

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**  
**ELCOS NO. E047 OF 2025**

**HARRISON MAINA KARIUKI.....**  
**PLAINTIFF**

**-VERSUS-**

**CRESCENT MEDICAL SERVICES**  
**KENYA LIMITED .....1<sup>ST</sup>**  
**DEFENDANT**

**CHIEF LANDS REGISTRAR NAIROBI.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. Before this court is the notice of preliminary objection dated 12<sup>th</sup> August 2025, filed by the 1<sup>st</sup> defendant challenging the plaintiff's application dated 30<sup>th</sup> July 2025, and the suit on the following grounds:-

***1. That this Court has no jurisdiction to entertain this application and suit, ab initio, as the dispute pertains to the demarcation of boundaries between the Applicant's LR. No. 13658/4 and the Respondent's LR. No. 13658/13 which lies squarely under the jurisdiction of the Land Registrar under Sections 18, 19 and 20 of the Land Registration Act, 2012.***

***2. That this Court has no jurisdiction to entertain this application and suit, ab initio, as the dispute pertains to the demarcation of boundaries between the Applicant's LR. No. 13658/14 and the Respondent's LR. No. 13658/13 which lies squarely under the jurisdiction of the Lands Surveyor under Sections 12 and 13 of the Land Registration Act, 2012.***

3. ***That this Court has no jurisdiction to delve into matters within the statutory penumbra of the Lands Registrar and Lands Surveyor and the Court is only to down tools as per the holding in Owners of the Motor Vessel Lillian SS v Caltex Oil (Kenya) Limited [1989] KLR.***
4. ***That this Court has no jurisdiction to entertain this application and suit, as the Applicant has no Leasehold, ownership or possessory rights over and against the occupation and use of the 1<sup>st</sup> Respondent's LR. No. 13658/13 as to be enforceable by this Court under Article 162(2) of the Constitution of Kenya as read together with Section 13(3) of the Environment and Land Court Act, 2011.***
5. ***THAT this Court has no jurisdiction to entertain this fatally defective application and suit, contravening Order 37 Rule 7(2) which requires that a claim for adverse possession be accompanied by a certified extract of the title to the land.***
6. ***Section 7 of the Limitation of Actions Act bars claims brought after the lapse of 12 years and pleadings plainly reveal that time has not begun to run and ipso facto, the claim is barred in limine.***
7. ***THAT the application and suit ought to be struck out, in limine, for want of jurisdiction.***

2. In response thereto, the plaintiff filed his replying affidavit sworn on 27<sup>th</sup> October 2025. The plaintiff refuted the 1<sup>st</sup>

defendant's averment that his suit relates to a boundary dispute and asserted that the claim concerns his proprietary, possessory and user rights over a section falling within the 1<sup>st</sup> defendant's parcel of land. It was further deposed that the subject dispute relates to imminent closure of an access road situated in the 1<sup>st</sup> defendant's land parcel which access road the plaintiff has been using for more than 24 years.

3. Furthermore, that the issues raised by the 1<sup>st</sup> defendant are incapable of resolution through a preliminary objection as they require for evidence to be adduced relating, *inter alia*, to boundary demarcation between their respective parcels of land. In addition, the issue that his suit is barred under the **Limitation of Actions Act** and the question of limitation can only be resolved upon a factual inquiry as opposed to the mechanism of a preliminary objection. Further, that failure to attach a copy of title in respect of the plaintiff's land is curable as distinguished from a fatal defect and that he has availed sufficient documentation before the court demonstrating his ownership of **LR. No. 13658/14**.

4. The notice of preliminary objection was canvassed by way of written submissions. The 1<sup>st</sup> defendant filed written submissions dated 7<sup>th</sup> November 2025 and submitted that the plaintiff's application dated 30<sup>th</sup> July 2025 and the originating summons

have flouted the doctrine of exhaustion by failing to present the subject dispute to the processes contemplated under **Sections 16, 17, 18, 19 and 20** of the **Land Registration Act, 2012**, prior to lodging the aforesaid application and suit. Three issues for determination were listed namely:-

- 1. Whether the court is possessed of jurisdiction to entertain the plaintiff/respondent's suit.**
  - 2. Whether the originating summons and application are fatally defective.**
  - 3. Whether the applicant's claim discloses any cause of action.**
5. The 1<sup>st</sup> defendant relied on the reasoning of the court in **Azzuri Limited v pInk Properties Limited & Another [2017] eKLR; Speaker of the National Assembly v Njenga Karume [1992] KLR 21; and, Geoffrey Muthinja v Samuel Henry and 1756 Others [2015] eKLR** to buttress the argument that the plaintiff's application dated 30<sup>th</sup> July 2025 offends the doctrine of exhaustion. Furthermore, the aforesaid claim being couched in terms of a claim for adverse possession offends the provisions of **Order 37 Rule 7(2)** of the **Civil Procedure Rules** for failing to attach a certified copy of the title in respect of **LR. No. 13658/14**.
6. It was further argued that the plaintiff ought not be allowed by this court to mutate his pleadings from a claim premised on

adverse possession to one based on the right of way or easement.

