



REPUBLIC OF KENYA



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Butu & 29 others v Delamere Estates Limited & another (Environmental and Land Originating Summons E005 of 2025) [2025] KEELC 8072 (KLR) (Environment and Land) (20 November 2025) (Ruling)

Neutral citation: [2025] KEELC 8072 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E005 OF 2025
MC OUNDO, J
NOVEMBER 20, 2025

BETWEEN

KELVIN OLE BUTU 1ST APPLICANT
JOSEPH KIPKURUI 2ND APPLICANT
JACKSON OMONDI OBWOLO 3RD APPLICANT
DAVID KINYUA KIHARA 4TH APPLICANT
PHILIP GITONGA KAMAU 5TH APPLICANT
KONENE NKURUNA 6TH APPLICANT
KERETO OLE NCHOE 7TH APPLICANT
FRANCIS NJENGA 8TH APPLICANT
ROBERT ROTIKEN 9TH APPLICANT
JOSHUA OE MEREU 10TH APPLICANT
ROBINSON TIKANI KATIOK 11TH APPLICANT
OLE WUERE KAMPALE 12TH APPLICANT
DAVID DIKIRR 13TH APPLICANT
SIMON DIKIRR 14TH APPLICANT
GEORGE OLE NAROIL 15TH APPLICANT
ROBINSON OLE OSEINA 16TH APPLICANT
ALEX MURIU GACHUNJI 17TH APPLICANT



JOSEPH NTUYOTO OLE SUYIANKA	18 TH APPLICANT
JOACHIM WANJAU NDEGWA	19 TH APPLICANT
NTETE NKOIPONI	20 TH APPLICANT
NCHIRONE OLE KUIYONI	21 ST APPLICANT
KENEDY MELITA OLE NAKUO	22 ND APPLICANT
JAMES WAINAINA NJOROGE	23 RD APPLICANT
ABIGAL NACHIAMBUKA	24 TH APPLICANT
DORCAS NJOKI KANYAGU	25 TH APPLICANT
LUCY WANGUI NJOROGE	26 TH APPLICANT
JOHN MAINA	27 TH APPLICANT
HELEN WAMBUI	28 TH APPLICANT
JOHN NJENGA	29 TH APPLICANT
MARY NJAMBI	30 TH APPLICANT

AND

DELAMERE ESTATES LIMITED	1 ST RESPONDENT
SOYSAMBU CONSERVANCY LIMITED	2 ND RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion Application dated 2nd July 2025 brought pursuant to the provisions of Order 40 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A of the *Civil Procedure Act* (Cap. 21) wherein the Applicants have sought for interim orders of injunction restraining the Respondents, by themselves, their agents, or employees, from evicting the applicants from those parcels of land known as LR. No. 32549 and LR No. 32550 and for costs of the Application.
2. The said application is supported by the grounds therein as well as the Supporting Affidavit of equal date sworn by Kelvin Ole Butu the 1st Applicant herein who deponed that the Applicants had been in possession of the parcels of land known as LR No. 32549 and LR No. 32550 (the suit land) situated in Gilgil Constituency since the year 1985 wherein they have been residing thereon, cultivating the land, planting crops, rearing animals and utilizing the land for their livelihoods without any interruption or challenge from the Respondent or any other person. That their occupation had been over 30 years and exceeded the statutory period of 12 years required for a claim of adverse possession under the *Limitation of Actions Act*.
3. That the Respondents had full knowledge of their occupation, and even acknowledged it in a meeting held on 27th February 2020, with Lord and Lady Ann Delamere and the area chief. The Respondents never attempted to assert any rights until recently on the or about the 1st July 2025, when they allegedly issued verbal threats of eviction and began surveying and marking the land for fencing, thus indicating an imminent forcible removal.



