



Kiriama v Ogwagwa (Sued as the Personal Representative/Administrator of the Estate of John Ogwagwa) & 7 others (Environmental and Land Originating Summons E004 of 2024) [2025] KEELC 5602 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5602 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2024
DO OHUNGO, J
JULY 29, 2025**

BETWEEN

STANLEY OCHENGO KIRIAMA APPLICANT

AND

NYAKERARIO OGWAGWA (SUED AS THE PERSONAL REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF JOHN OGWAGWA) 1ST RESPONDENT
ERICK OMayio ONGUBO 2ND RESPONDENT
DICKSON ONGERA ANGWENYI 3RD RESPONDENT
RUTH ONCHIRI 4TH RESPONDENT
OMETE NYARIKI ANGUS 5TH RESPONDENT
PONTIANUS OREKO MAKORI 6TH RESPONDENT
CHRISTINE MORAA OGETO 7TH RESPONDENT
THE LAND REGISTRAR, NYAMIRA 8TH RESPONDENT

RULING

1. Proceedings in this matter commenced on 6th June 2024, when the Applicant filed Originating Summons (OS) dated 6th June 2024 in which he averred that he was entitled to a share of the estate of John Ogwagwa Nyakweba (deceased). The Applicant therefore sought determination of the following:
 1. Whether John Ogwagwa Nyakweba (deceased) was the registered owner of all that 1.210 HA piece of land comprised in L.R No. West Mugirango/Siamani/2020 which he had sub-divided into L.R. No. West Mugirango/Siamani/3856, 3857 & 3858 prior to his death.



2. Whether the Applicant, Stanley Ochengo Kiriama had purchased the portion of land measuring 50ft by 100ft and comprised in L.R. No. West Mugirango/Siamani/2020 from the deceased registered owner on the 9th October 1988 prior to its subdivision into L.R. No. West Mugirango/Siamani/3856, 3857 & 3858.
 3. Whether the Respondents colluded and unlawfully and irregularly subdivided the title comprised in L.R No. West Mugirango/Siamani/3856 (Now resultant titles upon numerous illegal subdivisions being LR No. West Mugirango/Siamini/5376, 7515, 7514, 6719, 7915, 9475 & 9476), registered in the name of the deceased, without undertaking succession proceedings and in absence of a Certificate of Confirmation of Grant of Letters of Administration over the Estate of the deceased John Ogwagwa Nyakweba.
 4. Whether the actions of the 1st Respondent in connivance with the other Respondents, by reason of the illegal, irregular and unprocedural subdivision and transfer of the title comprised in LR No. West Mugirango/Siamni/3856 (Now Resultant titles upon numerous subdivisions being LR No. West Mugirango/Siamini/5376, 7515, 7514, 6719, 7915, 9475 & 9476); have denied the Applicant his rightful share of that portion measuring 50ft by 100ft in the said parcel of land.
 5. Whether the titles resultant from the illegal subdivision and closure of LR No. West Mugirango/Siamani/3856 namely LR No. West Mugirango/Siamani 5376, 7515, 7514, 6719, 7915, 9475 & 9476 and any other prior or subsequent titles thereto should be declared null and void and be therefore cancelled and the parcel restored to its former position as an undivided whole.
 6. Whether an order should issue directing the 1st Respondent to excise and hive off and transfer that portion measuring 50ft by 100ft and comprised in L.R No. West Mugirango/Siamini/3856 (Now Resultant titles upon numerous legal subdivisions being LR No. West Mugirango/Siamini/5376, 7515, 7514, 6719, 7915, 9475 & 9476) to the Applicant and whether in the event she fails, the Deputy Registrar of this honorable court should be empowered to execute the said subdivision and transfer instruments.
 7. Whether the Respondents should bear the costs of this suit.
2. The Fourth to the Seventh Respondents reacted to the OS by filing Notice of Preliminary Objection dated 12th July 2024, which is the subject of this ruling. The grounds of the objection as listed on its face are:
1. That this Honourable court is it seized of the requisite jurisdiction to entertain this suit as this is a succession matter and not a land matter.
 2. That without prejudice to ground (1) above the claim is statutory time barred.
 3. That 4th, 6th and 7th respondents have been misjoined in this proceedings.
 4. That the suit does not disclose a reasonable cause of action against the 4th 6th and 7th respondent.
 5. That the suit offends the mandatory provisions of the [Land Control Act](#), Limitation of Action Act and the [Law of Succession Act](#).
 6. That there is no nexus between the 1st respondent who is the principal respondent and the 4th 6th and 7th respondents.



