



**Oyugi & 2 others v Mbom (Sued as the administrator of the estate of Lawrence Ongadi Ongadi - Deceased) & another (Environmental and Land Originating Summons E014, E016, E024, E025, E026 & E027 of 2023 (Consolidated)) [2024] KEELC 5691 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5691 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS**  
**E014, E016, E024, E025, E026 & E027 OF 2023 (CONSOLIDATED)**  
**SO OKONG'O, J**  
**JULY 24, 2024**  
**SUED AS THE ADMINISTRATOR OF**  
**THE ESTATE OF LAWRENCE ONGADI ONGADI-DECEASED**

**BETWEEN**

**EDWARD OCHIENG OYUGI ..... APPLICANT**

**AND**

**LUCAS JIEYI MBOM (SUED AS THE ADMINISTRATOR OF THE ESTATE OF LAWRENCE ONGADI ONGADI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**CORNELLA ATIENO JIEYI ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E016 OF 2023**

**BETWEEN**

**JOSHUA OTIENO ONDU ..... APPLICANT**

**AND**

**LUCAS JIEYI MBOM (SUED AS THE ADMINISTRATOR OF THE ESTATE OF LAWRENCE ONGADI ONGADI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**. CORNELLA ATIENO JIEYI ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E024 OF 2023**



**BETWEEN**

**GORDON OTIENO OYUGI ..... APPLICANT**

**AND**

**LUCAS JIEYI MBOM (SUED AS THE ADMINISTRATOR OF THE ESTATE OF  
LAWRENCE ONGADI ONGADI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**. CORNELLA ATIENO JIEYI ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2023**

**BETWEEN**

**MILKA ANYANGO ODHIAMBO ..... APPLICANT**

**AND**

**LUCAS JIEYI MBOM (SUED AS THE ADMINISTRATOR OF THE ESTATE OF  
LAWRENCE ONGADI ONGADI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**. CORNELLA ATIENO JIEYI ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E026 OF 2023**

**BETWEEN**

**SAMWEL OMONDI OYUGI ..... APPLICANT**

**AND**

**LUCAS JIEYI MBOM (SUED AS THE ADMINISTRATOR OF THE ESTATE OF  
LAWRENCE ONGADI ONGADI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**. CORNELLA ATIENO JIEYI ..... 2<sup>ND</sup> RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E027 OF 2023**

**BETWEEN**

**MATHAYO OKETCH OYUGI ..... APPLICANT**

**AND**

**LUCAS JIEYI MBOM (SUED AS THE ADMINISTRATOR OF THE ESTATE OF  
LAWRENCE ONGADI ONGADI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**CORNELLA ATIENO JIEYI ..... 2<sup>ND</sup> RESPONDENT**



## RULING

1. Edward Ochieng Oyugi, Joshua Otieno Ondu, Gordon Otieno Oyugi, Milka Anyango Odhiambo, Samwel Omondi Oyugi and Mathayo Oketch Oyugi (hereinafter referred to only as “the Applicants”) filed the above suits which have been consolidated for this ruling against Lucas Jieyi Mbom and Cornella Atieno Jieyi as common Respondents through separate Originating Summonses seeking declarations that they have acquired all those parcels of land known as Title Nos. Kisumu/Got Nyabondo/303, Kisumu/Got Nyabondo/225, Kisumu/Got Nyabondo/308 and Kisumu/Got Nyabondo/708 (hereinafter together referred to as “the suit properties”) by adverse possession. The consolidated suits (Originating Summons) were all brought under Sections 7 and 38 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya and Order 37 Rule 7 of the [Civil Procedure Rules](#) 2010. The Originating Summonses (hereinafter referred to only as “applications”) were supported by separate affidavits of the Applicants to which they attached the photographs of the developments they have on the suit properties.
2. Upon being served with the applications, the Respondents filed Notices of Preliminary Objection to the same. In their Notices of Preliminary Objection, the Respondents contended that the Applicants’ applications offended the provisions of Order 37 Rule 7 of the [Civil Procedure Rules](#) in that the Applicants had not annexed to their affidavits in support of the applications certified copies of the titles for the suits properties. The Respondents contended that the said applications were incompetent, bad in law and amounted to an abuse of the process of the court. The Respondents urged the court to dismiss the same with costs to the Respondents.
3. At the hearing of the Respondents’ preliminary objection, the Respondents submitted that Order 37 Rule 7(2) of the [Civil Procedure Rules](#) provides in mandatory terms that an application seeking registration of land in the name of an applicant by adverse possession must be supported by an affidavit to which an extract of a title to the land in question is attached. The Respondents submitted that it is from this rule that the court derives its jurisdiction to entertain such application. The Respondents submitted that in the absence of such an extract of title, the court has no jurisdiction and must lay down its tools. The Respondents submitted that failure on the part of the Applicants to annex extracts of the titles to the suit properties to their affidavits in support of their applications was fatal to the same. The Respondents submitted that the omission could not be cured by Article 159 (2) (d) of the [Constitution](#). The Respondents urged the court to strike out the Applicants’ applications with costs.
4. In their submissions in reply, the Applicants submitted that the preliminary objections by the Respondents were taken prematurely. The Applicants submitted that a claim to land by adverse possession was a creature of Sections, 7, 13 and 38 of the [Limitation of Actions Act](#) and that the jurisdiction of the court to entertain the claim is derived from Article 162(b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#) 2011. The Applicants submitted that Order 37 Rule 7(2) of the [Civil Procedure Rules](#) is a rule of procedure which cannot override the provisions of a statute and the [Constitution](#). The Applicants submitted that the issue of the extracts of the titles of the suit properties being an evidential issue could only be raised after the court had given directions on the applications and not before.
5. The Applicants submitted that the court is enjoined under Article 159(2)(d) of the [Constitution](#) to dispense justice without undue regard to procedural technicalities. The Applicants submitted that the Respondents’ preliminary objections were premised on the rules of procedure. The Applicants submitted that the overriding objective of the [Civil Procedure Rules](#) is to enable the court to do justice.