4. He deponed that the interim injunction ought to be granted because they have a strong case with a high probability of success in the main suit, given their uninterrupted possession for over 30 years. That if evicted, they stood to suffer irreparable harm because the land was their only home and source of livelihood for their families, including children and the elderly. That the continuous possession was crucial in maintaining their claim for acquisition of title by adverse possession, and an eviction would render the outcome of the main suit (seeking a declaration of adverse possession) nugatory.
5. That the balance of convenience tilted in their favour as they had been in possession of the land for decades, while the Respondents showed no active interest until now.
6. That they were willing to abide by any court terms, including refraining from further development or alteration of the suit land pending the suit's determination. That granting the injunction sought was necessary to preserve the status quo and achieve the ends of substantive justice.
7. In response and in opposition to the Applicants' Application, the Respondents filed their Notice of Preliminary Objection dated 18th August 2025 on a point of law to the effect that the Applicants' claim was a nullity and an abuse of the court process as it offended the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules.
8. In their Replying Affidavit of an equal date, sworn by the 1st Respondent's chairman, William Coulson, the 1st Respondent deponed that the instant suit was bad in law, a nullity, and an abuse of the court process due to fundamental procedural failures and factual disputes. That the suit had offended the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules which was a mandatory rule because the Applicants failed to annex or exhibit a copy of the title document to the suit property. They deponed that the title document was a fundamental element that must be proved for an adverse possession claim to lie.
9. That the Applicants had failed to conduct an official search to confirm the ownership of the suit land, resulting in the joinder of the wrong party. That they had also failed to attach a copy of the official search or a survey map indicating the specific area, boundaries, and acreage each Applicant allegedly occupies, making their claim non-verifiable. That the annexed photographs did not provide the location details.
10. On the factual dispute the Respondent's position was that it was a stranger to the parcels LR Nos. 32549 and 32550 as it was neither the registered nor a beneficial owner. It thus questioned why it was joined in the proceedings and prayed for the Originating Summons to be struck out against it.
11. That contrary to the Applicants' assertion of long-term exclusive possession, the 1st Respondent deponed that the properties in their custody have never been idle because they have been actively utilizing the land for, farming activities, multiple dwelling units and various business establishments. That a large portion was used as an animal/wildlife sanctuary by the 2nd Respondent conservancy, which the court is invited to take judicial notice under the provisions of Section 60 (o) of the [Evidence Act](#), the fact that the 2nd Respondent is a Flora and Fauna conservancy as the same was a matter of notoriety.
12. That the Applicants had failed to satisfy the triple requirements for an injunction to wit; a prima facie case with a likelihood of success, irreparable injury that cannot be compensated by way of damages and if there was any doubt then a balance of convenience must tilt in favour of the Applicants. That the Applicants' Application lacked merit and should be dismissed with costs.



13. The 2nd Respondent on the other hand vide its Replying Affidavit sworn by Robin Boyd-Moss also reiterated the averment in the 1st Respondent's Replying Affidavits verbatim to depone that there was no merit at all in the Applicants' Application hence the same should be dismissed with costs.
14. Directions were issued for the disposal of the Application by way of written submissions wherein only the Respondents complied and filed their submissions which I shall summarize as hereinunder.
15. The Respondents vide their submissions dated 26th September 2025, summarized the factual background of the matter and then framed two (2) issues for determination as follows:
 - i. Whether the claim for adverse possession can stand when a search certificate is not annexed to the affidavit contrary to the mandatory provisions of Order 37 Rule 7(2) of the Civil procedure Rules.
 - ii. Whether a claim for adverse possession can lie against a person who is not the registered owner of the subject land.
16. On the first issue for determination, the respondents submitted that a claim for adverse possession was a claim with serious consequences against a registered owner of a parcel of land therefore strict adherence to the legal principles. That the Applicants' claim for adverse possession was fatally defective and an abuse of the court process due to mandatory procedural failures and misjoinder of parties.
17. That the Applicants' failure to attach an official search certificate or a certified copy of the title document to their Supporting Affidavit, as required by law was a fatal error as provided for under Order 37 Rule 7 (2) of the Civil Procedure Rules which uses the word "shall," denoting a mandatory requirement for an adverse possession claim. That the purpose of this mandatory provision was to ensure that the claim was lodged only against the duly registered owner of the property, and not against any other party, including a beneficial owner therefore the failure to attach this critical document was not a mere procedural lapse but one that went to the jurisdiction and competence of the claim itself. Reliance was placed on the decision in the case of *Ndonye & 2 Others v Land Registrar Machakos & Another and Muthuri v Mutiga & Another* [2022] KEELC 3506 (KLR), *Githi Mwangi & 4 Others* (2005) eKLR and *Muthuri v Mutiga & Another* (Environment and Land Case E007 of 2021) [2023] KEELC 17075 (KLR) (26 April 2023) (Judgement) to support their submission that non-adherence to this procedure rendered the Originating Summons fatally defective and warranted its striking it out.
18. On the second issue for determination, the Respondents submitted that an adverse possession claim could only lie against the registered proprietor of the subject land, and not against a party who was merely in custody or use of the land. They acknowledged the philosophy behind adverse possession—that a third party's peaceful occupation for over 12 years suggests the registered owner does not need the parcel—but stressed that this claim could only be sustained against the registered owner. While relying on the case of *Simon Gatutu & 587 Others v E. A Portland Cement* [2011] eKLR they submitted that they were not the registered owners of LR Nos. 32549 and 32550. That had the Applicants complied with Order 37 Rule 7(2) of the Civil Procedure Rules and conducted an official search, they would have ascertained the true owner before filing the suit. Their failure therefore to do even basic due diligence had led to misdirected litigation, needless wastage of judicial time, and unnecessary cost to the Respondents.
19. They concluded by submitting that the Applicants' action of filing suit without ascertaining land ownership and failing to comply with clear procedural requirements were clear aggregations to the law which amounted to an abuse of the court process as it unnecessarily draged parties without interest in the suit property into litigation while simultaneously failing to meet the basic legal threshold for adverse possession proceedings.