7. That there are no reliefs being sought against the 4th, 6th and 7th respondents capable of being determined by the court.
8. That the plaintiff's claim having been filed without the leave of the court hence the same should be struck out *ex debito justiae* with costs to the 4th, 6th and 7th respondents.
3. The Applicant swore and filed a replying affidavit in response and opposition to the preliminary objection. As will be manifest later in this ruling, a preliminary objection should raise a pure point of law. Consequently, it cannot be responded to through evidence, whether by way of affidavit or otherwise.
4. The objection was canvassed through written submissions. The Fourth to the Seventh Respondents submitted that the heading of the OS confirms that the Applicant's case concerns the estate of the deceased and is therefore a succession matter. That, consequently, this Court lacks jurisdiction to hear and determine the matter.
5. The Fourth to the Seventh Respondents further submitted that the Applicant's case is grounded on an allegation that he purchased land on 9th October 1988 which is 36 years ago and that consequently, the claim is statute barred in view of the provisions of Section 7 of the *Limitation of Actions Act*. They went on to argue that the OS offends Section 6 of the *Land Control Act* since there is neither evidence that consent of the Land Control Board was obtained within six months nor that the Applicant has been in occupation. Relying on the cases of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR, *Bosire Ongero vs Royal Media Services* [2015] eKLR, *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] eKLR and *Sohanaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR, the Fourth to the Seventh Respondents urged the court to strike out the suit due to misjoinder of the Fourth to the Seventh Respondents, want of jurisdiction and the claim being time barred.
6. Besides the Fourth to the Seventh Respondents, none of the other Respondents filed any submissions. As for the Applicant, his Counsel on record told the Court that he had filed submissions. Despite diligently perusing both the Case Tracking System (CTS) and the physical file, I have not seen any submissions by the Applicant.
7. I have carefully considered the Preliminary Objection and the submissions. The issues that arise for determination are whether the objection raises a pure point of law and, if so, whether the Court has jurisdiction.
8. For a preliminary objection to be valid, it must raise a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. If it is upheld, a valid preliminary objection should result in summarily terminating the suit or application against which it is raised.
9. Any discourse on what constitutes a valid preliminary objection finds immense enrichment in the wise counsel of Law, JA., delivered in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 as follows:

So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or



a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

10. The Mukisa Biscuit principles were recently restated by the Court of Appeal in *Ndumba v Returning Officer Kimilili Constituency & another* [2025] KECA 636 (KLR) as follows:

26. A P.O serves to challenge the legal sufficiency of a case, proceeding on the assumption that all factual claims presented are accurate. It is reserved solely for addressing legal points, strictly avoiding engagement with any disputed factual matters. The court's assessment hinges on whether the objection originates exclusively from the pleadings and is rooted firmly in established legal principles.

27. Should the determination necessitate an inquiry into extraneous factual matters, or the exercise of judicial discretion, a P.O would be deemed procedurally inappropriate. See the case of *Oraro Vs Mbaja* [2005] 1KLR 141, where the Court held that: "Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence".

28. A P.O cannot be raised if any fact has to be ascertained from elsewhere, or if the court is called upon to exercise judicial discretion. The court will also take into account that the P.O must stem from the pleadings and raise pure point/s of law. It should not deal with disputed facts, nor should it derive its foundation from factual information.

11. A perusal of grounds 3, 4, 5, 6 and 7 of the preliminary objection reveals that determination of the issues raised in the said grounds requires the Court to receive and consider contested evidence. Additionally, some of the said grounds raise matters of exercise of discretion and therefore fall outside the ambit of a preliminary objection. For example, ground 3 raises the issue of misjoinder. Pursuant to Order 1 Rule 9 of the Civil Procedure Rules, a suit need not be defeated by reason of misjoinder or non-joinder. The rule provides :

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

12. It follows therefore that the Court has discretion on matters of misjoinder or non-joinder and that a preliminary objection raising misjoinder or non-joinder cannot terminate the proceedings. I find that grounds 3, 4, 5, 6 and 7 of the preliminary objection do not raise pure points of law and are therefore not valid preliminary objections. On the other hand, grounds 1, 2 and 8 raise pure points of law and I will now proceed to consider them.