The Applicants submitted that the omission to annex copies of the extracts of the titles for the suit properties to their affidavits in support of their applications was an error that could be corrected. The Applicants urged the court to accord the applicants an opportunity to correct the error and be heard rather than shutting them out of court. The Applicants submitted that the Respondents' preliminary objections did not meet the threshold for a preliminary objection that was laid in the case of *Mukhisa Biscuits* and urged the court to dismiss the same.

### Analysis and determination

6. I have considered the Respondents' Notices of Preliminary Objection and the submissions by the advocates for the parties. The following is my view on the matter: In *Hassan Ali Jobo & Another v. Suleiman Said Shabbal & 2 others* (2014) eKLR, the Supreme Court stated as follows on preliminary objections:

To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors* (1969) EA 696.

‘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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is exercise of judicial discretion.’

7. In *Oraro v Mbaja*[2005]1KLR141, the court stated that:

A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and 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.”

8. It is on the foregoing principles that the Respondents' Notices of Preliminary Objection fall for consideration.

9. Section 38(1) and (2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides as follows:

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2). An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

10. Order 37 Rule 7 of the *Civil Procedure Rules* that provides for the procedure for making an application under Section 38 of the *Limitation of Actions Act* provides as follows:

7.

- (1) An application under section 38 of the *Limitation 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.
- (3) The court shall direct on whom and in what manner the summons shall be served.”

11. The Respondents’ objection to the Applicants’ applications is that the Applicants have not complied with the provisions of Order 37 Rule 7(2) of the Civil Procedure Rules. It is common ground that the Applicants have not complied with the requirements of Order 37 Rule 7(2) of the Civil Procedure Rules in that they have not annexed to their affidavits in support of their applications, extracts of the titles for the suit properties which they are claiming by adverse possession. I agree with the Applicants that this is a procedural infraction rather than a jurisdictional issue. As a procedural violation, the same can be overlooked by the court for the sake of substantive justice under Article 159 (2) (d) of the Constitution. I do not think that it would serve the interest of justice if I were to strike out the six (6) suits before me so that the Applicants can file an Order 37 Rule 7(2) of the Civil Procedure Rules’ compliant applications. I agree with the Applicants that the most equitable approach should be to allow the Applicants to correct the error rather than striking out their suits.
12. I have considered the two authorities cited by the Respondents in support of their preliminary objections. I find both distinguishable. The decision by Mutungi J. was on an application for review of a judgment of Waithaka J. What Waithaka J. was faced with was a situation where she had to write a judgment on a claim for adverse possession and there was no evidence that the Defendant was the registered owner of the property in dispute. The court had no alternative but to dismiss the claim at that stage as there was no room for the Plaintiff to make amends. The decision by Nzili J. on the other hand concerned an adverse possession claim over unregistered land. The land in dispute was still under adjudication and the same had not been registered in the name of the Defendant. This suit was also properly dismissed. The circumstances in those suits are not the same as those before me. In the case before me, the Applicants still have an opportunity to correct their errors. A court of justice should lean towards sustaining a suit rather than striking it out summarily.
13. I am also of the view that the Respondents’ preliminary objections were not properly taken. As was held in the authorities that I have cited earlier, a preliminary objection should be based on a point of law that has been pleaded. In this case, the point of law on which the Respondents have grounded their preliminary objections is not pleaded. The objection lacks foundation in the circumstances. Before raising the issue as a preliminary objection, the Respondents should have filed their responses to the applications by the Applicants in which they should have raised the issue of the Applicants’ failure to annex copies of the extracts of the titles of the suit properties to their affidavits. I agree with the Applicants that if the Respondents had taken this approach, the court would have dealt with the issue at the time of directions under Order 37 Rule 18 of the Civil Procedure Rules. The court would have directed the Applicants to file supplementary affidavits with the missing documents attached. The present objections would have only been taken and the court called upon to strike out the suits if the Applicants had failed to comply with such direction. To that extent, I agree with the Applicants that the preliminary objections were taken prematurely.
14. The upshot of the foregoing is that I find no merit in the Respondents’ preliminary objections to the consolidated suits. I will give the Applicants leave to file supplementary affidavits in each of the consolidated suits to which they shall annex certified copies of the extracts of the registers for the suit properties. The said supplementary affidavits shall be filed within 21 days from the date hereof and in default of filing the affidavit in any of the consolidated suits, such suit shall automatically stand dismissed with costs to the Respondents without any further reference to the court. Save as ordered, the preliminary objections are dismissed with costs to be in the cause.



**DELIVERED AND DATED AT KISUMU ON THIS 24<sup>TH</sup> DAY OF JULY 2024**

**S. OKONG'O**

**JUDGE**

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

Mr. Munuango for the Applicants

Mr. Mwamu for the Respondents

Ms. J.Omondi-Court Assistant

