



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 374 OF 2013 (OS)

**IN THE MATTER OF A CLAIM OF ADVERSE POSSESSION PURSUANT TO SECTION 38
OF THE LIMITATION OF ACTIONS ACT (CAP 22)**

AND

IN THE MATTER OF LR NO. SUNA WEST/WIGA/2007

BETWEEN

ALBERT JUMA KISOME PLAINTIFF

VERSUS

BENARD OTIENO NYASIME 1ST DEFENDANT

JENIPHER AUMA NYASIME 2ND DEFENDANT

ESTATE OF ZACHARIA NYASIME ONANGI 3RD DEFENDANT

ANDREW OCHIENG OGAO 4TH DEFENDANT

RULING

1. The plaintiff by an originating summons premised under the provisions of Order 37 Rule 3 of the **Civil Procedure Rules** and Section 38 of the **Limitation of Actions Act**, Cap 22 Laws of Kenya seeks the following orders:-

1. Declaration that the defendants rights to recover land parcel No. Suna West/Wiga/2007 is barred under the Limitation of Actions act (Cap 22 Laws of Kenya) and that his title thereto has become extinguished in favour of the plaintiff who has been in adverse possession of the land for a period exceeding 12 years.

2. That there be an order that the plaintiff be registered as proprietor of LR No. Suna West/Wiga/2007 in place of the defendants.

3. There be an order of injunction restraining the defendants from in any way or manner interfering with the plaintiff's peaceful possession and occupation of the suit land.

4. Costs of the suit.

2. The plaintiff contends he has been in open and continuous possession of the suit property for a period in excess of 12 years immediately before the filing of the instant suit and that his possession has been adverse such that the defendants' title has become extinguished by effluxion of time. The plaintiff asserts he has become entitled to become registered as the proprietor of the suit property. The plaintiff avers the defendants' registration through transmission is void and subject to the plaintiff's acquired rights through prescription.

3. The 3rd respondent filed a notice of preliminary objection dated 16th September 2013 stating the suit by the plaintiff does not disclose any cause of action against the 3rd defendant and indeed none of the defendants and that the same ought to be struck out on the grounds that:-

1. The plaintiff has disclosed that he was let and permitted to use the land hence an important ingredient of adverse possession has been displaced.

2. The estate is incapable of suing nor being sued and the suit against it is thus untenable.

3. There cannot be a cause of action against the 3rd respondent based on the pleadings filed.

4. As pleaded the 3rd respondent has no interest on the land the grant having been confirmed and distribution effected.

5. The 3rd respondent shall pray that the suit against it be struck out with costs.

4. On 21st February 2014 the 1st and 2nd defendants gave notice of supplementary preliminary objection to the plaintiff's amended originating notice of motion dated 15th October 2013 and took the following points of law:-

1. That as amended, the originating notice of motion is unknown to law and ought to be struck out.

2. That as amended, the motion even if it were known to law seeks prayers that are expressly prohibited by the law under the Land Control act at Section 6 (1) (a).

3. The action against the 1st, 2nd and 3rd defendants is in any event statute barred and incapable of being granted.

4. The defendants thus pray the said motion be struck out with costs to the defendants.

5. The parties canvassed the preliminary objection by way of written submissions. The defendants filed their submissions dated 28th November 2015 on 30th November 2015 while the plaintiff's submissions dated 22nd January 2016 were filed in court on the same date.

6. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696** considered what constitutes a preliminary objection and held that a preliminary objection cannot be grounded on disputed issues and facts. **Law JA** in the case stated thus:

“...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.”

Sir Charles Newbold, P; in the same case was more direct and succinct when he expressed his displeasure at what he considered as the increasing incidence of counsel raising preliminary objections when he stated thus:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the other side is correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse issues. This improper practice should stop.”

7. I have reviewed the points the defendants have taken in support of their preliminary objection and with respect the same are presumptive and argumentative. To determine the issues argued in support of the preliminary objection would involve having to consider the rival arguments by the parties. The parties positions need to be buttressed by evidence which is not available at this stage. For instance the defendants contend the plaintiff had leased the suit premises and was therefore in possession and occupation through permission. The plaintiff denies this and asserts he has been in adverse possession. Whether or not the plaintiff was a tenant/lessee with permission of the owner or an adverse possessor are issues to be proved by evidence at the trial. Again whether or not the provisions of Section 6 (1) of the **Land Control Act**, Cap 302 Laws of Kenya would be applicable to the plaintiff is again a matter of evidence. The plaintiff has stated he is not relying on any agreement that would be subject to the application of the provisions of the **Land Control Act**, but is rather relying on the fact of he having acquired prescriptive rights to which the **Land Control Act** has no application. He asserts that he is not relying on any agreement to establish his right but maintains he has been in adverse possession that has given him the right to seek to be registered as owner of the suit land.

8. Without having to make any findings on the specific issues submitted upon by the parties as I do not wish to prejudice any party at the hearing of the suit, my view is that the preliminary objection taken by the defendants is unsustainable. The preliminary objections are not on any pure points of law and that in order to determine the issues addressed one would need to consider the issues that are contested by the parties. That will only be possible at the full hearing of the suit when the parties testify and are subjected to cross examination.

9. Striking out a suit is a drastic step as it entails literally driving away a party from the seat of justice. It is a draconian step and ought to be taken in the clearest of cases where a suit is so hopeless that not even amendment can salvage it. The court should in all cases exercise its discretion in sustaining the suit rather than striking the same out. Parties need to have their day in court to ventilate their issues. That is what access to justice is all about.

10. The upshot is that I find no merit in the preliminary objection taken by the defendants and I dismiss the same. The costs of the preliminary objection will abide the outcome of the suit.

Ruling dated, signed and delivered at Kisii this 29th day of April, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....for the plaintiff

..... for the 1st defendant

..... for the 2nd defendant

..... for the 3rd defendant

..... for the 4th defendant

J. M. MUTUNGI

JUDGE