13. Pursuant to ground 8 of the preliminary objection, the Fourth to the Seventh Respondents contend that the Applicant's case was filed without leave of the Court. The record provides a ready answer to the said objection. On 18th December 2024, the Court (Mugo Kamau, J.) delivered a ruling wherein the Court stated thus:

Prior to the filing of this suit by way of an Originating Summons in this case on 6/6/2024, the Applicant sought for leave for extension of time on grounds that he was time barred and he explained the reasons for having brought the suit to Court belatedly. The Court granted the same leave on 5/6/2024 vide *Nyamira ELC Miscellaneous Civil Application Number E007 of 2024*. When giving the said orders of leave the Court directed that the Respondents



would be at liberty to apply for the setting aside of the same should it turn out that the said orders were unmerited.

14. It is thus manifest that leave was not only sought but was obtained. In the above ruling, the Fourth to the Seventh Respondents' application seeking setting aside of the leave to file this suit out of time was disallowed. Consequently, I find no merit in ground 8 of the preliminary objection.
15. Pursuant to ground 1 of the preliminary objection, the Fourth to the Seventh Respondents contend that the dispute before the Court is a succession dispute and that this Court therefore lacks jurisdiction. This Court's jurisdiction, as spelt out under Article 162(2) (b) of *the Constitution* of Kenya, 2010 and Section 13 of the *Environment and Land Court Act*, is to hear and determine disputes relating to the environment and the use and occupation of, and title to land.
16. Section 13 of the *Environment and Land Court Act* provides as follows:
 13. Jurisdiction of the Court
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.
17. I have perused the questions that the Applicant has listed in the OS for determination. They include whether the deceased was the registered owner of 1.210 Hectares of land comprised in L.R No. West Mugirango/Siamani/2020, whether the Applicant had purchased 50ft by 100ft portion of L.R. No. West Mugirango/Siamani/2020 from the deceased, whether the Respondents unlawfully and irregularly subdivided L.R No. West Mugirango/Siamani/3856, whether the titles resultant from subdivision of LR No. West Mugirango/Siamani/3856 should be nullified, cancelled and the parcel restored to its former position as an undivided whole and whether the deceased's estate should be ordered to excise and transfer to the Applicant the 50ft by 100ft portion of L.R No. West Mugirango/Siamini/3856. All those questions are matters of title to land which fall squarely within the jurisdiction of this Court. The fact that the Applicant used the phrase "In the matter of the *Law of Succession Act*" in the heading of the OS does not divest the Court of jurisdiction in view of the reliefs sought.
18. The last aspect of the Fourth to the Seventh Respondents' objection on jurisdiction is found at ground 2 of the preliminary objection pursuant to which they contend that the claim is statute barred in view of the provisions of Section 7 of the *Limitation of Actions Act*.



19. 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.

20. The effect of a suit being barred by *Limitation of Actions Act* is that the Court is thereby deprived of jurisdiction to hear and determine it. The Court of Appeal emphasised as much in *Divecon v Samani* (1995 – 1998) I EA 48 where it stated:

No one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action.

21. The Fourth to the Seventh Respondents have argued that the Applicant's case is grounded on an allegation that he purchased land on 9th October 1988 which is 36 years ago and that consequently, the claim is statute barred. While it is true that the Applicant's case is based on the allegation that he purchased a 50ft by 100ft portion of L.R. No. West Mugirango/Siamani/2020 from the deceased 36 years ago, the record herein shows that on 5th June 2024, the Court (Mugo Kamau, J.) in Nyamira ELC Miscellaneous Civil Application Number E007 of 2024, granted the Applicant leave to file this suit out of time.

22. The Fourth to the Seventh Respondents' attempt to set aside the leave was disallowed on 18th December 2024 with the Learned Judge holding thus:

The court is of the opinion that whether it was right to grant the extension orders or not can only be determined when all the parties have tendered their evidence in court at the main Hearing. The said Application is therefore disallowed. Costs in the cause.

23. In view of the foregoing holding, the Fourth to the Seventh Respondents will have wait and address the issue of whether the suit is barred by Section 7 of the *Limitation of Actions Act* at the hearing of the suit and in their final submissions.

24. In the result, I find no merit in the Notice of Preliminary Objection dated 12th July 2024, and I therefore dismiss it. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT NYAMIRA, THIS 29TH DAY OF JULY 2025.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Mr Mwita for the Applicant

No appearance for the First, Third to Eighth Respondents

Mr Mongare holding brief for Mr Nyamwange for the Second Respondent

Court Assistant: K Misiko

