



**Gatingi & 19 others v Sanghani (Environmental and Land Originating
Summons E016 of 2023) [2024] KEELC 335 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E016 OF 2023**

**JA MOGENI, J
JANUARY 31, 2024**

BETWEEN

PETER GATINGI 1ST APPLICANT
VINCENT OBIERO AYAYE 2ND APPLICANT
NAHASON MZEE 3RD APPLICANT
JUMA MWENYE JAKA 4TH APPLICANT
GEDFFREY MUHINDI 5TH APPLICANT
NAHASHON KEMBERO OMBUYA 6TH APPLICANT
GRACE GITERE 7TH APPLICANT
GILBERT MARAKWEN 8TH APPLICANT
KENNEDY KAUNDA 9TH APPLICANT
JUSTINE ATOSI 10TH APPLICANT
MBENEKA NZIKI MAINA 11TH APPLICANT
MESHACK ONGERA KIRAUMA 12TH APPLICANT
EDWIN ONGERA ARIGA 13TH APPLICANT
SHADRACK OKOTH NYAMUUA 14TH APPLICANT
FRANCIS LIVINGSTONE UMIA 15TH APPLICANT
SEBASTIAN ZIRO KEHIO MUTUKU 16TH APPLICANT
HAMEDUL NYONGESA 17TH APPLICANT
ALICE NDUNGE MUNUVE 18TH APPLICANT
FRED OKINDO 19TH APPLICANT



GEOFFREY NYABINGE OMBAYE 20TH APPLICANT

AND

RAVJI KARSAN SANGHANI RESPONDENT

RULING

1. This Ruling is in respect of an application dated November 3, 2023 brought by way of notice of motion by the plaintiffs /applicants seeking for orders of temporary injunction restraining the defendant/respondent and or his representative, agents or assigns from interfering with all that parcel LR No 209/105989 pending the hearing and determination of this application. The applicant further sought for a temporary injunction restraining the defendant/respondent and or his representative, agents or assigns from interfering with all that parcel LR No 209/1011091 pending the hearing and determination of this suit.
2. Upon service of the said application the defendant/respondent filed a notice of preliminary objection, replying affidavit and grounds of opposition all dated November 20, 2023 seeking to have the applicant's suit struck out for being incurably defective, frivolous and vexatious because it contravened the provisions of Sections 4 and 7 of the *Limitation of Actions Act*.
3. By consent directions were taken on the 23/11/2023 for both the application dated 3/11/2023 and the preliminary objection dated the 20/11/2023 to be disposed of through written submissions pursuant to which parties filed their written submissions.
4. Since the respondent filed the preliminary objection I will dispose of the preliminary objection before I deal with any other issue since by so doing there are instances where the findings of the preliminary objection have disposed of both the application and the main suit. The respondent has raised a Preliminary Objection to have the entire suit dismissed on the following grounds:
 - a. The originating summons is incurably defective for failure to annex an abstract of title as mandatorily required by Order 37 Rule 7 (2) of the *Civil Procedure Code, 2010*.
 - b. This honorable court cannot therefore entertain any suit and/or application for injunction by the Applicants on the basis of the originating summons' incompetence.
 - c. The Environment and Land Court in *Nicholas Oracha Omeny & another v Richard Olunga Migani & another* [2018] eKLR has re-interested as follows:

“The originating summons filed herein does not have an extract of title as an annexure. And since the requirement to annex such extract is mandatory, failure to annex it makes the origination summons incompetent” (Emphasis added)
 - d. This suit is fatally incurable by dint of misjoinder owing to the fact that the respondent does not own the properties mentioned in the application and originating summons.
5. Through the originating summons dated 3/11/2023 the plaintiffs' claim is for the portion of land measuring approximately three quarters of an acre which they have identified as LR No 209/10598. They claim that ownership had accrued by way of prescription and/or adverse possession by dint of section 38 of the *Limitation of Actions Act* (Cap22)



