



Ondiek v Ondiek (Land Case E537 of 2024) [2025] KEELC 5386 (KLR) (18 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

LAND CASE E537 OF 2024

CG MBOGO, J

JULY 18, 2025

BETWEEN

CONCELIA AOKO ONDIEK PLAINTIFF

AND

JOHN PAUL ONDIEK DEFENDANT

RULING

1. Before this court for determination is the notice of preliminary objection dated 25th February, 2025 filed by the defendant challenging the notice of motion dated 7th February 2025, and the plaint dated 17th December, 2024 on the grounds that the entire suit is incompetent, sham, vexatious, malicious and an abuse of the due process of the court, and that it is time barred by dint of Section 7 of the *Limitation of Actions Act* having been instituted 13 years from 9th September, 2011, when the late Archbishop Stephen Alloys Ondiek Oluoch died.
2. The notice of preliminary objection was canvassed by way of written submissions. The defendant filed his written submissions dated 2nd April 2025. He submitted that the suit property Nairobi/Block/72/2230 forms part of the deceased estate that had been allocated to Jane Atieno Ondiek, Margaret Nyakach Ondiek, Solomon Ondiek John Paul Ondiek Samson Ondiek, Elias Ondiek, Willys Ondiek and Henry Ondiek in the will dated 29th November, 1994. The defendant relied on the case of *Sobanladurgadass Rajput and another v Divisions Integrated Development Programmes Co. Ltd* [2021] eKLR.
3. The plaintiff filed written submissions dated 27th May, 2025 where she raised one issue for determination which is whether this suit is time barred by dint of Sections 7 and 9 [2] of the *Limitation of Actions Act*. On this issue, the plaintiff submitted that her right of action was not prompted by the death of the Stephen Alloys Ondiek Oluoch as no application had been filed in any court challenging her ownership as it formed part of the estate of the deceased. Instead, the first application was filed on 2nd December, 2024 which is the time when time began to run. While relying on the case of *Cornella Nabalanga Nabwana v Edward Vitalis Akuku & 2 others* [2017] eKLR, the plaintiff submitted that



the deceased was not the last person to be entitled to land because the right of survivorship promoted her to the pedestal when her husband died. Further, that notwithstanding the provisions of the deceased's written will, the right of survivorship takes precedence in this case and entitles her to fight for her interest in the said land. Further reliance was placed in the cases of *Estate of Job Ndunda Muthike [deceased]* [2018] eKLR, and *Yellow Horse Inns Limited v Mitar Consultants Limited* [Environment and Land Case E431 of 2022] [2024].

4. I have considered the notice of preliminary objection and the written submissions filed by both parties. I am of the view that the issue for determination is whether the preliminary objection has merit.
5. Law, J.A. in *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696 stated as follows: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”

6. Also, in the case of *John Musakali vs. Speaker County of Bungoma & 4 others* [2015] eKLR, it was held that: -

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”

7. Further, Ojwang J [As he then was] in *Oraro v Mbaja* [2005] KLR 141 where after quoting the statement of Law, JA. in the *Mukisa Biscuits case* [supra] went on to state that: -

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

8. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose off the issue that is before court without going to trial and lastly, the same ought to stem from pleadings and not outside of them.
9. The defendant is challenging the suit on the grounds that it is time barred by virtue of Sections 4, 7 and 9 of the *Limitation of Actions Act* having been instituted 13 years after the death of Stephen Alloys Ondiek. In determining whether the suit is statute barred, this court will confine itself to the pleadings only and nothing outside of that. I say so because, the plaintiff has filed a replying affidavit and grounds



of opposition in 'response' to the preliminary objection, a procedure which is unknown in standard practice.

10. In paragraphs 3 and 4 of the plaint dated 17th December, 2024, the plaintiff pleaded that the defendant in the suit no. HCCC Succession Cause No. 44 of 2012 filed a notice of motion dated 2nd December, 2024 challenging the validity of title purporting that the same forms part of the estate of the deceased. She further stated that she was and still is the bona fide registered owner of the suit property having been issued with a title deed on 7th March, 2012. She further stated that the validity of the title cannot be heard and determined through the succession cause and hence her approach to this court.
11. As I have understood these pleadings, the plaintiff seeks to assert ownership of her right over the suit property which has been prompted by the application dated 2nd December, 2024 filed at the High Court. From the plaint, it is clear that the cause of action did not arise at the time of death Stephen Alloys Ondiek as alleged. In fact, the defendant has not admitted or disputed this fact to enable the court assess the point of departure on issues which are undisputed.
12. It is my finding that the notice of preliminary objection dated 25th February, 2025 is thus misplaced, and must fail. The same is hereby dismissed with costs in the cause.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 18TH DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Odek for the Plaintiff

