



**Odula & another v Oricho (Environment and Land Case
E021 of 2024) [2025] KEELC 5353 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND CASE E021 OF 2024**

**AE DENA, J
JULY 17, 2025**

BETWEEN

MICHAEL ODONGO ODULA 1ST PLAINTIFF

JOSEPH OKUMU 2ND PLAINTIFF

AND

CHRISTOPHER OKELLO ORICHO DEFENDANT

RULING

1. This ruling is the subject of a Notice of Preliminary Objection dated 17/01/2024 filed on 4/2/2025 and the application dated 2nd September 2024. Directions in this regard were issued by this court on 11/02/2025 that the two shall be canvassed simultaneously.

The Preliminary Objection

2. The court will render itself on the preliminary objection since it is capable of disposing of the proceedings if merited. The preliminary objection is premised on the following verbatim grounds; -
 1. That this case as crafted and filed is incompetent and bad at law
 2. That the verifying affidavit in support of the suit is incurably defective
 3. That the plaintiffs lacks locus standi to bring this suit since they are not the legal administrators of the estate of Elkana Odula.
 4. That the defendant is not the legal administrator of the estate of Johana Oricho hence this suit incompetently brought against him.



5. That the suit as crafted is resjudicata as the same has been litigated in Siaya Succ Misc E079 of 2024 which court rejected the land sale agreement attached hereto, hence this suit may appear to be on appeal
 6. That the suit raises no plausible reason for cause of action against the defendants
 7. The entire suit is framed on falsehood
 8. That the suit is frivolous, vexatious, bad at law, incompetent and an abuse of the court process.
3. The preliminary objection was canvassed by way of written submissions. The defendants' submissions are dated 17/01/2025. The Plaintiff submissions are undated but filed on 20/2/2025 and I will consider therefrom responses relevant to the preliminary objection.

Analysis and Determination of the Preliminary Objection

4. I have considered the grounds forming the preliminary objection and the submissions of the parties. Two issues stand out for determination 1) Is the preliminary objection properly raised and 2) If yes whether it is merited to warrant the striking out of the plaintiffs suit.

Whether the preliminary objection is properly raised

5. The threshold of a preliminary objection was set out by the Court of Appeal in the case of Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696 as rightly cited by the defendant. Law JA at page 700 stated;

“... 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 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.”

6. According to the Black Law Dictionary a Preliminary Objection is defined as:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

7. The grounds upon which the preliminary objection has been raised are numerous and which ought to be reviewed by the process of elimination against the foregoing criteria.
8. But before I delve into the said review, I note that the defendant has summed up the preliminary objection as questioning the locus standi of the plaintiffs to file these proceedings. Firstly, it is submitted that the defendant is not the administrator of the estate of Johana Oricho for the reason that they have not taken out letters of administration as required by section 82 of the *law of Succession Act*. That the search annexed by the plaintiff shows that the suit is registered under the name of the said Johana Oricho. Reference is also made to the provisions of Section 2 of the *Civil Procedure Act*. Secondly it is averred that even the plaintiffs lack locus standi to institute the proceedings based on the agreement entered by their deceased father.



9. It is pertinent to look into the meaning of locus standi and whether it can suffice as a preliminary objection. the term locus standi was defined in Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, as follows: -

“ the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
10. In Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730 it was held that’;

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section 82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone”
11. Therefore property constituting the estate of a deceased cannot be dealt upon without grant of letters of administration which empower anyone to pursue issues with regards to the estate.
12. The preliminary objection on the issue of locus could therefore dispose of this suit at a preliminary stage. It is clear that locus standi is a primary point of law almost similar to that of jurisdiction.
13. I have perused the plaint dated 2/09/2024. At paragraph 2 thereof it is pleaded that the plaintiffs father (Elkana Odula) who is now deceased started living on the suit property and built his home in 1985. The plaint keeps referring to the family of the said deceased. At paragraph 6 it is averred that the defendant has since been reluctant to transfer the land to the family of the late Elkana Odula. Paragraph 8 reiterates that it is the Late Elkana Odula who first settled in the land.
14. Clearly from the foregoing the plaintiffs are suing as beneficiaries of their late father Elkana Odulo. In this regard they would have no locus standi to commence these proceedings in the absence of a grant of letters of administration or grant adlitem. This is a requirement of section 82 (a) of the Law of Succession Act. The suit would not stand. In this regard I’m further emboldened by the holding in the case of Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, to the effect that the lack of capacity to sue or be sued renders the suit incompetent. This court does not wish to circumvent the laid down law on the issue of locus standi, it is this court’s finding that the Plaintiffs did not have the capacity to sue and the suit is thus incompetent.
15. The defendant urges that it is not the legal administrator of the estate of Johana Oricho hence this suit is incompetently brought against him. They urge that the suit property is in the name of Johana Aricho (deceased) I have noted the averments in paragraph 5 of the plaint which confirm the suit property is in the name of the said Johana Aricho and I have also seen the green card and searches in the bundles.
16. I have noted that the plaintiff has sued Christopher Okello Oricho as the next of kin and or administrator to the estate of the late Johana Oricho deceased. This is an issue that is being contested and can only be ascertained by looking at the facts of the case and whether it could be an issue of joinder and not locus. An issue of citation proceedings has been raised which will necessitate review of evidence. On this point the preliminary objection has not been properly raised.
17. But what about the limb of adverse possession which seems to feature in the claim. Paragraph 7 of the plaint is pertinent in this regard. It is averred that the plaintiff went to Christopher Okello Oricho to transfer a portion of the land as per agreement/years of adverse possession staying on the land.