6. Together with the originating summons the plaintiffs through Auta Nyakundi & Company Advocates also filed an application dated 3/11/2023 seeking orders of temporary injunction until the hearing of the application and the suit.
7. By a 20-paragraphed replying affidavit sworn on 20/1/2023 and duly filed in court, the respondent termed this application and suit as being deficient, premature and fatally defective thus, 'sought its dismissal with costs. That the plaintiffs' claim is null and void, mischievous and an abuse of the process of the court. He therefore, denied the claim in its entirety.
8. The respondent stated that he is a stranger to the suit properties mentioned by the applicants since the copy of certificate of title for the property known as LR 209/11091 show that the owner is Peter Gakunu. He also averred that he owns Nairobi/Block 67/96 and LR 209/12106 all situated in South B within Nairobi County. That he co-owns LR 209/12106 with others who are not before the court and namely Navtamlal Ravji Sanhgai and Harshard Kumar Ravji Sanghai and any orders issued will be tantamount to condemning the co-owners unheard. He attached a copy of the ownership document at page 9.
9. He further averred that since the transfer was done in March 2022 the plaintiffs cannot make a claim for adverse possession since it is just one year, it fails to satisfy the 12 year period. Further it was his statement that the plaintiffs have been squatters on the land with temporary structures with no proprietary rights or a claim on and over the land.
10. Further that there is no open and notorious use of the suit property as alleged by the applicants since they have encroached on less than 0.001 acres pursuant to an informal licence and for this the respondent granted them permission to use the small portion to set up informal structures. That any claim to the small portion should have been brought over 12 years ago if it was to be considered to be valid.
11. In response to paragraphs 3-5 of the supporting affidavit the respondent avers that the demolitions and evictions depicted therein are not from his parcel of land but from adjacent piece of land. Further that there are squatters who have admitted to encroaching as evidenced by the email from Francis Mwankamba which is a page 21 of the bundle.
12. In his submissions dated 24/01/2024 learned counsel for the defendant Mr Gideon Solonka referred to the grounds of the preliminary objection, grounds of opposition and the originating summons initiated under Section 38 (1) of the *Limitation of Actions Act* (Cap 22 Laws of Kenya) and Order 37 Rule 7 of the *Civil Procedure Rules, 2010*. He submitted that since an extract of title to the suit land is not annexed to the originating summons, the same is not merited hence, should be struck out with costs.
13. To buttress his submissions, counsel cited earlier in the preliminary objection the case of *Nicholas Oracha Omeny & another v Richard Olunga Migan & another* [2018] eKLR. In this case the court held that failure to attach an extract of the certificate of title to the originating summons (OS) meant that the OS was incompetent.
14. The other cases cited were *Serab Muthoni Kimani v John Wanyoike Gerald* [Nairobi ELC No 791 of 2013 (OS)] and *Francis Gitonga Macharia v Muiruri Waitbaka* [1998] eKLR.
15. As at the time of writing this ruling, the plaintiff/applicant had not filed any submissions in court but since parties are bound by their pleadings I will draw from what the applicant filed in court.
16. I have duly considered the preliminary objection, the originating summons, the replying affidavit and the submissions filed by the defendant/respondent. At this stage there is only one issue for



determination which is whether the originating summons is incurably defective and whether it should be struck out on the ground of preliminary objection.

17. The Law under Order 37 Rule 7 of the [Civil Procedure Rules, 2010](#) provides as follows:
 1. An application under section 38 of [Limitations of Actions Act](#) shall be made by originating summons.
 2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. (Emphasis added)
 3. The Court shall direct on whom and in what manner the summons shall be served.
18. On the first ground, the originating summons is brought pursuant to Section 38 (*supra*) regarding registration of title to land or easement acquired under the act. Clearly, the section refers to section 37 of the same act in regard to application of the Act to registered land under inter alia, the [Registered Land Act](#) Chapter 300 Laws of Kenya now repealed by Section 109 of the [Land Registration Act, 2016](#) (2012) (The LRA herein).
19. In the case of [Wainaina v Murai and others](#) (1976-80) KLR 289, Simpson J (as he then was) made an observation which I endorse as it is relevant hereto. He held in part:

“The land in question is registered under the [Registered Land Act](#), an Act cited in Section 37.....”
20. At paragraph 3 of their supporting affidavit to the originating summons, the plaintiffs deposed that they have been on the portion of Land which they have identified as LR 209/10598 for a period of 30 years but that the respondent has now started trespassing.
21. On his part, the respondent stated that he only lays a claim of 0.001 acres to the property being claimed by the applicants which he allowed them to use pursuant to an informal licence and for this he granted the plaintiffs permission to use the small portion upon which they set up informal structures. Apart from this he has no other claim to the suit property. The proprietorship documents he annexed to the replying affidavit refer to LR 209/12106 and Nairobi/Block 67/96.
22. Both the plaintiffs and the respondent refer to different parcels of land except for the admission of the respondent to the shared 0.001 acres of LR 209/10598 to which he allowed the applicants permission to use through what he calls an informal licence.
23. I see that the plaintiffs quoted Article 159 of [the Constitution](#) in their originating summons. Now, this Article provides that justice shall be administered without undue regard to procedural technicalities. It is one of the guiding principles of judicial authority in Kenya. The Court of Appeal pronounced itself on the same in the case of [Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri](#) (2014) eKLR, thus:

