



Chepkwony & another v Chepkwony & another & 8 others (Environmental and Land Originating Summons E014 of 2024) [2025] KEELC 7001 (KLR) (9 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E014 OF 2024
LA OMOLLO, J
OCTOBER 9, 2025**

BETWEEN

JOEL KIPYEGON CHEPKWONY 1ST APPLICANT

DAVID KIPNGENO BETT 2ND APPLICANT

AND

**SAMWEL CHESULO CHEPKWONY & JOSEPH KIPKEMOI
CHEPKWONY 1ST RESPONDENT**

ANNAH CHEPKURUI KITUR 2ND RESPONDENT

ELIZABETH CHEPKOECH MOKUMO 3RD RESPONDENT

RICHARD KIPLANGAT KORIR 4TH RESPONDENT

SAMWEL KIPRONO NGETICH 5TH RESPONDENT

MUSA KIPROTICH RUGUT 6TH RESPONDENT

FRANCIS KIMUTAI BETT 7TH RESPONDENT

THE LAND REGISTRAR, BOMET LAND REGISTRY 8TH RESPONDENT

THE ATTORNEY GENERAL 9TH RESPONDENT

RULING

Introduction

1. This ruling is in respect of the 1st, 3rd, 4th, 5th and 6th Respondents Preliminary Objection dated 9th December, 2024. It is on the following grounds;



- a. That the Originating Summons was an abuse of the Honourable Court Process. (sic) For starters, the Estate of the Chepkwony Arap Tole (Deceased), has already been lawfully administered in the Kericho High Court Succession Cause No.33 of 1993 in the matter of the Estate of Chepkwony Arap Tole in accordance with the Law of Succession Act (Cap. 160 Laws of Kenya). The Applicants claims (sic) that the estate was not administered or otherwise that titles were procured on un-administered estate were baseless, misleading, and constitutes an abuse of the Court process. It follows that the Applicants' filings herein were therefore for striking out in Limine. (sic)
- b. That the Honourable Court lacks jurisdiction to entertain the Originating Summons as the same was commenced outside the Limitation period and without leave. In law jurisdiction is everything.
- c. That the Originating Summons dated the 5th August,2024, was frivolous, vexatious and an abuse of the Court process as it raises matters that have already been conclusively determined in the succession proceedings of the deceased's estate in Kericho High Court Succession Cause No. 33 of 1993 and is thus res judicata and cannot be reopened. (sic)
- d. That Section 82 of the Law of Succession Act Cap.160 Laws of Kenya outlines the powers of personal representatives (executors or administrators) in managing the deceased's estate. Once the estate has been fully administered and the final accounts submitted, the role of the personal representatives comes to an end. In the circumstances the estate of Chepkwony Arap Tole(Deceased) has been administered under the above Succession Cause No.33 of 1993 and any party aggrieved ought to be filing an Appeal or doing other filings and not reopening a concluded succession/family matter before another Court and in the instant case before the Environment and Land Court and in a sense the application herein was to invite one Court of equal and/or coordinate (sic) jurisdiction to sit on appeal over the orders made in Kericho High Court Succession Cause No. 33 of 1993. (sic)
- e. That Section 94 of Law of Succession Act (Cap. 160 Laws of Kenya) on finality of administration of the estate states that once an estate has been administered and the final accounts settled and approved by the Court, the administration is deemed to be final such that the basis of another administration as sought in the instant Originating Summons is clearly without any legal basis and is for dismissal in Limine. (Sic)
- f. That the Originating Summons before Court has been caught up by the doctrine of laches and Limitation of Actions Act having been brought to this Court after almost and over 3 decades since the Respondents took possession of the land. The application runs afoul of Section (sic) 7, 13, 16, 17, 18, 20 and 37 of the Limitation of Actions Act Cap.22 Laws of Kenya.
- g. That the application is misconceived, misplaced and incompetent. The Originating Summons procedure is inappropriate for determining the issues herein. Put differently that the Litigation ought to have been commenced by way of a substantive suit by way of plaint as provided under the Civil Procedure Act and Rules thereunder.
- h. That it is trite law that the Originating Summons procedure is intended for matters that are straightforward and do not require extensive fact-finding or trial and the application before this Court raises issues of fraud which ought to be resolved by filing of a substantive suit before the Court. The application before Court raises substantive issues that require full trial of the case and therefore the Originating Summons before Court ought to be dismissed for being misplaced and misconceived and in total it was meritless. (sic)



Factual Background.