Paragraph 12 and 13 is also pertinent as it raises adverse possession. Prayer A of the plaint speaks clearly to adverse possession.

18. Based on the foregoing the suit would be sustainable for purposes of determination of the plea of adverse possession of the plaintiffs in their own capacity on merits.
19. The preliminary objection posits that the present proceedings are res judicata Siaya Succ Misc E079 of 2024 where the court rejected the land sale agreement. I will be very brief on this ground. This preliminary objection has not been properly raised on this point. A plea of res judicata can only be raised by way of a proper application where the ground can be argued and the relevant proceedings attached for comparison. This would therefore entail ascertainment of the facts and ceases to be a pure point of law. See the case of Kimani & 4 Others Vs. County of Transzoia & Another (2014)eKLR.
20. For purposes of the doctrine of res judicata it is the finding of this court that the preliminary objection is not properly raised and cannot be sustained on this point.
21. Further the verifying affidavit in support of the suit is stated to be incurably defective for being jointly sworn by the two plaintiffs. The court has not been led to any legal provision that outlaws an affidavit that is jointly sworn.
22. Moreover even assuming there was a defect in the verifying affidavit, the subject of whether a defective affidavit would warrant a striking out of a suit has been a subject of numerous judicial pronouncements where it has been held that it would not render the entire suit defective as follows; -
23. In Muli v China Road Bridge and Corporation (Civil Appeal 7 of 2020) [2024] KEHC 3104 (KLR) (7 March 2024) (Ruling) the court rendered thus'-

‘Thus although the Court does have discretion to strike out defective pleadings, such defective affidavits are not necessarily fatal and the Court is at liberty to grant a party the opportunity to file a complaint Affidavit within a specified time.

I find that the defective nature of the Verifying Affidavit to this suit is not fatal to the entire suit. I am fortified in this finding by the provisions of Article 159(2) Constitution of Kenya which exhorts Courts to administer substantive justice without undue regard to technicalities.’

24. In Benel Development Limited v First Community Bank Limited [2021] eKLR the court observed thus; -

‘In my view the failure to commission the Verifying Affidavit though indeed rendering the Plaint defective does not render it fatally so. Order 4 Rule 2(6) uses the word “may” giving the Court the discretion on whether or not to strike out a Plaint which is non-compliant. In deciding upon a similar issue in Agricultural Finance Corporation & Another –Vs- Drive-In Estate Development Ltd [2006]eKLR Hon. Justice Azangalala (as he then was) held as follows:-

“So the only issue for determination is whether or not failure to file the compliant verifying affidavit within the period allowed by the Court is fatal and should result in the striking out of the Plaint. The requirement for a Verifying Affidavit



is contained in Order VII rule 1(2) of the Civil procedure Rules. Sub-rule (3) of the same rule reads:-

“The Court may of its own motion or on the application of the Defendant order to be struck out any Plaintiff which does not comply with subrule (2) of this rule.”

In my view the use of the work “may” shows that the Court has a discretion as to whether or not to strike out a Plaintiff which is not accompanied by an affidavit verifying the correctness of the averments contained in the Plaintiff.” [Emphasis added]

25. The upshot of the foregoing is that the preliminary objection partly succeeds only to the extent that the plaintiffs have not demonstrated they are administrators of the estate of their father Elkana Odula. The other grounds are not properly raised as pure points of law and must fail. However, the suit is sustainable on the claim of adverse possession as already elucidated hereinbefore.

