

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 336 OF 2017

PETER MBATI

FRANCIS MUCHERA MBATI.....PLAINTIFFS

VERSUS

JIMMY KULECHO

LAND REGISTRAR KAKAMEGA.....DEFENDANTS

RULING

The 1st defendant raised the following submissions in respect of the preliminary objection. That the plaintiff brought the above suit claiming for a refund of 1 acre of land or it is equivalent valued from the defendant. From the records the defendant obtained title deed for land parcel number Kakamega/Lukume/1059 on the 27th day of September, 1993 after the plaintiff himself executed all the necessary papers. That the plaintiff also put boundary features at the time of sale of the land in the year 1975 and did not raise any complaint that the defendant had taken more land that he had sold him. The plaintiff and defendant have been staying on their respective portions of land for a period of more than 44 years and the plaintiff never raised any claims of fraud. That under the limitation of actions Act Section 7, 17, 37 and 38 Cap 22 a claim in respect of land should be filed within a period of twelve (12) years from the date of the cause of action. In the case herein the cause of action arose on the 27th day of September, 1993 when the defendant was registered as the owner of land parcel number Kakamega/Lukume/1059. The plaintiff should have filed his claim by the 27th day of September, 2005 when a period of twelve (12) years elapsed. The plaintiff herein filed his claim on the 22nd day of September, 2017 a period of more than twenty-four (24) years from the period the cause of action arose. It is their submissions that the plaintiff's claim is statutorily time barred since the same was filed out of time without the leave of the court they urge the court to strike out the plaintiff's suit with costs to the defendant.

The plaintiff submitted that he raised the allegation of fraud on the issue of the mutation and the green card hence the issue of limitation does not arise. That the 1st defendant states that he has occupied and used 2 ¼ acres of land parcel number Kakamega/Lukume/1059 peacefully and without any interruption from both plaintiffs for a period of more than twelve (12) years and hence adversely acquired possession of the same against both plaintiff's hence these raise triable issues

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a 'Preliminary Objection'.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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. 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. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

I find that the issues of fraud and adverse possession are matters of fact which need to go to full trial for this court to determine the matter. The court needs to investigate the facts in order to make a final determination. I find that this preliminary objection is not merited and I overrule the same.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE