

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. E006 OF 2024 (OS)

JAPHET KIBET MUTAI

(Suing as the personal representative of the estate of JOEL KIMUTAI ARAP LANGAT).....

.....APPLICANT

VERSUS

DAVID KIPKEMOI KEMEI

JOSEPH CHERUIYOT KEMEI (Sued as personal representatives of the estate of KIPKEMEI ARAP LANGAT)

.....RESPONDENTS

RULING.

Introduction.

1. This ruling is in respect of the Respondents preliminary objection dated 5th December, 2024. It is on the following grounds;

a. That the Originating Summons and the sworn affidavit in support thereto offend the provisions of Order 37 Rule 7 (2) of the Civil Procedure Rules, as the Applicant invokes adverse possession and

has not attached a certified extract of the title deed to the land in question as required by the statute.

- b. That the Originating Summons offends Section 7 and related provisions of the Limitations of Actions Act as it is not yet twelve years since the land was discharged by the lands settlement scheme trustees to the estate of Kipkemei Arap Langat in March 2022.***
- c. That the suit herein offends Section 41 of the Limitation of Actions Act as read together with Article 62 (1) (b) of the Constitution of Kenya 2010.***
- d. That the suit ELC (OS) No. E006 of 2024 is incurably defective, incompetent, bad in law and should be struck out as it is in contravention with the Limitation of Actions Act and Civil Procedure Rules.***
- e. That the prayers for injunction in the application dated 20th May, 2024 and the Originating Summons dated 8th April, 2024 should be dismissed with costs to the Respondents for failure to disclose a concise cause of action against the Respondent and for offending the***

Limitation of Actions Act and the Civil Procedure Rules.

Factual Background.

2. The Applicant commenced the present proceedings vide the Originating Summons dated 8th April, 2024 where he seeks the determination of the following questions;
- a. ***Whether the Plaintiff bought the suit land Kericho/North Sotik/30 in 1967 using his own money and registered it in the name of the Defendant his brother to be held in trust for the Plaintiff.***
 - b. ***Whether in the circumstances the Court should declare the Plaintiff the beneficial owner of the suit land.***
 - c. ***Whether the Plaintiff herein and his children have been in peaceful, quiet and uninterrupted possession of the whole of Kericho/North Sotik/30 from 1967 to date.***
 - d. ***Whether in addition to the aforesaid trust, the suit land has now devolved to the Plaintiff herein by virtue of the doctrine of adverse possession.***

e. Whether the Plaintiff is entitled to declaration of ownership of land parcel Kericho/North Sotik/30 by adverse possession.

f. Whether the title deed in respect of Kericho/North Sotik/30 issued in the name of the Defendant should be cancelled and the name of the Plaintiff be entered in the register of lands as proprietor of Kericho/North Sotik/30.

g. Whether costs of this suit should be provided for.

- 3.** As at the time of writing of this ruling, the Respondents have not filed a response to the Originating Summons.

Issues for Determination.

- 4.** The Respondents filed their submissions on 23rd April, 2025 while the Applicant filed his submissions on 29th April, 2025.
- 5.** The Respondents submit on the issue of whether their preliminary objection dated 5th December, 2024 has merit.

6. It is the Respondents submissions that a claim of adverse possession cannot be sought over government land.
7. It is also the Respondents submissions that the suit parcel of land was purchased in the year 1969 but the title deed was issued on 31st March, 2022.
8. It is further the Respondents submissions that between the year 1969 and the year 2022, the suit parcel of land was government land and therefore the said period cannot be included in computing time in a claim for adverse possession.
9. The Respondents rely on **Section 41** of the Limitation of Actions Act, **Article 62(1)(b)** of the Constitution of Kenya, the judicial decisions of **Kennedy Nyamumbo Sese vs Settlement Fund Trustees & 2 Others [2017] eKLR, Kuria Kiarie & 2 Others vs Sammy Magera [2018] KECA (KLR)** and submit that land parcel No. Kericho/North

Sotik/30 was charged to the Settlement Fund Trust and it therefore falls under the definition of government land.

- 10.** The Respondents rely on **Section 37** of the Limitation of Actions Act and **Section 175** of the Agriculture Act in support of their submissions.
- 11.** The Respondents submit that the Applicant's claim of adverse possession can only run from 31st March, 2022 when the title deed was issued for the first time in the name of their deceased father **Kipkemei A. Lang'at**.
- 12.** The Respondents rely on the judicial decisions of **Ann Itumbi Kiseli vs James Muriuki Muriithi [2013]eKLR, Francis Gitonga Macharia vs Muiruri Waithaka Civil Appeal No. 110 of 1997** as was cited in **Karuntimi Raiji vs M'makinya M'itunga [2013] eKLR** and **Wambugu v Njuguna (1983) KLR 173** in support of their submissions.

- 13.** The Respondents submit that the Applicant has failed to comply with **Order 37 Rule 7** of the Civil Procedure Rules as he has not attached an extract of the title of the suit parcel to his affidavit in support of the Originating Summons. The Respondent relies on the judicial decisions of **John Wambura & another v Anakletus Wambura [2017] eKLR** and **Susan Wanchara Acher versus Maurice Adek Oduogi [2017] eKLR** in support of their submissions.
- 14.** The Respondents also rely on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** and submit that their preliminary objection raises pure points of law.
- 15.** The Respondents also submit that the Originating Summons is incurably defective, incompetent, bad in law and should therefore be struck out.

- 16.** The Respondents rely on **Section 27** of the **Civil Procedure Act** and urge the Court to allow their preliminary objection with costs.
- 17.** The Applicant submits on the following issues;
- a. *Whether the preliminary objection raises pure points of law.***
 - b. *Whether the preliminary objection is merited.***
- 18.** On the first issue, the Applicant relies on the judicial decisions of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR** and submits that the Respondents preliminary objection does not raise a pure point of law and neither does it arise by clear implication of the pleadings.

- 19.** The Applicant also submits that for the Court to determine the Respondents preliminary objection, it will have to call for evidence.
- 20.** The Applicant further submits that the Court will have to examine documents such as the discharge by the Settlement Scheme Trustees in order for it to determine the issues raised in the preliminary objection.
- 21.** On the second issue, the Applicant submits that issues on ownership of land cannot be determined by way of a preliminary objection.
- 22.** The Applicant relies on the judicial decision of **Dickson Karaba versus John Ngata Kariuki & another [2010]eKLR** and submits that dismissal of a suit is draconian and cannot solve the issues in dispute.

- 23.** It is the Applicant's submissions that the Respondents contend that the suit should be dismissed for failure to disclose a concise cause of action.
- 24.** It is also the Applicant's submissions that the issue of whether or not there is a cause of action against the Respondents should be raised during the hearing and determination of the Originating Summons as it cannot be ventilated in a preliminary objection.
- 25.** It is further the Applicant's submissions that it has attached an extract of the title deed as required under **Order 37 Rule 7(2)** of the **Civil Procedure Rules** and this cannot therefore be a ground for dismissing the suit.
- 26.** The Applicant relies on the judicial decision of **Daykio Plantations Limited vs National Bank of Kenya Limited & 2 Others [2019] eKLR** and urges the Court to dismiss the Respondents preliminary objection.

Analysis and Determination.

27. I have considered the Respondents preliminary objection dated 5th December, 2024 and the rival submissions. The Preliminary Objection is on five grounds and I have condensed them into the following issues;

a. *Whether the Originating Summons contravenes Order 37 Rule 7(2) of the Civil Procedure Rules.*

b. *Whether the Originating Summons contravenes Section 7 of the Limitation of Actions Act.*

c. *Whether the Applicant's suit contravenes Section 41 of the Limitation of Actions Act as read together with Article 62(1) (b) of the Constitution of Kenya.*

d. *Who should bear costs of the preliminary objection.*

A. Whether the Originating Summons contravenes Order 37 Rule 7(2) of the Civil Procedure Rules.

28. 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.”

(Emphasis mine)

- 29.** In summary, 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.
- 30.** The Respondents under ground **(1)** of their preliminary objection contend that the Applicant’s Originating Summons contravenes **Order 37 Rule 7(2)** of the **Civil Procedure Rules** as the Applicant has failed to attach a certified extract of the title deed of the suit parcel.
- 31.** The Applicant submits that he has filed a copy of the extract of title and has therefore complied with **Order 37 Rule 7(2)** of the **Civil Procedure Rules**.

32. Order 37 Rule 7 of the Civil Procedure Rules provides as follows;

“7. (1) An application under section 38 of the Limitation of Actions Act 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.

(3) The Court shall direct on whom and in what manner the summons shall be served.”