Application Dated 2nd September 2024

26. The application dated 2nd September 2024 is filed by the Plaintiff seeking the following orders; -
1. That this court issue declaration that the applicants here are beneficial owners of parcel portion of land North Gem/Asayi/154 measuring (0.4 Ha) by dint of adverse possession
 2. The defendants to execute the necessary documents to effect the transfer of the said 0.4Ha parcel portion of land North Gem/Asayi/154
 3. In the case the family of Christopher Okello Oricho family or the family of late Johana Oricho find it hard or refuse to give the land, then they pay a considerable amount of Kshs 2,700,000/- as per the valuation report annexed to the supporting affidavit
 4. That the court do issue a temporary injunction against the defendant or his agents or his employees from interfering or disposing of the parcel North Gem/Asayi/154 pending hearing and determination of the main suit. In the alternative Status Quo to be maintained
 5. That costs be in the course
27. The above application is supported by the affidavit of Joseph Okumu and Michael Odongo Odula and the grounds on its face which the court has read and considered.
28. The application was canvassed by way of written submissions. The plaintiffs submissions were filed on 20/02/2025. The defendants submissions focused on the preliminary objection which I have already dealt with.
29. The main issue for determination is whether the orders sought should issue.
30. Having considered the prayers sought above it is clear that the orders sought and specifically 1,2 and 3 are orders that cannot be granted at interlocutory stage. The consequences of granting the said orders would amount to determining the suit to its finality at interlocutory stage. Procedurally the parties must be heard at a full hearing where the plaintiff will be required to prove their case to the required standard. What I see the plaintiffs doing is more less the equivalent of a litigant seeking summary judgement on a matter for adverse possession which is not appropriate.
31. In view of the above the submissions which seem to argue the main case have been not been considered by this court.



32. The application also seeks orders of injunction and in the alternative the status quo be maintained as highlighted hereinabove. I will proceed on the basis of whether it is necessary to have the status quo maintained.
33. What is an order of status quo and the purpose it serves. This has been the subject of various judicial pronouncement as seen in the following cases; -
34. In *TSS Spinning & Weaving; Company Ltd Vs Nic Bank Limited & another* [2020] e KLR, the court expounded on the purpose of a status quo order as follows:
- “In essence therefore, a status quo order is meant to preserve the subject matter as it is/existed, as at the day of making the order. Status quo is about a court of law maintaining the situation or the subject matter of the dispute or the state of affairs as they existed before the mischief crept in, pending the determination of the issue in contention.”
35. In *Kenya Airline Pilots Association (KALPA) Vs Co-operative Bank of Kenya Limited & another* [2020] e KLR, the purpose of a status quo order was explained as follows:
- “..... By maintaining the status quo, the court strives to safeguard the situation so that the substratum of the subject matter of the dispute before it is not so eroded or radically changed or that one of the parties before it is not so negatively prejudiced that the status quo ante cannot be restored thereby rendering nugatory its proposed decision.”
- Apart from preserving the substratum of the suit, the status quo orders will prevent prejudice as between the parties herein pending the hearing and determination of the main suit. I am guided by the holding by the Court of Appeal in the case of *Mugah Vs Kunga* [1988] KLR 748, which upheld the practice of issuing status quo orders in land matters thus; -
- “Status quo orders should always be issued for purposes of preserving the subject matter. This court’s practice direction vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the court the leeway and discretion to make an order for status quo to be maintained until determination of the case.”
36. In the present case it is the plaintiffs case they have lived on a portion of the suit property for over 30 years. This is not refuted by the defendants except the circumstances under which they came to be in possession. I have seen photos of structures alleged to be on the portion attached to the valuation report. I’m aware that at this juncture the court must refrain from delving into the merits of the case. I think in the circumstances the balance of convenience tilts in favor of preserving the situation as it exists on the ground from the date herein.
37. The following orders therefore issue to dispose of Notice of Preliminary Objection dated 17/01/2024 filed on 4/2/2025 and the application dated 2nd September 2024.
- i. The preliminary objection partly succeeds on the ground of the plaintiffs lack of locus standi to file these proceedings as beneficiaries of the estate of Elkana Odula. The rest of the grounds fail on the basis that they are not properly raised
 - ii. The case shall be determined on merit on the claim of adverse possession.



- iii. The status quo on the portion of land North Gem/Asayi/154 measuring (0.4 Ha) occupied by the plaintiffs shall be maintained pending hearing and determination of the main suit.

DELIVERED AND DATED AT SIAYA THIS 17TH DAY OF JULY 2025

HON. LADY JUSTICE A.E. DENA

JUDGE

17/07/2025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Joseph Okumu 1st plaintiff in person

Michael Odongo 2nd plaintiff in person

Christopher Oricho Defendant in person

Court Assistant: Ishmael Orwa