7. The plaintiff filed his written submissions dated 10<sup>th</sup> November 2025. He submitted that the 1<sup>st</sup> defendant has lodged an application for change of user of **LR. No. 13658/13** with the intention of putting a commercial complex thereon hence he will lose access to a portion of the servient land, access which he has enjoyed for more than 24 years. Further, that he constructed a gate on the aforementioned access road/easement in order to preserve and protect his property rights over the same.
8. The plaintiff raised three issues for determination as listed below:-
  1. ***Whether the subject preliminary objection is merited.***
  2. ***Whether the court has the requisite jurisdiction to determine the plaintiff/respondent's application and originating summons.***
  3. ***Whether the plaintiff/respondent's application and originating summons offend Section 7 of the Limitation of Actions Act.***
9. While relying on the Supreme Court's decision in **Independent Electoral and Boundaries Commission v Jane Cheperenger and other [2015] eKLR** the plaintiff submitted that the instant

preliminary objection is incapable of resolving the complex factual matters contained in the application dated 30<sup>th</sup> July 2025. Further, that the court has jurisdiction to adjudicate the aforesaid application because it relates to interference with access and analogous user rights which falls within the mandate of the court pursuant to **Article 162(2) of the Constitution of Kenya**.

**10.** I have carefully considered the instant preliminary objection and responses thereto together with parties' rival submissions. The issue for determination is *whether the notice of preliminary objection is merited*.

**11.** The first and most fundamental issue for determination is whether this court has jurisdiction to entertain the application dated 30<sup>th</sup> July 2025, and the originating summons. In the application, the plaintiff is seeking the following reliefs:-

***(a) A temporary injunction to issue restraining the 1<sup>st</sup> Respondent [now Applicant] from disposing the property comprising of an access road the Applicant has been using to access his property.***

***(b) That a conservatory Order do issue directing that the status quo be maintained in regard to the access road granting access to LR. No. 13658/13.***

***(c) That a permanent injunction do issue restraining the Respondents from dealing with***

*the access road to the Applicant's property in any way.*

*(d) A declaration that the Applicant has acquired prescriptive rights to the access road to the suit property by virtue of adverse possession having occupied the same for more than 12 years."*

12. From the foregoing, it is evident that what is contested by the parties herein is not merely a boundary dispute involving their respective parcels of land namely, **LR. No. 13658/13 and LR. No. 13658/14**. The plaintiff is laying claim to a section of the 1<sup>st</sup> defendant's **LR. No. 13658/13**, on grounds that he has been using the access road located therein for more than 24 years.
13. **Article 162(2)(b)** of the **Constitution of Kenya** as read together with **Section 13** of the **Environment and Land Court Act, 2011** vests this court with original and appellate jurisdiction to hear and determine all disputes relating to land, including disputes concerning title to land, tenure, boundaries, rates, rents, valuations, and land administration. In the case of **Lydia Nyambura Mbugua v Diamond Trust Bank (K) Ltd & another [2018] eKLR**, the court declared that it is the nature of the dispute, rather than the reliefs sought or the form of the action, that determines which court has jurisdiction and that where the issue concerns ownership, use or occupation of land, it is the ELC that has jurisdiction to entertain the matter.

- 14.** In the application dated 30<sup>th</sup> July 2025, the plaintiff contests the ownership of that part of the 1<sup>st</sup> defendant's **LR. No. 13658/13** subsumes an access road.
- 15.** The issue of encroachment has not been raised in the preliminary objection before the court nor, in the application which it challenges. I find that the question of the creation/existence of an easement in relation to the 1<sup>st</sup> defendant's land parcel **LR. No. 13658/13** arising the plaintiff's alleged use of the same for more than 24 years, to be an issue concerning the ownership of land, thus, falling squarely within this court's purview. Ownership of land is a factual matter involving the adducing of evidence to establish occupation and related issues, hence, is not amenable to resolution through a preliminary objection.
- 16.** In the premises, the 1<sup>st</sup> defendant's contentions and submissions that the Lands Registrar is better placed than this court to adjudicate on the issues raised in the application dated 30<sup>th</sup> July 2025 and the originating summons lack in merit.
- 17.** From the above, the notice of preliminary objection dated 12<sup>th</sup> August, 2025 is unmerited and it is hereby dismissed with costs to the plaintiff. The said costs are assessed at Kshs.50,000/-.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 11<sup>TH</sup> DAY OF DECEMBER, 2025.**

**HON. MBOGO C.G.  
JUDGE  
11/12/2025.**

**In the presence of:**

*Mr. Benson Agungo - Court assistant*

*Mr. Wachira holding brief for Mr. Kariuki for the Applicant*

*Mr. Ali Satar for the 1<sup>st</sup> Respondent*

ORIGINAL