

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCL CASE NO. E007 OF 2024

RAPHAEL OKONJI BUKACH1ST PLAINTIFF/RESPONDENT
TABITHA OSURO BUKACHI2ND PLAINTIFF/RESPONDENT
JOSEPHINE OLESI BUKACHI3RD PLAINTIFF/RESPONDENT
BEATRICE OYIELA BUKACHI.....4TH PLAINTIFF/RESPONDENT
SARAH SERUYA BUKACHI5TH PLAINTIFF/RESPONDENT
CONRAD OBBAYI BUKACHI6TH PLAINTIFF/RESPONDENT

VERSUS

FREDRICK OKONJI BUKACHI1ST DEFENDANT/APPLICANT
RUTH WANZA BUKACHI2ND DEFENDANT/APPLICANT

AND

FELIX ODERO BUKACHI INTERESTED PARTY/APPLICANT

RULING

The Notice of Motion application dated 9th October 2025 expressed to be brought pursuant to the provisions of sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 6 Rule 1, Order 7 Rule 1 and Order 10 Rule 11 of the Civil Procedure Rules seeks for orders that;

- a) any order herein be set aside and the Defendants and the Interested Party be granted unconditional leave to defend the suit.
- b) The annexed draft defence be deemed duly filed and served.
- c) Costs of the application be in the cause.

The application was based on the grounds that there was no proper service in the matter and that the defendants and the Interested Party never got the Summons to Enter Appearance and the pleadings, that it is in the interest of justice that any consequential orders issued herein be set aside and the Defendants and the Interested Party be granted unconditional leave to defend the suit. That the defendants and Interested Party will suffer irreparable loss and damage if the orders sought are not granted as they will be condemned unheard despite having a reasonable defence worth of the court's indulgence.

The application was supported by the averments in the Supporting Affidavit of the 1st Defendant sworn on 12th October 2025 and the annexures thereto. In addition to the application, the applicants also filed a Notice of Preliminary Objection dated 9th October 2025 seeking that the plaint be struck out with costs on the grounds that: -

- a) the plaint is incompetent, misconceived and an abuse of the due process of the court.
- b) the plaint is fatally incompetent as the plaintiffs lack *locus standi* to institute the suit.
- c) the plaintiffs have no *locus standi* as they have not obtained explicit authority, consent or resolution to institute a suit on behalf of the Interested Party as required by Order 1 Rule 13 of the Civil Procedure Rules.
- d) in the absence of such authority, consent or resolution from the Interested Party as the proprietor, the plaintiffs' pleadings are incompetent, misconceived and null *ab initio*.

- e) the inclusion of the father- the registered owner of the suit property as an Interested Party instead of a plaintiff or principal litigant further underscores the absence of proper instructions and authority to file suit.
- f) The plaint and all consequential pleadings filed herein offend sections 19, 24-26 of the Land Registration Act, 2012 which recognizes the rights of the registered proprietor as absolute and indefeasible save as provided by law.
- g) Consequently, the entire suit is incompetent fatally defective and an abuse of the court process and ought to be struck out with costs.

Vide directions taken on 13/10/2025, both the Notice of Motion and the Preliminary Objection were heard together by way of written submissions.

In response to the application and the preliminary objection, the plaintiffs filed a Replying Affidavit sworn by the 1st plaintiff on 28th October 2025. The case of the plaintiffs is that the Preliminary Objection was misconceived as the suit was not filed on behalf of the Interested Party. That the defendants were served with summons to enter appearance on various occasions but deliberately refused to enter appearance and file defence.

The plaintiffs averred that the court ordered alternative mode of service by affixing the relevant documents on the gate of the defendants and Interested Party which the process server did and took photographs. That a glance of the draft defence shows that the same lacks substance as it contains mere denials and does not explain how the defendants sub-divided the land and denied the plaintiffs access to their father. That the original land is no longer in existence as the defendants have since sub-divided it and assigned themselves portions thereof.

That litigation must come to an end. That no party shall suffer prejudice if the original title is restored in the name of the Interested Party and the parties are all

allowed to see the Interested Party without anybody threatening to kill any of them. None of the parties filed written submissions within the timelines given.

The substantive relief sought in the application is for setting aside orders so far taken and allowing the defendants and the Interested Party to defend the suit.

It is clear that the suit proceeded to hearing *ex parte* and was pending filing of submissions and a date for judgment when the applicants brought the application and the preliminary objection.

Grounds for setting aside of *ex parte* proceedings and orders are that the applicant must explain to the satisfaction of the court his/her failure to participate in the proceedings, the applicant must demonstrate that he/she has a good defence that raises triable issues and that prejudice will not be occasioned to the respondent.

