preliminary Objections as was observed in the decision in the case of *In Mukisa Biscuit Manufacturer Limited v Westend Distributors Limited*; the Court held in respect of a preliminary objection, that “so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as 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 acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”
10. Similarly in the decision in the case of *Omondi v National Bank of Kenya Limited and 2 others*; as quoted in the decision of *J. N. and 5 others v Board of Management St. G. School Nairobi and Another* where it was 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.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
11. From the above excerpts a Preliminary Objection must not deal with issues of ascertainment of the facts and evidence. The issue of the form and structure of the Supporting affidavit to an amended Originating summons is not a factual issue as it does not go to the depositions made therein but simply looks as to whether there can be an amendment to a Supporting affidavit. The court does not need to call for evidence in relation to the said issue raised and therefore the preliminary objection raises pure points of law. It follows therefrom as drawn the Preliminary objection meets the threshold of a preliminary objection and issue number 1 is answered in the positive.
12. On issue number 2 as to whether the Preliminary objection is merited. Ms. Kithinji submitted that there was no law barring the amendments of affidavits. While the opposing counsels Mr. Kiprotich and Mr. Shira cited two decisions to support the Notice of preliminary objections. The nature of an affidavit generally is that it is a deposition. Depositions being statements of truth on oath cannot be amended as was held in the decision in the case of *Eastern & Southern African Devt. Bank v African Greenfields Ltd HCCC 1189/00* which decision is quoted in the decision in the case of *Republic v The Resident Magistrates Court Mks And Stephen Maundu Muia* also quoted in the decision of *Omar & 161 others v National Land Commission & 40 others* cited in support of the preliminary objection. It follows therefrom that there is a clear breach with the requirement that affidavits cannot



be Amended as held in various dictas. In so far as the supporting affidavit was amended the 1st respondent preliminary objection is well founded and merited which answers issues number 2.

13. On what reliefs sought to issue, having found that the Amended supporting affidavit is fatally defective and ought to be struck out it follows that the Amended Originating summons has no supporting affidavit rendering it defective too hence it is equally struck out.
14. The upshot is that the preliminary objection dated 31.3.2025 is hereby upheld and the Amended Originating summons is hereby struck out with costs to the 1st Respondent.

DATED AND DELIVERED AT KILGORIS THIS 25TH DAY OF SEPTEMBER 2025.

HON. M.N. MWANYALE

JUDGE

In the presence of;-

C/A Emmanuel/ Sylvia/ Sandra

Ms. Kithinji for the Applicant

Mr. Kiprotich for 2nd Respondent

Mr. Shira for 1st Respondent