33. In the judicial decision of Oyugi & 2 others v Mbom (Sued as the administrator of the estate of Lawrence Ongadi - Deceased) & another (Environmental and Land Originating Summons E014, E016, E024, E025, E026 & E027 of 2023 (Consolidated)) [2024] KEELC 5691 (KLR) (24 July 2024) (Ruling) the Court held as follows;

“The Respondents’ objection to the Applicants’ applications is that the Applicants have not complied with the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules. It is common ground that the Applicants have not complied with the requirements of Order 37 Rule 7(2) of the Civil Procedure Rules in that they have not annexed to their affidavits in support of their applications, extracts of the titles for the suit properties which they are claiming by adverse possession. I agree with the Applicants that this is a procedural infraction rather than a jurisdictional issue. As a procedural violation, the same can be overlooked by the Court for the sake of substantive justice under Article 159 (2) (d) of the Constitution.

I do not think that it would serve the interest of justice if I were to strike out the six (6) suits before me so that the Applicants can file an Order 37

Rule 7(2) of the Civil Procedure Rules' compliant applications.

I agree with the Applicants that the most equitable approach should be to allow the Applicants to correct the error rather than striking out their suits. (Emphasis mine)

- 34.** In the above cited judicial decision, the Court held that failure to attach an extract of title to an affidavit in support of an application for adverse possession is a procedural violation which can be overlooked by the Court for the sake of substantive justice under **Article 159 (2)(d)** of the Constitution of Kenya.
- 35.** In the present matter, it is not disputed that the Applicant did not attach a copy of the extract of the title of the suit parcel to his affidavit in support of the Originating Summons.
- 36.** A perusal of the Court record shows that on 21st January, 2025, the Applicant filed a further list of documents and has

attached a copy of the green card for land parcel No. North Sotik/Settlement Scheme/30.

- 37.** It is evident that the Applicant has remedied the said oversight and has therefore complied with **Order 37 Rule 7(2)** of the Civil Procedure Rules.

B. Whether the Originating Summons contravenes Section 7 of the Limitation of Actions Act.

- 38.** The Respondents contend that the Applicant's suit contravenes **Section 7** of the Limitation of Actions Act as twelve years have not lapsed since the land was discharged by the Settlement Fund Trustees.
- 39.** The Applicant submits that this limb of the Respondents preliminary objection does not raise a pure point of law as it requires examination of evidence.

- 40. Section 7** of the Limitation of Actions Act provides as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

- 41.** The Applicant contends, in the Originating Summons, that he purchased the suit parcel in the year 1967 and registered it in the name of his deceased brother one **Kipkemei Arap Lang’at**.
- 42.** The Applicant also contends that he has been in possession of the suit parcel together with his family since the year 1967 and he has therefore acquired the suit parcel by way of adverse possession.
- 43.** The Respondents on the other hand contend that their deceased father one **Kipkemei Arap Lang’at** was registered as the owner of the suit parcel in the year 2022

and therefore the Applicant cannot seek for orders of adverse possession as twelve years have not lapsed.

44. In the judicial decision of **Mary v Olegeem & 2 others (Land Case E024 of 2024) [2025] KEELC 5630 (KLR) (30 July 2025) (Ruling)** the Court held as follows;

“The plea that the suit is Statute barred by virtue of section 7 of the Limitation of Actions Act is undoubtedly a point of law which has the potential of determining a matter summarily. The Plaintiff submits that the cause of action arose in 2016 while the 1st Defendant pleads that the cause of action arose in 2000 hence rendering this suit statute barred. A resolution of the above rival positions by the parties can only be reached by ascertainment of evidence. This ground too does not meet the threshold of a Preliminary Objection.” (Emphasis mine)

- 45.** In the above cited judicial decision, the Court held that the determination of when a cause of action arose requires the examination of evidence and it therefore does not meet the threshold of a preliminary objection.
- 46.** In their preliminary objection, the Respondents essentially contend that the Applicant cannot seek for orders of adverse possession over the suit parcel as the land was only registered in their deceased father's name in the year 2022.
- 47.** They contend that the period of twelve years as provided for under **Section 7** of the **Limitation of Actions Act** has not lapsed. The Applicant on the other hand contends that the cause of action arose in the year 1967.
- 48.** It is this Court's view that this is a question of fact and requires the examination of evidence for it to be determined.

