



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**ELC CASE NO. 40 OF 2018 (O.S)**

**JACOB MURIUNGI IKIARA & JOSEPH GIKUNDA**

**IKIARA (The Legal Representative of the Estate of**

**M'RINKANYA alia GERALD M' IKIARA M' RINKANYA).....1<sup>ST</sup> PLAINTIFF**

**DENNIS PATRICK MUTHOMI & ANNARITA KAWIRA**

**(The Legal Representative of the Estate SEBASTIAN NYAMU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**KINYUA M' MBIJIWE (The Legal Representative of the**

**Estate of GILBERT KABEERE.....DEFENDANT**

**RULING**

1. The plaintiffs filed an Originating Summons on 12<sup>th</sup> October 2018, seeking a determination as to whether the Estate of M' Ikiara M' Rinkanya and Sebastian Nyamu had acquired Plot No. 58 (58A & 58B) measuring 12M by 60M at Nkubu Market by way of adverse possession.
2. Before the case could be heard on its merits or otherwise, the defendants filed a Notice of Preliminary Objection on 22<sup>nd</sup> October 2018, contending inter alia that the suit offends the provisions of Section 37 and 38 of the Limitation of Actions Act CAP 22 of the Laws of Kenya and that the suit was therefore incompetent and an abuse of the court process.
3. The Preliminary Objection was argued orally. It was submitted for the defendant that Section 38 of the Limitation of Actions Act sets out the relevant Acts that a party may use to bring a claim on adverse possession. It was submitted that the Registered Land Act was repealed and the current Acts were the Land Act and the Land Registration Act and that adverse possession could not apply under land not so registered. It was contended that in the instant case the plaintiffs were claiming adverse possession against a plot which was registered in the year 2008. It was contended that in the foregoing, a claim for adverse possession was a claim against time and that in this case, time began to run on 3<sup>rd</sup> May 2008 upon registration and issuance of lease. It was contended thus that it was 10 years since the suit property was registered and that as such adverse possession could not lie as plaintiffs had come to the court too early.
4. On the other hand, it was submitted for the plaintiff that the Notice of Preliminary Objection was an abuse of the court process and that the court was being asked to determine an issue not pleaded by the defendant and that the issue could only be raised at the trial. It was further submitted that what was being raised here was not a pure point of law. It was thus submitted that the Preliminary Objection was not merited and the same was misconceived and should be dismissed.
5. I have carefully considered the Notice of Preliminary Objection, the rival submissions by the parties and the authorities in support thereof. The law on Preliminary Objection was well settled in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*. More recently Ojwang J (as he then was), in *Oraro vs. Mbaja [2005] 1 KLR 141* expressed himself thus as regards **Preliminary Objections**;

***“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 off the suit. A “preliminary objection” correctly understood, is now well defined as, and declared to be, 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 processes of evidence (emphasize mine). Any assertion, which claims to be a preliminary objection, 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”*

6. In the instant case it was contended inter alia that the plaintiffs were claiming adverse possession against a plot which was registered in the year 2008. It was contended that in the foregoing, a claim for adverse possession was a claim against time and that in this case time began to run on 3<sup>rd</sup> May 2008 upon registration and issuance of lease. It was contended thus that it was 10 years since the suit property was registered and that as such adverse possession could not lie.

7. Counsel for the defendant had posed the question; “**when did time begin to run?**”. It is crystal clear that the answer to this question necessitates production of evidence. The statutory period of 12 years is the back bone of a claim of adverse possession and the court cannot purport to determine this period via a preliminary objection. In the case of **Benson Mukuwa Wachira vs. Assumption Sisters of Nairobi Registered Trustees Court of Appeal No. 121 of 2006** (cited as Authority no. 7 by the plaintiffs), it was held that Adverse possession and running of time did not depend on the issuance of the title deed.

8. It is the considered opinion of this court that the issues the defendant is raising require further interrogation and proof in a trial. It is also not lost to this court that defendant has not filed his pleadings.

9. I find that the Notice of Preliminary Objection as raised is not sustainable. The same is hereby dismissed with costs to the plaintiffs.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 20<sup>TH</sup> MARCH, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Ojiambo holding brief for Nyamu Nyaga for plaintiff

Miss Njenga for defendant

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**