



Ogong v Bwoya & 2 others (Enviromental and Land Originating Summons E015 of 2024) [2025] KEELC 6441 (KLR) (25 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2024
E ASATI, J
SEPTEMBER 25, 2025
IN THE MATTER OF REGISTERED LAND ACT CAP 300(REPEALED)
AND
IN THE MATTER OF SECTIONS 26 AND 61 OF THE LAND
REGISTRATION ACT, NO. 3 OF 2012
AND
IN THE MATTER OF THE LAW OF SUCCESSION ACT, CAP 160
AND
IN THE MATTER OF PARCEL OF LAND NO. KISUMU/KANYAWEGI/6046**

BETWEEN

DANIEL OUMA OGONG APPLICANT

AND

APELA ZACHARIA BWOYA 1ST RESPONDENT

GEORGE OTIENO APELA 2ND RESPONDENT

THE COUNTY LAND REGISTRAR-KISUMU 3RD RESPONDENT

RULING

1. The applicant initiated this matter vide the Originating Summons brought, inter alia, under the provisions of Order 37(1) and (8) of the *Civil Procedure Rules*. Order 37 Rule 1 provides;

“The executors or administrators of a deceased person or any of them and the trustees under any deed or instruments or any of them and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir or legal representative of a deceased or as cestui que



trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise under any such creditor or other person as aforesaid may take out as of court an originating summons, returnable before a judge sitting in chambers for such relief of the nature of kind following, may by the summons be specified and as circumstances of the case may require that it to say, the determination, without the administration of the estate or trust of the following questions;

- a. any question affecting the rights or interests of any person claiming to be creditor, devisee, heir or cestui que trust;
- b. the ascertainment of any class of creditors, devisees, legatees, heirs or others;
- c. the furnishing of any particular accounts by the execution, administrators or trustees and the vouching when necessary of such accounts;
- d. the payments into court of any money in the hands of the executors, administrators or trustees.
- e. Directing the executors, administrators or trustees to do or abstain from doing any particular act in their character as executors administrators or trustees;
- f. The approval of sale, purchase, compromise or other transaction;
- g. The determination of any question arising directly out of the administration of the estate or trust.

2. Rule 8 provides that;

“an application under the Registered [Land Act](#) other than under section 120, 128, 133, 138, 143 and 150 thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit”.

3. The Originating Summons sought for the determination of 3 questions namely;

1. Whether land parcel number Kisumu/Kanyawegi/6046 was first registered in the name of Pitalis Ongong Ayata (a.k.a. Pitalis Ogong Ayata) deceased and if so whether the transfer of the same from the deceased to Apela Zacharia Boywa and George Otieno Apela (the 1st and 2nd Respondents/Defendants) was made without a Grant of Letter of Administration to the deceased's estate and further, whether the registration of the same in the name of the 1st and 2nd Respondent was obtained illegally, un-procedurally and through a corrupt scheme and therefore null and void.
2. Whether the register for the said land parcel No. Kisumu/Kanyawegi/6046 should be rectified by cancelling the registration of the 1st and 2nd Respondents/Defendants as proprietors thereof and by restoring and registering the said parcel of land in the name of Pitalis Ongong Ayata aka Pitalis Ogong' Ayata) deceased, pending succession.
3. Whether the costs of the summons should be provided for and paid by the 1st and 2nd Respondents.
4. *Vide* the Notice of Preliminary Objection dated 3rd September, 2024 the 1st and 2nd respondents raised a preliminary objection against the Originating Summons and sought that the same be struck out on the grounds that:



