



Kombo & 2 others (Representing over three hundred residents residing on land parcel No's 274/1/MN) v Bryant & another (Environment & Land Case 148 of 2021) [2023] KEELC 16517 (KLR) (21 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16517 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 148 OF 2021
NA MATHEKA, J
MARCH 21, 2023**

BETWEEN

**MADZAO NDEGWA KOMBO 1ST PLAINTIFF
MWANAJUMA BAHARU BEKIDUSA 2ND PLAINTIFF
DANIEL CHIHONGA CHNDUGU 3RD PLAINTIFF
REPRESENTING OVER THREE HUNDRED RESIDENTS RESIDING ON
LAND PARCEL NO'S 274/1/MN**

AND

**TIMOTHY ISAAC BRYANT 1ST DEFENDANT
LEAH NTHAMBI BRYANT 2ND DEFENDANT**

RULING

- 1 The defendants raised a preliminary objection on the following grounds;
 1. From the documents of the plaintiffs and in particular the unmarked annexure SCN3 identified in paragraph 3 of the supporting affidavit of the 1st plaintiff, proceeding with this suit without service of the owners of the disclosed subdivisions will amount to a mistrial and unconstitutional contrary to article 52 of the Constitution.
 2. The property known as Plot 274/1/MN, the suit property does not in law exist. It is only a historical fact on which the court cannot issue any remedy on to the Plaintiffs.
 3. The doctrine of adverse possession disappears after subdivision. The claim is frivolous and should be struck out with costs.



- 2 The defendant's submitted that from the supporting affidavit on record subdivision has occurred and hence the suit lacks substratum for the claim of adverse possession. That the suit lies as against third parties and they have a right to be heard.
- 3 The plaintiffs submitted that the defendant's preliminary objection raises issues of facts and not law. That the defendants state that from the plaintiffs documents the alleged subdivision will amount to a mistrial. That the suit lacks substratum that the suit has since been subdivided hence the original number has ceased to be. That the third parties and interested parties have a right to be heard. The plaintiffs submit that all these are questions of fact and the suit ought to proceed to full trial.
- 4 This court has considered the preliminary objection and the submissions therein. This court will first have to determine whether the objection raised by the defendants qualifies to be a preliminary objection as described in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit".

- 5 Further the court stated;

"A preliminary objection raises a pure point to 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".

- 6 In the present matter the defendants has hinged their preliminary objection on the fact that the suit property does not exist and they are third parties involved. The preliminary objection must be on a point of law. The defendants state that from the plaintiffs documents the alleged subdivision will amount to a mistrial. That the suit lacks substratum that the suit has since been subdivided hence the original number has ceased to be. That the third parties and interested parties have a right to be heard. I find that these are questions of fact and cannot be determined at this interlocutory state. This suit ought to proceed to full trial for all these issues to be canvassed. I find that this preliminary objection is not merited and is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