2. The Applicants commenced the present proceedings vide the Originating Summons dated 5th August, 2024.
3. There is a Copy of an Amended Originating Summons in the Court record. It is filed on 11th March, 2025. It does not show the date on which it was amended. I have also noted that it was amended without leave of the court.
4. for purposes of determining this Preliminary Objection, I shall make reference to the Originating Summons dated 5th August, 2024 and filed on 12th August, 2024.
5. The originating summons seek the determination of the following questions;
 - a. Whether the Respondents fraudulently subdivided the land parcel LR No. Kericho/Kimulot/18 registered in the name of Chepkwony Tole (Deceased) and transferred the resultant parcels to themselves without undertaking succession proceedings as by law required. (sic)
 - b. Whether the titles subsequent to the subdivision; to wit, title numbers LR No. Kericho/Kimulot/1183, LR No. Kericho/Kimulot/1184, LR No. Kericho/Kimulot/1186, LR No. Kericho/Kimulot/1187, LR No. Kericho/Kimulot/1188, LR No. Kericho/Kimulot/1189, LR No. Kericho/Kimulot/1190, and any other resultant number, should be declared null and void being resultant from a subdivision in contravention of the law. (sic)
 - c. Whether the ownership of the property LR No. Kericho/Kimulot/15 should be restored to the name of Chepkwony Tole (Deceased) for purposes of undertaking succession of the said estate.
 - d. Whether the Respondents should bear the costs of this suit.
6. On 9th December, 2024 The 2nd to 7th Respondents filed a Replying Affidavit sworn by Musa Kiprotich Rugut in response to the Originating Summons.
7. On 12th March, 2025 the Court issued directions that the Preliminary Objection be heard by way of written submissions.
8. On 24th April, 2025, the matter was mentioned to confirm filing of submissions and on the said date Counsel for the 8th and 9th Respondents informed the Court that he would not be participating in the hearing of the Preliminary Objection. The matter was then reserved for ruling.

Issues for Determination.

9. The 3rd, 4th, 5th and 6th Respondents filed their submissions on 22nd April, 2025 while the Applicants filed their submissions on 7th July, 2025.
10. The 3rd, 4th, 5th and 6th Respondents rely on Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA pages 696 – 701 and first submit on grounds 1, 2, 3, 4, 5 and 6 of the Preliminary Objection.
11. It is their submissions that in the year 1993, the Estate of Chepkwony Arap Tole alias Chepkwony Tole filed Kericho HC Succession Cause No. 33 of 1993.
12. It is also their submissions that upon conclusion of the said succession proceedings, the beneficiaries distributed the estate of the deceased amongst themselves.



13. It is further their submissions that the estate of the deceased was distributed contrary to the contention by the Applicants.
14. The 3rd, 4th, 5th and 6th Respondents rely on Sections 82 and 83 of the *Law of Succession Act* and submit that any disputes over the distribution of the estate of the deceased ought to have been raised in the succession cause.
15. They also submit that the Applicants have raised issues in the present proceedings that have already been determined in Kericho HC Succession Cause No. 33 of 1993 which makes the present suit res judicata.
16. The 3rd, 4th, 5th and 6th Respondents further submit that the Originating Summons raises issues that do not fall within the jurisdiction of this Court.
17. The 3rd, 4th, 5th and 6th Respondents rely on the judicial decisions of *Agalo v County Government of Trans Nzoia & another* (citation not given) and *Anne Wanjiku Kibe t/a Anne Kibe & Co. Advocates & 4 Others* (citation not given) and submit that the Applicants filed the present suit twenty-seven years after the Respondents took possession of the suit parcel.
18. It is their submissions that the present suit is therefore statute barred and contravenes Section 7 of the *Limitation of Actions Act*.
19. The 3rd, 4th, 5th and 6th Respondents rely on the judicial decisions of *Mukuru Munge v Florence Shingi Mwawana & 2 Others* [2016] eKLR, *Koech (Suing as Legal Personal Representative and beneficiary of the Estate of the Late Kipkoech Arap Mutai) v Siele & 18 Others* (Environment & Land Case E003 of 2022) [2023] KEELC 861 (KLR) (16 February 2023) (Ruling), *Bosire Ogero v Royal Medial Services* [2015] eKLR, *Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 others* [2018] eKLR, *Edward Moonge Lengusuranga vs James Lanaiyara & another* [2019] eKLR, *Gathoni v Kenya Co-operative Creameries Ltd* (1982) KLR 104 and submit that the issue of limitation of time is a point of law that goes to the jurisdiction of the Court and can be raised in a preliminary objection.
20. It is their submissions that David Kipngeno Bett the 2nd Applicant in his affidavit in support of the application states at paragraph 5 that they are challenging the actions (sic) that took place on 22nd October, 1998.
21. On grounds 7 and 8 of the Preliminary Objection, the 3rd, 4th, 5th and 6th Respondents submit that Originating Summons are designed for matters that raise uncontested issues of law and fact.
22. It is also their submissions that issues of fraud and ownership of land should not be raised in an Originating Summons as have been raised in the present matter.
23. The 3rd, 4th, 5th and 6th Respondents rely on the judicial decisions of *Kibutiri v Kibutiri* [1983] KECA 74 (KLR), *Mramba v Mugambi* [2024] KECA 442 (KLR), *Rimpanson & another* (Suing as Legal Representative of the Late Rimpason ole Santamu alias Impasol ole Kuraru Santamu) v *Njenga & another* [2024] KEELC 13631 (KLR), *Speaker of National Assembly v Karume* [1992] KLR 21 and submit that issues of fraud and ownership of land should be raised in a Plaintiff and a Defence filed so that parties can present evidence and be cross examined.
24. It is also their submissions that the Originating Summons filed herein is defective and irregular as it raises issues of fraud and it should therefore be struck out.
25. The 3rd, 4th, 5th and 6th Respondents submit the Applicants have sued deceased persons.



