



REPUBLIC OF KENYA



**Gachui v Kamonjoh & another; Thambiri & 3 others (Interested Parties) (Environment & Land Case E179 of 2021) [2024] KEELC 13974 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13974 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E179 OF 2021**

**MD MWANGI, J  
DECEMBER 18, 2024**

**BETWEEN**

**JAMES GACHENGU MACHARIA GACHUI ..... PLAINTIFF**

**AND**

**EPHRAIM MATHENGE KAMONJOH ..... 1<sup>ST</sup> DEFENDANT**

**CAROLINE WAIHERA KAMONJOH ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JOHSON THAMBIRI ..... INTERESTED PARTY**

**CATHERINE NDUKU MWANGI ..... INTERESTED PARTY**

**THE CHIEF LAND REGISTRAR (SUED ON BEHALF OF THE REGISTRAR OF  
LANDS NAIROBI LANDS REGISTRY) ..... INTERESTED PARTY**

**THE NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**RULING**

1. Vide a Notice of Preliminary Objection, dated 23rd April, 2024, the 2<sup>nd</sup> Defendant/Objector sought an Order for striking out the entire suit on the following grounds:
  - a. That to the extent that the Plaintiff's claim of entitlement and registration as a proprietor/owner over the suit property based on adverse possession was commenced by way of Plaint instead of originating summons contrary to Order 37 Rule 7 of the Civil Procedure Rules, 2010, which is hereby invoked the instant suit is fatally defective and ought to be struck out.
  - b. That for the above reason, the suit herein is otherwise frivolous, vexatious and offends the mandatory provisions of the Civil Procedure Rules.
  - c. That entertaining the suit herein is a waste of judicial time.



2. The Plaintiff opposed the 2nd Defendant's preliminary objection on the grounds set out in the grounds of opposition dated 10th September, 2024. The Plaintiff asserted that;
  - a. The entire Preliminary Objection is incompetent, frivolous and vexatious and a misuse of the court process and the same should be struck out or dismissed with costs to the Respondents.
  - b. The Complaint before the Court raises complex issues that could not be adequately ventilated in an originating summons filed pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
  - c. That Courts have previously held that a claim for adverse possession can be commenced by way of a Complaint and even in some instances courts have converted originating summons filed in a claim for adverse possession into a Complaint to enable the parties properly Respondent to the issues raised before the Court.
  - d. The nature of the prayers sought in the Complaint are such as would invite oral evidence and an Originating Summons is not appropriate to afford the parties herein an opportunity to fully respond to the issues raised in this case.
  - e. That there is no prejudice to be suffered by any of the parties if the case herein proceeds by way of a Complaint.
  - f. The Preliminary Objection is defective and should be dismissed with cost.
3. On 23rd October, 2024, the Court directed that the 2nd Defendant/Objector's Notice of Preliminary Objection, be canvassed by way of written submissions. Both parties complied. The 2nd Defendant's submissions are dated 31st October, 2024 whereas the Plaintiff's are dated 28th December, 2023.

### **2nd Defendant's Submissions**

4. The 2nd Defendant/ Objector identified Three (3) issues for determination. The first issue is whether the suit is fatally defective due to non-compliance with Order 37 Rule of the Civil Procedure Rules, 2010. The Objector cites the said provisions and further submits that the Plaintiff's claim being that of adverse possession, the suit ought to have been commenced through an Originating Summons. That contrary to the assertions that the suit raises complex issues, a perusal of the Complaint does not show any complex issues that could not be ventilated in an originating summons. The Plaintiff's suit herein is a blatant abuse of the Court's procedure. That the procedural misstep is not a mere technicality but a fundamental flaw that renders the suit fatally defective.
5. The second issue is whether the Plaintiff's suit is defective for failure to annex a certified extract of the title to the land in question. The 2nd Defendant cites Order 37 Rule 7 (2) of the Civil Procedure Rules which requires that the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. She submits that the Plaintiff's suit is defective for failure to annex a certified extract of the title to the land in question as required in law. The Objector submits that despite filing the suit more than 4 years ago, the Plaintiff has never provided the certified extract of the title as required. She cites the case of *Titus Mutuku Kasuve –vs- Mwaani Investments Limited & 4 Others (Civil Appeal 35 of 2002) (2004) KECA 161(KLR)*.
6. Regarding costs of the Preliminary Objection and the suit, the 2nd Defendant submits that costs should follow the event, as established in Section 27 of the *Civil Procedure Act* (Cap. 21). She prays that the Plaintiff's suit be struck out with costs in favour of the 2nd Defendant.



## Plaintiff's Submissions

7. The Plaintiff submits that indeed his claim is that of adverse possession which is well within the provisions of Section 7 of the *Limitation of Actions Act*. The legal provision requires that for one to claim adverse possession, he or she must have been in possession of the land for more than 12 years. He asserts that the Preliminary Objection by the 2nd Defendant confirms the claims by the Plaintiff. The Preliminary Objection according to the Plaintiff is unmerited and should be dismissed with costs.