20. They thus urged the court to dismiss the instant suit with costs to each of the Respondents.

Determination.

21. I have considered the Notice of Motion Application dated 2nd July 2025 the response thereto as well as the preliminary objection herein filed by the Respondents. I have also considered the authorities cited and the applicable law. The Plaintiffs seek interim orders of injunction to issue against the Respondents restraining them from evicting them from parcels of land known as LR. No. 32549 and LR No. 32550 for reason that they had been in uninterrupted occupation and possession of the same for over 30 years thereby making a strong case of adverse possession in the main suit.

22. The Respondent's opposition to both the Application and the main suit was that they sought for the same to be struck out as they were defective for failing to attach the title/search certificate which was mandatory under the provision of Order 37 Rule 7 (2) of the Civil Procedure Rules. That they are not the registered owners, hence this was a misdirected litigation.

23. Consequently, I find one (1) issue as standing out for my determination, to wit; whether the application has merit.

24. The Court of Appeal in its decision in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] KECA 728 (KLR) had held as follows;

“Indeed, the then Order XXXVI Rule 3D(2) specifically provided:

...summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...

That requirement no doubt was couched in mandatory terms failing which it would render the O. S. incompetent. We have perused the entire O. S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission.” (Emphasis supplied)

25. The Court of Appeal in this matter had emphasized that lack of an extract of the title to the suit property was fatal. Order 37 Rule 7(2) of the Civil Procedure Rules makes it mandatory that the extract of the register, or green card, be annexed to the Originating Summons and for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land that is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.

26. The provisions of Order 37 Rule 18 of the Civil Procedure Rules also provide as follows:

‘At the time of directions, if the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.’

27. From the above caption provisions of the law, it is clear that the court has discretion to remedy non-compliance with Order 37 Rule 7 (2) prior to trial. That is more so in the context of the provisions of



Article 159 (2) (d) of *the Constitution* of Kenya and Section 19 of the *Environment and Land Court Act* which emphasize the overall mission of the court to do substantive justice.

28. However, it is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that parties who fail to file their submissions on an application as ordered by the court are deemed as parties who have failed to prosecute their application and therefor that application is liable for dismissal. The filing of submissions having been ordered, on the 31st July 2025 in the presence of counsel for the Applicants wherein there had been no compliance clearly demonstrated inertia and inordinate delay, lack of interest and/or seriousness on the part of the Applicant in the prosecution of the matter.
29. The Court of Appeal in *Rowlands Ndegwa and 4 Others vs. County Government of Nyeri and 3 Others; Agriculture, Fisheries and Food Authority & Another (Interested Parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai vs. Attorney General & 3 Others* [2016] eKLR, observed as follows:

“With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the Respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity....”
30. The mode of hearing of the Application having been accepted by the parties, and there having been no compliance to prosecute the same, the Plaintiffs /Applicants Application dated the 2nd July 2025 is thus dismissed for want of prosecution with costs.
31. Further directions are that the Applicants shall file and serve within thirty (30) days from the date of delivery of this ruling a Supplementary Affidavit with a certified extract of the title and official search to the suit parcel of land. In default of compliance this suit shall stand struck out.

DATED AND DELIVERED AT NAIVASHA VIA TEAMS MICROSOFT THIS 20TH DAY OF NOVEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND COURT – JUDGE