26. They also submit that upon this issue being brought to their attention, they (Applicants) amended the Originating Summons by erasing the names of the deceased persons and filing an Amended Originating Summons without leave of Court.
27. They further submit that the suit against the deceased persons was not withdrawn and they therefore urge the Court to find that the said amendments are a nullity and the Amended Originating Summons be struck out in Lemine.
28. The 3rd, 4th, 5th and 6th Respondents rely on the judicial decisions of *Limuru Hills Limited (In Receivership) v Muriithi* [2024] KEELC 1154 (KLR) and *Benjamin Leonard Macfoy -vs- United Africa Co. LTD* (1961)2 ALL ER 1169 in support of their submissions.
29. It is their submissions that the present suit is a nullity and they rely on the judicial decisions of *Francis Mogaka Maranya v. National Bank of Kenya Limited and Another*, Civil Appeal No. 60 of 1997 and *Official Receiver and Provisional Liquidator, Nyayo Bus Service Corporation v. Firestone E.A. (1969) Limited*, Civil Appeal No. 172 of 1998 as was cited in *Kenya Transport Association V Municipal Council of Mombasa & another* [2011] KEHC 4279 (KLR) in support of their submissions.
30. The Applicants submit that grounds 1 to 8 of the 3rd, 4th, 5th and 6th Respondents Preliminary Objection are premised on issues of fact which require evidential proof.
31. It is also their submissions that the said issues cannot be dealt with at this preliminary stage.
32. The Applicants rely on Article 48 of *the Constitution* of Kenya and submit that Courts in exercising their judicial authority should administer justice without undue regard to technicalities.
33. The Applicants submit that no certificate of confirmation of Grant has been filed by the 3rd, 4th, 5th and 6th Respondents to demonstrate that indeed Kericho HC Succession Cause No. 33 of 1993 was concluded.
34. The Applicants also submit that the Respondents have availed forms filed in Kericho HC Succession Cause No. 33 of 1993 which are not sufficient evidence to demonstrate that the said succession cause was pursued to its logical conclusion.
35. The Applicants further submit that the Court cannot rely on the said forms until other material facts are adduced in Court.
36. It is the Applicants submissions that a grant was issued to them (Applicants) with respect to the estate of the Chepkwony Arap Tole (deceased) in Sotik CM Succession Cause No. 47 of 2022.
37. It is also the Applicants submissions that the issue of fraud is an exception to the *Limitation of Actions Act*. (sic)
38. It is further the Applicants submissions that the present matter cannot be said to be res judicata because no proof has been availed to show that Kericho HC Succession Cause No. 33 of 1993 was pursued to its logical conclusion.
39. The Applicants rely on Order 37 of the Civil Procedure Rules and urge the Court to dismiss the 3rd, 4th, 5th and 6th Respondents Preliminary Objection dated 9th December, 2024.

Analysis and Determination.

