

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC (O.S) CASE NO. E079 OF 2025**

**IN THE MATTER OF APPLICATION UNDER SECTION 37 OF THE  
LIMITATION OF ACTIONS ACT, CAP 22, LAWS OF KENYA**

**AND**

**IN THE MATTER OF APPLICATION FOR ADVERSE POSSESSION OF  
LAND PARCEL NO.L.R. NO. KISUMU/KOGONY/3437**

SCHOLA AYIEKO OCHIENG (Suing as the administrator of the Estate  
of NELSON OCHIENG ADHOK ..... APPLLCANT

VERSUS

IBRAHIM ABIRA .....RESPONDENT

**R U L I N G**

1. This ruling is in respect of the Preliminary Objection raised on behalf of the Respondent vide the Notice of Preliminary Objection dated 29<sup>th</sup> January, 2026.
2. The grounds of objection as contained in the Notice of Preliminary Objection are:-

(1) THAT, the Originating Summons is incompetent, fatally defective in law, and an abuse of the court

process for pleading mutually exclusive, legally inconsistent, and irreconcilable cause of action.

- (2) THAT, the Applicant's pleadings and Supporting Affidavit expressly plead entry into the suit property in or about the year 1989 pursuant to an alleged purchase arrangement between the late Nelson Ochieng Adhok and the late Joseph Ramogi Akobi, thereby disclosing permissive, consensual, and licenced occupation deriving from the registered proprietor at the material time.
- (3) That in the same pleadings, the Applicant simultaneously claims adverse possession commencing from the said year 1989, which in law requires hostile, non-consensual, open, exclusive, and uninterrupted possession (nec vi, nec clam, nec precario) under sections 7, 13, 17, 37 and 38 of the Limitation of Actions Act.
- (4) THAT the foregoing averments are self-contradictory on the face of the pleadings, as a claim founded on contractual or permissive entry cannot coexist with adverse possession running from the inception of

that entry, thereby disclosing no reasonable cause of action under the Limitation of Actions Act and offending the doctrine against approbation and reprobation.

(5) THAT the claim for adverse possession is statute-barred, legally untenable, and unsustainable on the face of the Applicant's own pleadings and annexed land register documents.

(6) THAT the Applicant's Supporting Affidavit and annexed Green Card confirm that:

- a) the original registered proprietor died intestate on 25<sup>th</sup> May 2003;
- b) no Letters of Administration were issued until the year 2020; and
- c) the Respondent was registered as absolute proprietor on 29<sup>th</sup> July 2022.

(7) THAT under the Limitation of Actions Act, time does not run against an intestate estate until a legal personal representative is appointed, and consequently, the alleged period of adverse

possession pleaded from 1989 was interrupted by operation of law upon the death of the proprietor in 2003.

- (8) THAT no continuous, uninterrupted twelve (12) year period of adverse possession has accrued against the Respondent as the registered proprietor as at the date of filing the Originating Summons, rendering the claim premature, incompetent, and statute-barred.
- (9) THAT the Originating Summons is procedurally defective for seeking declaratory and transfer orders over an undefined and unsurveyed portion of registered land.
- (10) THAT the Applicant seeks ownership and transfer of a specific portion measuring 0.09 hectares out of L.R. No. KISUMU/KOGONY/3437 without pleading or annexing any survey plan, mutation form, beacon certificate, coordinates, or boundary delineation capable of identifying the alleged portion.

- (11) THAT under Section 18 of the Land Registration Act, 2012, and the Survey Act, Cap. 299, this Honourable Court lacks jurisdiction in Originating Summons proceedings to grant ownership or transfer orders over an unascertained portion of registered land, rendering the reliefs sought vague, unenforceable, and incapable of execution.
- (12) THAT the Originating Summons improperly invokes the court's jurisdiction by seeking to defeat or override a registered and indefeasible title without complying with the statutory safeguards under the Land Registration Act, 2012.
- (13) THAT although the Applicant pleads alleged prescriptive or overriding interests to defeat the Respondent's title, no fraud, misrepresentation, illegality, or procedural impropriety is pleaded against the Respondent's registration as required under Sections 26 and 28 of the Land Registration Act.
- (14) THAT any challenge to a registered proprietor's indefeasible title or assertion of overriding interests

requires a plenary suit by way of plaint, permitting full evidentiary interrogation, and cannot be properly determined through summary originating summons proceedings under Order 37 of the Civil Procedure Rules.

