

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELC CASE NO: E003 OF 2024(OS)

MIRIAM ENYANGU CHUNGULI.....1ST PLAINTIFF

DINAH VUGUSTA.....2ND PLAINTIFF

VERSUS

FRED AZENGA ISANDULI.....DEFENDANT/APPLICANT

RULING

The Notice of Motion dated 5th May 2025 brought on behalf of the Defendants pursuant to the provisions of orders 37 Rule 7 (2) of the Civil Procedure Rules seeks for orders that; -

- A) The Originating Summons be struck out for want of certified copy of register.
- B) The Originating Summons be struck out for lack of locus by the applicant to transfer the suit portion.
- C) The costs of the suit and of the application be awarded to the defendant/applicant.

The grounds upon which the application was brought were that the plaintiff seeks title and/or ownership title by way of adverse possession. That the plaintiff failed to attach a certified copy of the register to the Supporting Affidavit. That the defendant /applicant is not the registered owner of the suit portion. That the plaintiff's suit is totally without merit and the same amounts to an abuse of the process of the honourable court.

That it is in the interest of justice that the plaintiffs' suit be struck out for want of a certified copy of the register and lack of locus by the applicant herein to transfer good title. The application was supported by the contents of the Supporting Affidavit sworn by Fred Azenga Isandula and the annexures thereto.

The application was opposed vide the Grounds of Opposition filed on behalf of the plaintiffs dated 6th June 2025. It is the plaintiffs' case that the application is misconceived. That since pleadings are yet to close, the plaintiff can still seek leave of the court to file documents. That the applicant's list of documents dated 8th November 2024 contains certificate of official search in respect of the suit parcel. The Replying Affidavit dated 8th May 2025 together with the application admit that the applicant is the registered owner of the suit land parcel. That in the circumstances the application is a waste of court's time and an abuse of the process of the court and that the same should be struck out.

The application was heard by way of written submissions. On behalf of the Defendant/applicant, written submissions dated 4th July 2025 were filed. Relying on the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules, Counsel submitted that an extract of title should be annexed to the Affidavit in support of the Originating Summons and that in the present case the same was not annexed. Counsel urged the court to allow the application dated 5th May 2025 as the requirement of Order 37 Rule 7 had not been complied with.

On behalf of the plaintiff written submissions dated 7th July 2025 were filed. Counsel submitted that no provisions in case law or in any statute had been cited for the requirement that the Originating summons for adverse possession be accompanied with a certified copy of the register. Counsel relied on the provisions of article 159(2) (d) of the Constitution and submitted that justice should be

administered without undue regard to technicalities. That the omission, if any, is capable of being cured by amendment.

I have considered the application, the grounds of position and the submission made. The law requires in O. 37 Rule 7(2) that originating Summons claiming for adverse possession be accompanied with a Supporting Affidavit and that to the Supporting Affidavit be annexed an extract of the title the subject matter of the suit.

The purpose of this requirement is to enable the court from the onset of the suit to ascertain existence of the suit property and proprietorship thereof. There is no dispute that the suit land is registered in the name of the Defendant/Applicant.

Documents filed in the list of documents contain certificate of official search that shows that the land is registered in the name of the Defendant.

The court finds that the omission to annex the extract of title to the Affidavit in support of the Originating Summons is not fatal. In Nairobi Civil Appeal No. 241 Of 2013, the Court of Appeal observed that

“as regards the contention that the OS was incompetent due to failure to annex a certified copy of the title and that the respondents had divested themselves of title to the suit property in favour of the 4th respondent when the appellant filed the OS, we do not think there is any merit in the assertions. The purpose of the requirement to annex an extract of the title is to satisfy the court on the existence and proprietorship of the suit property. (See Symon Gatutu Kimamo & 587 Others v. East African Portland Cement Co Ltd [2011] eKLR). In this case there is no dispute that the suit property was at the material time registered in the names of the respondents and

subsequently in the name of the 4th respondent. The extract would be critical if there was a dispute as to the registered owner, which is not the case in this appeal.”

The application is therefore hereby dismissed. Each party to bear own costs of the application. The plaintiff is hereby directed to file and serve extract of the title (Copy of register or green card) in respect of the suit land within 14 days hereof by way of Supplementary Affidavit.

Orders accordingly.

Ruling, dated and signed at Vihiga and read virtually this 16th day of October, 2025 through Microsoft Teams online application.

E. ASATI,

JUDGE.

In the presence of:

James - Court Assistant.

Willie for the Plaintiffs.

Rabote h/b for Malanda for the Defendant/applicant.