40. I have considered the 3rd, 4th, 5th and 6th Respondents Preliminary Objection dated 9th December, 2024 and the rival submissions filed.



41. It is my view that the issue that arises for determination is whether the said preliminary objection has merit.
42. The judicial decision of *Ushago Diani Investment Limited v Abdulwahab* (Environment & Land Case 12 of 2023) [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling) cited with approval *Oraro v Mbaja* [2005] eKLR 141 where the Court held as follows on the nature of preliminary objections;

“A preliminary objection is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary objection 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.”
43. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
44. The 3rd, 4th, 5th and 6th Respondents preliminary objection is on the following grounds;
 - a. That succession proceedings with regard to the estate of Chepkwony Arap Tole (deceased) were commenced in Kericho HC Succession Cause No. 33 of 1993.
 - b. That the Applicants suit is statute barred.
 - c. That the Applicants suit is Res judicata.
 - d. That issues of fraud cannot be raised in an Originating Summons.
45. I will now address each of the grounds.

A. Whether succession proceedings with regard to the estate of Chepkwony Arap Tole (deceased) were commenced in Kericho HC Succession Cause No. 33 of 1993.

46. Under grounds 1 and 5 of the Preliminary Objection under consideration, the 3rd, 4th, 5th and 6th Respondents contend that the estate of Chepkwony Arap Tole (deceased) filed Kericho HC Succession Cause No. 33 of 1993.
47. The 3rd, 4th, 5th and 6th Respondents also contend that upon conclusion of the said succession proceedings, the estate of Chepkwony Arap Tole (deceased) was distributed amongst the beneficiaries of his estate.
48. The 3rd, 4th, 5th and 6th Respondents further contend that the Applicants allegations that the estate of Chepkwony Arap Tole (deceased) was not administered is therefore not true.
49. The Applicants in response submit that the issues raised in grounds 1 and 5 of the 3rd, 4th, 5th and 6th Respondents Preliminary Objection are factual issues which issues cannot be determined in a preliminary objection.
50. The Applicants also submit that the 3rd, 4th, 5th and 6th



Respondents did not avail the Certificate of Confirmation of Grant that would have been issued in Kericho HC Succession Cause No. 33 of 1993 to demonstrate that the said succession proceedings were filed and concluded.

51. In the Originating Summons, the Applicants contend that land parcel No. Kericho/Kimulot/18 initially registered in the name of Chepkwony Tole (deceased) was subdivided without the filing succession proceedings.
52. In the judicial decision of Mukisa Biscuits Manufacturing Co. Ltd .v. West End Distributors Ltd [1969] EA 696 the Court held as follows;

“ 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.”
53. In the above cited judicial decision, the Court held that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other party are correct.
54. As afore stated, the Applicants in the Originating Summons contend that land parcel No. Kericho/Kimulot/18 that was registered in the name of Chepkwony Arap Tole (deceased) was subdivided before succession proceedings were commenced.
55. Under grounds 1 and 5 of the preliminary objection, the 3rd, 4th, 5th and 6th Respondents contend that succession proceedings with respect to the estate of Chepkwony Arap Tole (deceased) were commenced in Kericho HC Succession Cause No. 33 of 1993.
56. Put simply, the Applicants deny any such proceedings were filed while the 3rd, 4th, 5th and 6th Respondents contend that succession proceedings were filed.
57. Essentially the 3rd, 4th, 5th and 6th Respondents are disputing the facts as pleaded by the Applicants.
58. Given the said circumstances, it is this Court’s view that the issue of whether or not succession proceedings with respect to the estate of Chepkwony Arap Tole (deceased) were commenced is a question of fact and not of law.

B. Whether the Applicants suit is statute barred.

59. The 3rd, 4th, 5th and 6th Respondents under grounds 2 and 6 of their Preliminary Objection contend that the present proceedings are statute barred as they have been commenced three decades after they (Respondents) took possession of the suit parcels.
60. They contend that the present proceedings contravene Sections 7, 13, 16, 17, 18, 20 and 37 of the *Limitation of Actions Act*.
61. It is their submissions that the 2nd Applicant states at paragraph 5 of the affidavit in support of the Originating Summons that land parcel No. Kericho/Kimulot/18 was subdivided on 22nd October, 1998.
62. They submit that the present proceedings have been filed twenty-seven years after the alleged subdivision.
63. It is the 3rd, 4th, 5th and 6th Respondents submissions that the present suit is therefore statute barred as it contravenes Section 7 of the *Limitation of Actions Act*.