C. Whether the Applicant's suit contravenes Section 41 of the Limitation of Actions Act as read together with Article 62(1) (b) of the Constitution of Kenya.

49. The Respondents contend that the Applicant's suit offends **Section 41** of the **Limitation of Actions Act** as read together with **Article 62(1)(b)** of the Constitution of Kenya.
50. The Respondents submit that the suit parcel was registered in the name of the Settlement Fund Trustee and therefore it was government land until the year 2022 when it was registered in the name of their deceased father.
51. The Respondents also submit that the suit parcel therefore falls under the definition of government land under **Section 41** of the Limitation of Actions Act as read together with **Article 62(1)(b)** of the Constitution of Kenya and the Applicant cannot therefore claim adverse possession.

52. The Applicant did not address this issue in his submissions but he generally submits that the Respondents preliminary objection does not raise a pure point of law.

53. Article 62 (1)(b) of the Constitution of Kenya provides as follows;

***“62. (1) Public land is—
... and lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;”***

54. Section 41 of the Limitation of Actions Act provides as follows;

***“This Act does not—
(a) enable a person to acquire any title to, or any easement over—
(i) Government land or land otherwise enjoyed by the Government;***

(ii) mines or minerals as defined in the Mining Act (Cap. 306);

(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);

(iv) water vested in the Government by the Water Act (Cap. 372);

(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300);

or

(vi) land vested in the trustees of the National Parks of Kenya;

or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.”

55. In the judicial decision of **Mburu v Kwale County Government & 2 others [2025] KEELC 3295 (KLR)** the Court held as follows;

“50. Undoubtedly, all these are issues of fact and not Law to be deliberated through intense examination in chief, cross examination and re - examination as provided for in the provision of the Evidence Act, Cap. 80. During the trial, the Court will hear and make a determination whether a claim of adverse possession would suffice in respect of public land. The Plaintiff/Applicant is keen on being declared the lawful proprietor of the suit property having been in occupation and use of the same for over 30 years. Additionally, the Court will determine whether there was no rent payable and presumably the lease is public. On the other hand, the Court will consider the arguments by the 2nd and 3rd Defendants/Respondents who seek to have the suit be dismissed based on the provisions of Section 41 of the Limitation of Actions Act, Cap. 22 among other pertinent submissions hereof.

51. Therefore, I discern that the proper forum to make all these deliberations would be during a full trial. Based on the principles of natural Justice, Equity and Conscience, all the parties need to be accorded access to justice, fair hearing and an opportunity to be heard as clearly spelt out under the provisions of Articles 25 (c), 48, 50 (1) & (2) and 159 (1) & (2) of the Constitution of Kenya, 2020, I strongly hold that the issues raised from the objection are mainly matters of facts to be ably deliberated during a full trial. Hence, by and large, the objection is not sustainable.”

(Emphasis mine)

- 56.** In the above cited judicial decision, the 3rd and 4th Defendants filed a Preliminary Objection and stated among other grounds that the Court did not have jurisdiction to hear and determine the said matter because the suit parcel was public land. The 3rd and 4th Defendants also contended that

the suit therefore contravened **Article 62(1)** of the Constitution as read together with **Section 41** of the **Limitation of Actions Act**. The Court held that this was a question of fact which ought to be deliberated upon during the trial.

57. Similarly, in the present case, the Respondents contend that the Applicant's suit contravenes **Section 41** of the Limitation of Actions Act as read together with **Article 62(1)(b)** of the Constitution of Kenya because the suit parcel was allegedly public land until the year 2022.

58. It is evident that the issue of whether or not the suit parcel was public land prior to the year 2022 is a factual issue and is therefore beyond the scope of a preliminary objection.

D. Who should bear costs of the preliminary objection.

59. The general rule is that costs shall follow the event in accordance with the provisions of **Section 27** of the **Civil Procedure Act (Cap. 21)**. A successful party should

ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

60. Taking the foregoing into consideration, I find that the Respondents preliminary objection dated 5th December, 2024 lacks merit and it is hereby dismissed with costs.

61. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 20TH DAY OF NOVEMBER, 2025.**

**L. A. OMOLLO
JUDGE.**

In the presence of: -

Miss Cherono for Mr. Langat for the Applicant.

Miss Chebet for Mr. Korir for the Respondents.

Court Assistant; Mr. Joseph Makori.

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