“Article 159 (2) (d) of [the Constitution](#) stipulates that justice shall be administered without undue regard to procedural technicalities. This is a court of law and a court of equity;The court is bound to deliver substantive rather than technical and procedural justice...”
24. Justice Anne Omollo in the case of [Ismael Busolo Watuko v Joseph Busolo & 3 others](#) (2013) eKLR also held that the applicants could not therefore invoke Article 159 of [the Constitution](#) when it was clear they made no effort in applying the law. She further held that failure to annex the certified extract of the title to the land in question was inexcusable hence the originating summons was incompetent.



25. The respondent has refuted claims by the applicant that he is the owner of the suit property mentioned in the originating summons and attached certificates of title that show different parcels of land. The applicants did not attach any proof that the respondent owned the LR 209/10598. This means that the ownership of the suit land is therefore contested and there is no document produced by either party to show proof of ownership.
26. It is therefore laughable that the applicants can lay claim to a property they have no idea who owns the said piece of land. They have gone further and sued a respondent who claims to own completely different parcels and despite his protesting at misjoinder the applicants have gone ahead to insist that he owns a parcel he lays no claim to. I agree with the person who coined the phrase “desperate times call for desperate measures”. Even if the plaintiffs desperately want to own a piece of Nairobi as seems to be the craze in Kenya today then look for a piece that you can lay a legal claim to.
27. Kenyans think they must own land through whatever means, by force or by fire, no matter what!. This is ridiculous.
28. In the case of *Kweyu v Omuto* (1990) KLR 709, the court of Appeal restated that Order 37 Rule 7 (*supra*) is a mandatory legal requirement. I will also make invite the parties to this suit to consider and refer to the case of *Symon Gatutu & 587 others v EA PortLand Cement* (2011) eKLR, *Douglas Mwangi Muteru v Victoria Mere Dzilla* (2017) eKLR and *John Wambura & Anor v Anakletus Wambura* (2017) eKLR.
29. This court is extremely conscious of Article (50) (1) of *the Constitution* of Kenya, 2010 with regard to right to fair hearing. Admittedly it is one of the fundamental rights and freedoms that shall not be limited as provided under Article 25(c) of *the Constitution*.
30. Be that as it may, the applicant sought to establish that the respondent is the registered owner of the suit land. Under section 26(1) of the *Land Registration Act*, 2012, a certificate of title is to be held by the court to be conclusive evidence of proprietorship. At the onset, the proprietorship of the suit land is unclear and doubtful as a certified extract of the title to the land has not been annexed to the applicants’ affidavit. I find the omission to be fundamental in nature which is not curable under Article 159(2) (d) of *the Constitution* of Kenya, 2010.
31. The term “Title” referred to under the said legal provisions, is defined in the *Black’s Law Dictionary, 10th Edition* at page 1712 *infra*;
- “Legal evidence of a person’s ownership rights in property, an instrument (such as a deed) that constitutes such evidence.”
32. From the material availed to the court it is clear that the ownership of the suit property is under great challenge herein. I do agree with the decision made by A.K Kaniaru J, in *John Wambura case (supra)* where he stated that:
- “The originating summons filed herein does not have an extract of title as an annexure. And since the requirement to annex such extract is mandatory, failure to annex it makes the originating summons incompetent.” (Emphasis added).
33. Conclusively therefore, I find the preliminary objection merited and this being the case it also resolves the issue of the application which cannot see the light of day since the originating summons as filed, the above cited authorities and submissions by learned counsel for the respondent leaves no room for



its survival. I am therefore persuaded that the originating summons is faulty and I will proceed and uphold the respondent's preliminary objection dated 20/11/2023.

34. Having so found, I consider the other issues raised by the respondent in the notice of preliminary objection moot.
35. The upshot of all this is that I strike out the Originating Summons dated 20/11/2023 with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31st DAY OF JANUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of:-

Ms. Mwangi for the Advocate/Applicant

Mr. Pareno for the Respondent

Ms. Caroline Sagina: Court Assistant