## Issues for Determination

8. Having considered the Preliminary Objection, parties' respective rival submissions and the pleadings filed herein I find that the issues arising for the determination are as follows: -
- a. Whether the objection raised herein meets the criteria of what constitutes a Preliminary Objection.
  - b. Whether the Preliminary Objection by the 2nd Defendant is sustainable – entitling the 2nd Defendant of the relief sought.
  - c. Who should bear the costs of the filed preliminary objection?

## Analysis and Determination

### A. Whether the objection raised herein meets the criteria of what constitutes a Preliminary Objection.

9. According to the Black Law Dictionary a Preliminary Objection is defined as being:
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
10. The above legal preposition was made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696, where Lord Charles Newbold P. held that a proper preliminary objection constitutes pure points of law. The Learned Judge stated that: -
- “A preliminary Objection is in the nature of what used to be a demurer..... 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 the exercise of judicial discretion.”
11. In the case of Attorney General & Another –vs- Andrew Mwaura Githinji & another [2016] eKLR, the Court the position and stated that:
- i. A Preliminary Objection raises a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - ii. A Preliminary Objection cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion; and
  - iii. The improper raising of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.



12. In the case of *Lemitei Ole Koros & Another –vs- Attorney General & 3 Others* [2016] eKLR, Munyao, J stated as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of facts within a preliminary objection.”

13. The 2nd Defendant/Objector has alleged that the suit herein offends the provisions of Section 37 Rule 7 of the Civil Procedure Rules. A claim for adverse possession ought to be brought through an Originating Summons. This is a pure point of law.
14. Consequently, the court finds that the objection raised by the Defendant/Objector herein is a pure point of law, which if upheld may dispose of the suit. Therefore, the court finds and holds the Notice of Preliminary Objection herein meets the criteria of what is a Preliminary Objection as described in the *Mukisa Biscuits case* (supra) and will go ahead to consider it as such.

**B. Whether the Preliminary Objection by the 2nd Defendant is sustainable – entitling the 2nd Defendant of the relief sought**

15. The Objector contends that the Plaintiff’s suit is bad in law as it offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules, which provides as follows:

“An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons”

16. For the above proposition, the 2nd Defendant relied on Section 38 (1) & (4) of the *Limitation of Actions Act* which 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.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

17. While indeed the court agrees that the provisions of Order 37 Rule 7 of the Civil Procedure Rules, state that a claim for adverse possession ought to be brought to court by way of Originating Summons, the overriding objective under Section 1A and 1B of the *Civil Procedure Act* and Article 159 (2) (d) of *the constitution* enjoin the courts to do substantive justice without being shackled by technicalities of procedure. This overriding objective otherwise referred to as the oxygen principle (O2) is mirrored under section 3 of the *Environment and Land Court Act* while Section 19 (1) of the *Environment and Land Court Act* restates the provisions of Article 159 (2) (d) of *the Constitution* in the following terms: -

1. In any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure.

18. The Court of Appeal in the case of *Chevron (k) Ltd -vs- Harrison Charo Wa shutu* (2016) eKLR, either made it clear that a claim by adverse possession could be brought by way of plaint.



19. In the case of *Gulam Mariam Noordin -vs- Julius Charo Karisa Civil Appeal No 26 of 2015*, where a similar claim was raised in the defence, the court in rejecting the objection to the procedure stated as follows: -

“Where a party like the respondent is in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala -vs- Okumu (1997) LLR 609 (CAK)* which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd -vs- Kosgey (1998) LLR813* where the plaintiff made no specific plea for adverse possession, the plea was nonetheless granted.”

20. A suit is not rendered fatally defective merely because it is commenced by way of a plaint rather than by way of an originating summons.
21. Striking out suits preliminarily is a draconian measure, which should be resorted to only as last resort and when the suit is so hopeless and cannot be salvaged, even by an amendment. Courts have held that where there is a semblance of cause of action, parties should be allowed their day in court.
22. Regarding the issue of failure to attach an extract of the title, the production of the title can be at any time subject to leave of court after close of pleading. The matter herein is yet to proceed to pre-trial or be certified ready for hearing. It will therefore be premature to strike out the suit at this stage.
23. The upshot is that I find and hold the preliminary objection is devoid of merit and the same is dismissed. The costs of the preliminary objection will abide the outcome of the suit.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF DECEMBER, 2024**

**M.D. MWANGI JUDGE**

In the virtual presence of:

Ms. Khauser for the 2<sup>nd</sup> Defendant Mr. Onyango for the 1<sup>st</sup> Defendant

N/A by the Plaintiff and the Interested Party Court Assistant: Joan

**M.D. MWANGI JUDGE**