The applicant's explanation for non-participation in the proceedings is that there was no proper service of the Summons to Enter Appearance and pleadings. The respondents depose that the applicants were served but deliberately refused to take the appropriate action.

Perusal of the court file shows that hearing of the matter was adjourned on a number of occasions because the Affidavits of Service file did not disclose sufficient service of the Summons to Enter Appearance, pleadings and other court processes upon the defendants/applicants. That finally the court allowed substituted service by (i) affixing copies thereof at some conspicuous place in the court house and the gates to the defendants' and Interested Party's home(s) and (ii) by registered post to the last known postal address of the Defendants and Interested Party.

An Affidavit of service sworn by one Harum Odhiambo Okello a Court Process Server filed on 8/7/2025 indicated that the Process Server had on 30th April 2025 and 16th June 2025 tried to access the Defendants' homes for purposes of service but that he could not serve because he found the gate leading to the homestead locked from inside.

That on 18/6/2025 while in the company of the 1st plaintiff he served the defendants and the Interested Party by pinning the Summons to Enter Appearance, plaint, verifying Affidavit, witness statements, list of documents, request for judgement and hearing notice due on 9/7/2025 on the gates leading to the homestead of Fredrick Okonji Bukachi and Felix Odero Bukachi.

That on 4/7/2025, he sent the same documents via registered mail to Box 513 Yala as the 1st defendants and Interested Party's last known postal address. Attached to the Affidavit of Service were copies of the hearing Notice for 9/7/2025, photographs of the gates and certificate of postage.

The applicants' response to this was that they never saw the documents said to have been pinned to the gate and that they were not aware of the hearing of 9/7/2025.

The court has considered the Affidavit of Service and the attachment thereto just as it did before the matter proceeded to hearing *ex parte* on 9/7/2025. The court finds that the defendants were properly served as per the court order. The Defendants' explanation for none-attendance and non-participation in the proceedings is therefore not plausible.

The court has also considered the draft defence annexed to the application wherein the defendants have denied the plaintiffs claim and averred that the plaintiffs lack

locus standi to bring the suit with regard to distribution of the property of the Interested Party while he is still alive.

The court finds that the defence raises triable issues. The court has also considered that the parties in the suit are members of one family namely; siblings and their father, who ought to handle the dispute among them more amicably.

Regarding the preliminary objection, the law is that a preliminary objection can only be raised on pure points of law as contained in the pleadings. In the case of

Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd [1969] E.A

696 it was held that;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order by clear implication out of pleadings and which if argued as a Preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

The court further held that

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

From the foregoing, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court's discretion.

The preliminary objection herein is based on a plea that the plaintiffs have no capacity to bring the suit as the owner of the suit land is still alive and has not given authority to the plaintiffs to bring the suit. Capacity to sue or *locus standi* is a point of law and it is evident that the same has been drawn from the pleadings as contained in the plaint.

As it is clear from the plaint, the suit land is the property of the Interested Party. The Interested party has not filed the suit. There is no evidence that he has authorized the plaintiffs to bring the suit on his behalf. The complaint before court concerns the manner in which the suit land has been sub-divided which according to the plaintiffs is contrary to the wishes of the Interested Party.

Without consent and/or authority of the Interested party, the plaintiffs have no *locus standi* to bring the suit. For if such authority had been obtained, the same would have been pleaded in the plaint in terms of Order 1 Rule 13, Order 9 or Order 32 of the Civil Procedure Rules.

As for the claim regarding access to the Interested Party and the prayer that an order be made that the plaintiffs and/or relatives of the Interested Party have right

to visit him and offer help in whatever form without hindrance from the defendants or any other person, that relief is outside the jurisdiction of this court as provided for in Article 162 of the Constitution and section 13 of the Environment and Land Court Act.

I find that both the Application and the Preliminary objection have merit. But as the preliminary objection disposes of the suit, the order that commends itself to the court is to uphold the preliminary objection with the result that the suit is hereby struck out. While striking out pleadings is a drastic action that should be applied as a last resort, the court finds that lack of capacity to sue on the part of a plaintiff is such a fundamental defect in the suit that cannot be rectified by any amount of amendment. As the parties are close relatives, each party will bear own costs of the suit and the preliminary objection.

Orders accordingly.

**RULING DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY
THIS 11TH DAY OF DECEMBER 2025.**

E. ASATI,

JUDGE.

In the Presence of;-

Patricia... Court Assistant

Mukony h/b for Weda for the Defendants and Interested Party.