(15) THAT the Originating Summons is therefore incompetent, an abuse of the court process, and discloses no triable issue under the Limitation of Actions Act when read alongside the statutory doctrine of indefeasibility of title.

(16) THAT the Originating Summons dated 5th December 2025 ought to be struck out with costs to the Respondent.

3. In reply to the Notice of Preliminary objection, the Applicant filed Grounds of Opposition dated 5<sup>th</sup> March, 2026, that;

a) The Notice of Preliminary Objection is misconceived, incompetent, and an abuse of the court process as it raises matters of fact requiring evidentiary proof and judicial evaluation and therefore does not meet the threshold of a proper preliminary objection.

- b) That the Respondent's objection invites the court to interrogate disputed facts, including the nature of the Applicant's occupation, the alleged permissive entry, the effect of the 2014 agreement, the date of accrual of adverse possession, and the alleged interruption of possession, all of which can only be determined after hearing evidence.
- c) That a preliminary objection must raise a pure point of law capable of disposing of the suit without reference to contested facts, yet the Respondent's objection is predicated on contested factual allegations which require proof through viva voce evidence.
- d) That the Applicant's claim for adverse possession of properly brought by way of Originating Summons pursuant to the provisions of Section 38 of the Limitation of Actions Act and Order 37 Rule 7 of the Civil Procedure Rules, and the same procedure has consistently been upheld by Kenyan courts.
- e) That the assertion that the Applicant's claim is contradictory or mutually exclusive is legally

untenable, as the law recognizes that entry pursuant to a failed sale agreement may subsequently crystallise into adverse possession once the statutory period expires and the occupation becomes hostile.

- f) That the Respondent's argument that time cannot run against a deceased proprietor is legally erroneous, since time for purposes of adverse possession runs against the registered owner of land and continues notwithstanding succession proceedings or transmission of title.
- g) That the Respondent's contention that the suit should have been commenced by way of a plaint rather than Originating Summons is without legal basis, as adverse possession claims are specifically provided for under Order 37 of the Civil Procedure Rules.
- h) That the alleged defects relating to survey details, acreage or parcel description are matters of evidence and cannot be determined as preliminary issues of law.

- i) That the objection improperly seeks to invite the court to determine the merits of the substantive adverse possession claim at a preliminary stage, contrary to established jurisprudence discouraging the striking out of suits where triable issues exist.
  - j) That the Respondent's Preliminary Objection is therefore devoid of merit and ought to be dismissed with costs.
4. Vide directions given on 3<sup>rd</sup> March, 2026, the Preliminary Objection was heard by way of written submissions. Written submissions dated 9<sup>th</sup> March, 2026, were filed by the firm of Okal Odero & Company Advocates on behalf of the Respondent, and written submissions dated 5<sup>th</sup> March, 2026, were filed on behalf of the Applicant.
5. I have considered the grounds of the Notice of Preliminary Objection, the grounds of opposition, and the written submissions filed. The test as to whether an objection amounts to a preliminary objection was set in the case of *Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors (1969) E. A 696* where it was held that a preliminary objection must be based on pure points of law, must arise from the

pleadings, may dispose of the suit/case 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.

6. The Originating Summons is challenged on the grounds that the basis of entry onto the suit land was a contract of sale; therefore, the entry was permissive and cannot form the basis of adverse possession. The Applicant contends that those are matters that require evidentiary interrogation to establish the nature of the Applicant's possession, the circumstances under which the occupation of the suit land commenced, the duration and continuity of such possession, and the factual basis of the claim.

The suit is also challenged on the grounds that the claim of adverse possession is time-barred.

7. In the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR*, the court held that;

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a

trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court.”

Further that

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.”

8. I have considered the issues raised in the preliminary objection and find that they are issues beyond the realm of a preliminary objections which require to be ascertained through the production and analysis of evidence. The Preliminary Objection is declined. The suit shall proceed to hearing and determination on merit.

Costs of the preliminary objection shall be in the main suit

Orders accordingly.

**Ruling dated and signed at Kisumu, read this 14<sup>th</sup> day of May, 2026, virtually, through Microsoft Teams online application.**

**E. ASATI,  
JUDGE.**

**In the presence of**

Atika: Court Assistant

Ochieng for Obach for the Plaintiff.

Okal for the Respondent/applicant in the P.O.