64. The Applicants submit that they have raised issues of fraud which they contend is an exception to the *Limitation of Actions Act*.
65. The 3rd, 4th, 5th and 6th Respondents in ground 6 of the Preliminary objection contend that the Applicants suit contravenes Sections 7, 13, 16, 17, 18, 20 and 27 of the *Limitation of Actions Act*.
66. The 3rd, 4th, 5th and 6th Respondents contend that the Applicants filed the present suit twenty-seven years after the cause of action arose.
67. Upon perusal of the affidavit in support of the Originating Summons, it is evident that at paragraph 5, the 2nd Applicant contends that land parcel No. Kericho/Kimulot/18 was subdivided on 22nd October, 1998.
68. He also contends that land parcel No. Kericho/Kimulot/18 was initially registered in the name of Chepkwony Tole who died on 5th June, 1974.
69. He further contends that he and the 1st Applicant were issued with a Grant of Letters of Administration Intestate of the estate of Chepkwony Tole on 15th August, 2023.
70. The 2nd Applicant alleges fraud under paragraphs 8 and 12 of the affidavit in support of the Originating Summons.
71. In the judicial decision of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] KEHC 2521 (KLR) the Court held as follows;

“ 13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The Court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of *Oruta & Another vs. Nyamato* [1998] KLR 590, where the Court held that limitation of action:-

”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial Judge would have to deal with the matter on the evidence to be adduced at the trial” (Emphasis mine)

72. As was held in the above cited judicial decision, the defence of limitation of time can only be determined at the trial and cannot be dealt with as a preliminary objection. This is because a determination of the question of limitation of time requires the Court to ascertain facts and this can only be done by interrogating evidence.
73. The decision in *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* (Supra) is sound and I have relied on and applied it on numerous occasions and especially in instances where the question as to when the cause of action arose cannot be determined from the pleadings. The other instance when this decision offers guidance is when there is a dispute as to when the cause of action arose.
74. In *Gichari & another v Muchiri* (Environment & Land Case E010 of 2023) [2024] KEELC 1519 (KLR) (20 March 2024) (Ruling) the Learned Judge observed as follows;

“The Court earlier had stated that for determination on whether the suit is caught by limitation of action, (sic) the Court has to determine the cause of action herein. The case of



Edward Moonge Lenguuranga vs James Lanaiyara & Another (2019) eKLR, defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. For a cause of action herein to be determined, it is important to look at the averments and the prayers sought in the Plaint.” (Emphasis mine)

75. In the present matter, it is evident that the cause of action arose on 22nd October, 1998 when land parcel No. Kericho/Kimulot/18 was subdivided. The prayers sought in the Originating Summons have been set out in the preceding paragraphs but I will nonetheless replicate them as hereunder;
- a. Whether the Respondents fraudulently subdivided the land parcel LR No. Kericho/Kimulot/18 registered in the name of Chepkwony Tole (Deceased) and transferred the resultant parcels to themselves without undertaking succession proceedings as by law required. (sic)
 - b. Whether the titles subsequent to the subdivision; to wit, title numbers LR No. Kericho/Kimulot/1183, LR No. Kericho/Kimulot/1184, LR No. Kericho/Kimulot/1186, LR No. Kericho/Kimulot/1187, LR No. Kericho/Kimulot/1188, LR No. Kericho/Kimulot/1189, LR No. Kericho/Kimulot/1190, and any other resultant number, should be declared null and void being resultant from a subdivision in contravention of the law. (sic)
 - c. Whether the ownership of the property LR No. Kericho/Kimulot/15 should be restored to the name of Chepkwony Tole (Deceased) for purposes of undertaking succession of the said estate.
 - d. Whether the Respondents should bear the costs of this suit.
76. From the prayers sought in the Amended Originating Summons, it is evident that the Applicants are seeking that the Court makes a finding that the subdivision of land parcel No. Kericho/Kimulot/18 was fraudulent.
77. The 2nd Applicant has at paragraph 5 of the affidavit in support of the application expressly stated that the said parcel of land was subdivided on 22nd October, 1998. This is when the cause of action arose.
78. Under Section 7 of the Limitation of Actions Act, a suit for recovery of land cannot be brought twelve years after the cause of action arose.
79. The present suit was filed in 2024 which was twenty-six years after the cause of action arose. It is therefore evident that the present suit is statute barred.
80. I further note that the Applicants submit that fraud is an exception to the provisions of the Limitation of Actions Act but have failed to demonstrate how.

