



Nyanyuki (Suing as the Legal Representative of the Estate of the Late Dickson Nyanyuki Orwenyo) v Ayore & 5 others (Environment and Land Case E001 of 2025) [2025] KEELC 5601 (KLR) (29 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5601 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND CASE E001 OF 2025**

**DO OHUNGO, J
JULY 29, 2025**

BETWEEN

GEORGE OYIEKO NYANYUKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE DICKSON NYANYUKI ORWENYO) ... PLAINTIFF

AND

**SAMWEL OBAGA AYORE 1ST DEFENDANT
DANIEL OGONDI KEBATA 2ND DEFENDANT
KAMASEGA FARMERS CO-OPERATIVE SOCIETY LIMITED 3RD
DEFENDANT
CHIEF LAND REGISTRAR NYAMIRA 4TH DEFENDANT
COUNTY LAND SURVEYOR, NYAMIRA COUNTY 5TH DEFENDANT
THE HON. ATTORNEY GENERAL 6TH DEFENDANT**

RULING

1. Proceedings in this matter commenced on 13th January 2025, when the Plaintiff filed Plaintiff dated 9th January 2025 in which he averred that he was a son of Dickson Nyanyuki Orwenyo [deceased] and the administrator of the deceased's estate. That the deceased was the registered proprietor or owner of a parcel of land known as Plot No. 13 comprised in Certificate of Ordinary Shares No. 42 and measuring 3.5 acres [the suit property] which forms part of 390.5 acres of a parcel of land known as LR. No. 6765/2 Sotik registered in the name of the Third Defendant.
2. The Plaintiff further averred that the deceased and his family had lived on the suit property since 1965 and that the Third Defendant had come up with an altered list of members and intended to subdivide the parcel of land known as LR. No. 6765/2 Sotik with a view to dispossessing the deceased's



estate of the suit property and evicting them. The Plaintiff therefore prayed for judgment against the Defendants jointly and severally for:

- A. A declaration that the Estate of the Late Dickson Nyanyuki Orwenyo is the absolute sole registered proprietor and/or owner of all that Parcel of Land known as Plot No. 13 comprised in the Certificate of Ordinary Shares No. 42 and measuring 4.5 acres being a portion of LR. No. 6765/2 Sotik situate in Borabu Division within Nyamira County of the Republic of Kenya and therefore entitled to absolute and exclusive ownership, possession and occupation thereof.
 - B. A permanent injunction restraining and/or prohibiting the Defendants whether by themselves, their servants, employees, agents and/or by whomsoever from entering onto, taking possession and/or trespassing on the Estate of the Late Dickson Nyanyuki Orwenyo's Parcel of Land known as Plot No. 13 comprised in the Certificate of Ordinary Shares No. 42 and measuring 4.5 acres being a portion of LR. No. 6765/2 Sotik, erecting a fence thereon, or purporting to subdivide, demarcate, alienate, sell, transfer, mortgage, lease, rent, and/or dispose of the said Parcel of Land or otherwise dealing with any portion thereof or at all.
 - C. A permanent injunction restraining and/or prohibiting the Defendants whether by themselves, their servants, employees, agents and/or by whomsoever from evicting the Estate of the Late Dickson Nyanyuki Orwenyo and/or his family from the said Parcel of Land known as Plot No. 13 comprised in the Certificate of Ordinary Shares No. 42 and measuring 4.5 acres being a portion of LR. No. 6765/2 Sotik.
 - D. A permanent injunction restraining and/or prohibiting the Defendants whether by themselves, their servants, employees, agents and/or by whomsoever from interfering in any manner whatsoever with the Estate of the Late Dickson Nyanyuki Orwenyo's ownership, possession and/or occupation of the Parcel of Land known as Plot No. 13 comprised in the Certificate of Ordinary Shares No. 42 and measuring 4.5 acres being a portion of LR. No. 6765/2 Sotik.
 - E. Costs of this suit.
 - F. Interest E above at such rate and for such period as this Honourable Court may deem fit to grant.
 - G. Any other or further relief that this Honourable Court may deem fit and/or just to grant.
3. Together with the Plaint, the Plaintiff filed Notice of Motion dated 9th January 2025, through which he sought injunctive order against the Defendants as well as an order of status quo.
 4. The First to Third Defendants reacted to the Notice of Motion by filing a Replying Affidavit sworn by the First Defendant on 13th February 2025. Further, they filed Notice of Preliminary Objection dated 13th February 2025, which is the subject of this ruling. The objection was pleaded as follows:

"TAKE NOTICE that the 1st, 2nd and 3rd Respondents will raise a preliminary objection on points of law against the plaintiff's/applicant's notice of motion dated 9th January, 2025 together with the suit in its entirety pursuant to Section 7 of the Civil Procedure Act, 2010 prior to the hearing of the said notice of motion by the applicant and commencement of the suit."
 5. The objection was canvassed through written submissions. The First to Third Defendants filed submissions dated 20th February 2025 in which they argued that the First and Second Defendants



are members of the Third Defendant and that the issues raised in the present suit had been litigated between the Third Defendant and Dickson Nyanyuki Orwenyo [deceased] in a Cooperative Arbitration Case, then in an appeal to the Commissioner for Cooperative Development, followed by a petition to the Minister for Cooperative Development, adoption and enforcement proceedings in the High Court, an appeal to the Court of Appeal and lastly a Judicial Review Application in the High Court. They referred to their aforesaid Replying Affidavit sworn by the First Defendant and annexures thereto in support of their submissions. Relying on the decisions in *John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR and *Yopuri & 12 others v Waso Trustland Project & another* [2025] KEELC 578 [KLR], they argued that this suit is *res judicata* and urged the Court to strike it out with costs to them.

6. The Fourth to Sixth Defendants opted not to file any submissions.
7. On his part, the Plaintiff filed submissions dated 24th May 2025. He argued that the issues raised in the Preliminary Objection, particularly authenticity and legal effect of revised membership list and the correlation between Share No. 39/39B and are factual matters that require evidentiary proof. That in the circumstances, the Preliminary Objection fails the test in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. Further relying on the case of *Margaret Njeri Gitau v Julius Mburu Gitau & 2 others* [2022] eKLR, he argued that parties, cause of action and subject matter are different in this case and that *res judicata* is not therefore applicable. He concluded by urging the Court to dismiss the Preliminary Objection with costs to him.
8. 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 suit is *res judicata*.
9. Discourse on what constitutes a valid preliminary objection finds sure footing in the wise counsel of Law, J.A., delivered in *Mukisa Biscuit Manufacturing Co. Ltd v 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 upshot of the foregoing is that 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.
11. The foregoing 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 v 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.
12. To determine the present objection, this Court needs to examine the causes of action and the determinations in the Cooperative Arbitration Case, the appeal to the Commissioner for Cooperative Development, the petition to the Minister for Cooperative Development, the adoption and enforcement proceedings in the High Court, the appeal to the Court of Appeal and lastly the Judicial Review Application in the High Court. In fact, the Court needs to receive evidence on whether those proceedings existed in the first place. The Plaintiff did not place on record any evidence on the existence of the said cases and their outcome. Instead, the First to Third Defendants have sought to rely on their Replying Affidavit to provide the facts that they need to prop up their objection. That is not permissible since the contents of the affidavit constitute disputed facts.
13. In view of the foregoing, I find and hold that the Notice of Preliminary Objection dated 13th February 2025 does not raise a pure point of law. Consequently, it is not a valid preliminary objection. I accordingly dismiss it with costs to the Plaintiff. If the First to Third Defendants would like the Court to determine the issue of res judicata, they may consider filing a formal application on the issue to give all parties opportunity avail relevant evidence on the matter.

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

D. O. OHUNGO

JUDGE.

Delivered in the presence of:

Mr Angwenyi for the Plaintiff

Mr Mongare holding brief for Mr Nyamwange for the First to Third Defendants

Mr Ndiritu for the Fourth to Sixth Defendants

Court Assistant: K Misiko