- i. the Plaintiff's application and suit are fundamentally flawed and incompetent for want of locus standi;
 - ii. the suit herein offends the *Law of Succession Act*;
 - iii. there is no cause of action before the court;
 - iv. jurisdiction is contested.
5. It was submitted on behalf of the 1st and 2nd respondents that the Applicant has no locus standi to bring the suit since the property has transited to the Defendants who have title. That the Plaintiff is not the administrator of the estate of the deceased. That he has not been authorized by the estate of the deceased to bring the suit. That the jurisdiction of the court is ousted as the matter is an estate contest and not a land case under the Environment & Land Court.
 6. That Order 37(1) of the *Civil Procedure Rules* must be read together with Order 37 Rules (7) and (8) *Civil Procedure Rules*. That Originating Summons applications can only be brought by competent persons. That to determine that the land belongs to the estate of the deceased, it requires the Probate and Administration Court under Cap.160 Laws of Kenya.
 7. That the allegations of corruption and fraud must be proved. That the sale was a contract done in the year 2014, that hence by the doctrine of privity of contract, the applicant is prevented from enforcing the contract.
 8. That case No.50 of 2016 (Court of Appeal) relied on by the Appellant was distinguishable from the present case in that in the said case, unlike the present case, there was probate proceedings by a person called Mary who was the Respondent and who had hence obtained locus standi.
 9. That under Rule 59 the *Probate and Administrative Rules*, the rights of an heir accrue after probate.
 10. On behalf of the Applicant, reliance was placed on the provisions of Order 37 Rule 1(a) which Counsel submitted, gives the Applicant the locus standi to bring the Originating Summons. That the categories of persons identified in the said provision of law may take out Originating Summons as of right. That the Applicant's right is as an heir of the estate of the deceased. That an heir has his/her own right and that the Applicant has demonstrated that he is an heir and is asking the court to determine questions that affect him as an heir. That the matter before court is not a succession cause. That the succession cause will determine the heirs of the deceased and distribute the estate. That what the Applicant is seeking is that the register in respect of the suit land be rectified pending succession.
 11. Counsel submitted further that the intention of such a suit is to preserve the estate from being intermeddled with. Counsel relied on the case of Mombasa ELC No.242 of 2020 and submitted that any of the persons named in Order 37 had a right to take out Originating Summons. That the rule allows any party including heirs to bring the Originating Summons. That the court has the power to convert the Originating Summons to a plaint in case of need for viva voce evidence. That title to the property was acquired without the process of succession.
 12. Counsel urged the court to dismiss the preliminary objection.
 13. I have considered the preliminary objections and the grounds raised in opposition thereto.
 14. Order 37 Rule 1 is clear on the categories of persons who can bring an Originating Summons thereunder. The Applicant has brought the application in his capacity as heir of the deceased.



15. On the face of the Originating Summons, he claims to be having a proprietary interest in land parcel number Kisumu/kanyawegi/6046 as an heir/beneficiary. In paragraph 1 of the Supporting Affidavit he stated that he is one of the sons of the late Pitalis Ogong' Ayata a.k.a. Pitalis Ongong Ayata (deceased) who died intestate on 17th May, 2010 and therefore interested in the estate of the deceased as an heir. That there are other children of the deceased who are also interested in the estate of the deceased and whose names have been disclosed in the Assistant Chief's letter dated 18th June, 2024 and annexed to the application.
16. A reading of the Originating Summons shows that the Applicant is seeking relief on behalf of the estate of the deceased. Although he claims to be heir of the deceased, the ultimate relief sought is for recovery of the suit land which according to the Applicant is part of the estate of the deceased. He further seeks for restoration of the said parcel of land in the name of the deceased. This is meant to benefit of the Applicant and the estate of the deceased including the other children of the deceased whose names are listed in the Chief's letter.
17. My view is that this requires a succession cause to determine not only whether the deceased and the other children whose names are contained in the Chief's letter are heirs of the deceased but also whether the suit land formed part of the estate of the deceased before it was transferred to the respondents.
18. The applicant claims that the transfer of the suit land to the respondents was fraudulent and seeks cancellation of the title held by the Respondents and an order reverting the land to the name of the deceased. This in my view requires a full hearing in a suit in which the rights of the applicant, the estate of the deceased and the current registered owners over the suit land will be determined. In order for the Applicant to file suit, he requires to be clothed with capacity/locus standi by obtaining Letters of Administration in respect of the estate of the deceased. It is not denied that the Applicant has not taken out Letters of Administration in respect of the estate of the deceased.
19. It was submitted on behalf of the applicant that the court has powers to convert an Originating Summons into a plaint and allow the matter to proceed to hearing as a suit. However, although under Order 37 Rule 19 the court is empowered to proceed to hear an Originating Summons as a suit commenced by plaint, the applicant will still be required to have capacity to sue.
20. I find that the preliminary objection has merit and hereby uphold it.
21. The Originating Summons dated 26th July 2024 is hereby struck out. As the dispute is yet to be resolved, each party to bear own costs of the Originating Summons.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Maureen- Court Assistant.

Orengo for the Applicant.

No appearance for the Respondents.