C. Whether the Applicants suit is Res judicata.

81. Under grounds 3 and 4 of the Preliminary Objection, the 3rd, 4th, 5th and 6th Respondents contend that the present suit is res judicata.
82. The 3rd, 4th, 5th and 6th Respondents contend that the issues raised in the present proceedings were determined in Kericho High Court Succession Cause No. 33 of 1993.
83. In response, the Applicants submit that the 3rd, 4th, 5th and 6th Respondents have not produced the Certificate of Confirmation of Grant that would have been issued in Kericho HC Succession Cause No. 33 of 1993 in support of their contention that the said suit was concluded.



84. In the judicial decision of Henry Wanyama Khaemba Vs Standard Chartered Bank Ltd & Another [2014] eKLR the Court held as follows;

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”. (Emphasis mine)

85. The Court in George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] eKLR also held as follows;

“I have considered the points raised by the first Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of preliminary objection. The best way to raise a ground of res judicata is by way of notice of motion where pleadings are annexed to enable the Court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of notice of motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of raising the issue of res judicata. The other points raised in the preliminary objection are issues which require ascertainment of facts by way of evidence. They cannot be brought by way of preliminary objection.” (Emphasis mine)

86. It is now clear that the question of res judicata cannot be raised by way of a preliminary objection as it requires interrogation of pleadings filed in the former suit.

D. Whether the question of fraud can be determined by way of Originating Summons.

87. The 3rd, 4th, 5th and 6th Respondents contend under grounds 7 and 8 of the Preliminary Objection, that the question of fraud cannot be determined by way of Originating Summons. They go on to submit that issues that can be raised by way of Originating Summons are those that are uncontested questions of fact and law and that fraud is not in realm of uncontested questions.

88. In response, the Applicants submit that they are the administrators of the estate of the late Chepkwony Arap Tole and they can therefore file Originating Summons under Order 37 of the Civil Procedure Rules.

89. Order 37 Rule 1 of the Civil Procedure Rules provides as follows;

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, 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 person, 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 course, an originating summons, returnable before a Judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the



case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

- (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, 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 executors, administrators or trustees, and the vouching, when necessary, of such accounts;
- (d) the payment 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 a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

90. In the present matter, the 3rd, 4th, 5th and 6th Respondents contend that issues of fraud cannot be raised by way of Originating Summons. The Applicants, on the other hand, hand contend that they can file Originating Summons under Order 37 of the Civil Procedure Rules as they are administrators of the estate of a deceased person.
91. The Provisions of Order 37 state in no uncertain terms that the executors or administrators of a deceased person may approach the Court by way of originating summons for determination of the question set out thereunder. Fraudulent transfer of land belonging to a deceased person is certainly not one of them.
92. It is trite law that allegations of fraud must be specifically pleaded and proved. This, simply stated, is that a person alleging fraud must not only submit evidence of fraud but must state with certainty who committed and/or perpetrated fraud and in what way the alleged acts of fraud were committed and/or perpetrated. In *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR it was held as follows;

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”
93. Consequently, I uphold the preliminary objection on this ground. The originating summons fail to meet this simple test and are therefore not the proper way to move the Court in an intended determination of the question of fraud.
94. Before penning off, this Court notes that the 3rd, 4th, 5th and 6th Respondents submit that the Applicants sued deceased persons.
95. They also submit that when the said issue was raised, the Applicants filed an Amended Originating Summons without leave of Court and left out the names of the deceased persons. The 3rd, 4th, 5th and 6th Respondents therefore seek that the Amended Originating Summons be struck out.



96. It is important to note that this issue was not raised in the Preliminary Objection dated 9th December, 2024.
97. In the judicial decision of Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR the Court held as follows;
- “The Applicant, the Respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”
98. Submissions are not pleadings and new issues raised by way of submissions are best ignored. I decline to make a finding on this question.

Disposition.

99. Taking the foregoing into consideration, the 3rd, 4th, 5th and 6th Respondents Preliminary Objection dated 9th December, 2024 succeeds on grounds that have been enumerated in the foregoing paragraphs. Consequently, the Applicants suit is hereby struck out with costs.
100. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 9TH DAY OF OCTOBER, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

No appearance for the Applicants.

Miss Kiget for the 3rd, 4th, 5th and 6th Respondents.

Court Assistant; Mr. Joseph Makori

