



REPUBLIC OF KENYA



KENYA LAW
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**Mbeya v Okata (Land Case E003 of 2025)
[2025] KEELC 8638 (KLR) (11 December 2025) (Ruling)**

Neutral citation: [2025] KEELC 8638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
LAND CASE E003 OF 2025**

E ASATI, J

DECEMBER 11, 2025

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE ESTATE OF AMOS MBEYA OLANG'O (DECEASED)

AND

IN THE MATTER OF REGISTRATION OF PLOT NO. WB/EBUSAKAMI/2745

BETWEEN

NASHON AKANDA MBEYA PLAINTIFF

AND

ZAKARIA KUYA OKATA DEFENDANT

RULING

1. Vide Notice of Preliminary Objection dated 6th October 2025 the Defendant raised objection that the suit is improperly before the court having been commenced by way of Originating Summons.
2. Vide directions given on 15th October 2025, the Preliminary Objection was heard by way of written submissions. It was submitted on behalf of the defendant vide the written submissions filed by the firm of K'Owinoh & Company Advocates dated 30th October 2025 that the suit is solely based on allegations of fraud upon which the applicant is seeking the court to determine whether to cancel the respondent's title. That the procedure of Originating Summons is designated to deal with simple matters which can be settled without the expense of bringing an action in the usual manner. That a suit based on fraud can only be brought by way of plaint and not an Originating Summons. Counsel relied on the case of *Cyrill J. Haroo & Another v Uchumi Services Ltd & 3 others* (2014) eKLR where it was held that when it becomes obvious that the issues raised are complex and contentious a judge should



- dismiss the Summons and leave the parties to pursue their claim by ordinary suit. Counsel submitted that the suit was wrongly before court and urged the court to dismiss it with costs.
3. On behalf of the plaintiff written submissions dated 7th November 2025 were filed by Justin Asige Advocate. Counsel submitted that the plaintiff brought the suit by way of Originating Summons as it is the proper procedure prescribed by the rules of procedure.
 4. That the determination of the matters could be reached without calling viva voce evidence as they are not complex.
 5. Relying on the provisions of Order 37 Rule 1(a) and Order 38 Rule (8) of the Civil Procedure Rules, Counsel submitted that Originating Summons are not limited to matters in respect of which the facts are not in dispute, that viva voce evidence can be called if the matters turn out to be complex.
 6. Relying on the case of Kenya Hotels Ltd - v- Orient Commercial Bank Ltd (Formerly known as the Delplies Bank Limited) (2019) KLR) Counsel submitted that Originating Summons cannot be defeated merely because the dispute is highly contentious, complex or involving questions of law. That in order for a preliminary objection to succeed, it should raise a pure point of law, it is argued on assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact is to be ascertained or what is sought is the exercise of judicial discretion.
 7. That the point of law must therefore be set out in the written statement of defence before the preliminary objection is considered as properly raised.
 8. Counsel also relied on the cases of Margaret Gatambia & 2 Others -v Peninah Ngechi Njaaga & 3 Others 2019 KEELC 95(KLR) and Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Ltd (1969) E.A 696 on raising of Preliminary objections.
 9. I have considered the preliminary objection, the submissions in support thereof and the plaintiff's submissions.
 10. The Originating Summons to which the preliminary objection is directed is expressed to be brought pursuant to the provisions of section 26 (1) (b) of the [Land Registration Act](#) and Order 37 Rules 1, 8, 14 and 15 of the Civil Procedure Rules. The same is brought by the plaintiff who claims to be the rightful heir of Plot No. WEST BUNYORE/EBUSAKAMI/2745. It seeks for orders that certificate of plot No. WEST BUNYORE/EBUSAKAMI/2745 is null and void for reasons of being acquired illegally, unprocedurally and through corrupt means, that the said parcel of land registered in the name of the defendant be cancelled and registered as plot No. 1862 in the name of Amos Mbeya Olang'o (deceased)
 11. The facts as contained in the Supporting Affidavit are detailed and complex namely; that the suit land was part of plot No. 1862 registered in the name of one Amos Mbeya Olang'o. That the plaintiff is the son of Amos Mbeya Alang'o. That the land the defendant bought was No. 1852 and has no relation with the suit land. That the suit land is enclosed in plot No. 1862. That there was a process leading to sub-division of the land to produce new numbers namely; 2744 and the suit land and that the said process was fraudulent. That there was no consent of the Land Control Board. That Luanda Land Tribunal Council ordered in favour of Amos Mbeya Olang'o for cancellation of the suit land and parcel No 2744 and restoration of No. 1862. That members of the deceased's family have always been in possession of the suit land to date.
 12. In my view, these are matters to be subjected to a full hearing in a suit commenced by way of plaint.



13. Although Order 37 allows certain categories of persons to commence action by way of originating Summons, the dispute disclosed in the Originating Summons herein does not fall within the category of disputes under Order 37.
14. The plaintiff who seeks to impeach the defendant's title under section 26 of the Land Registration Act must approach the court in a way that allows the defendant to defend his title appropriately and adequately.
15. The threshold for a preliminary objection to succeed as correctly submitted on behalf of the plaintiff was set in the case of Mukisa Biscuit Manufacturing Co. Ltd – v- West End Distributors Ltd [1969] E.A 696 as follows;

“...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.”

And 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.”

16. 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.
17. I find that the preliminary objection herein meets the threshold and that the same has merit and hereby uphold it.
18. Although Order 37 Rule 19 provides for the court to order the proceedings to continue as if the cause had been commenced by way of filing a plaint, this does not extend to cover where an Originating Summons is filed in a dispute not covered by the provisions of Order 37.
19. The court finds that the Originating Summons filed herein for a claim based on fraud is improperly before court. The Originating Summons is struck out. No order as to costs.

Orders accordingly.

RULING DATED AT VIHIGA AND DELIVERED VIRTUALLY THIS 11TH DAY OF DECEMBER 2025.

E. ASATI,

JUDGE.

In the Presence of;-

Patricia – Court Assistant

Asige for the plaintiff



K'Owinoh for the Defendant.

