



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE NO. 38 OF 2020

ESTHER NYABOKE ONDARA.....PLAINTIFF

VERSUS

SUSAN NJERI.....1ST DEFENDANT

DISTRICT LAND REGISTRAR, NAKURU.....2ND DEENDANT

RULING

1. Through a Preliminary Objection dated 8/6/2021 and filed on 17/6/2021 The 1st Defendant raised a preliminary objection to the instant suit on the following grounds:

- a. That the 1st defendant title/ownership started on 18th June 2019 and as such any cause of action against her started on the said date.
- b. That the Plaintiff has no claim against the 1st defendant under sections 7, 13 and 17 of the Limitation of Actions Act.
- c. That the 1st defendant bought and took possession immediately as such no one is in adverse possession of her land.

2. I will set out the background to the preliminary objection briefly. The plaintiff filed the instant suit on 15/6/2020 against the 1st and 2nd defendants seeking a raft of orders against them including a declaration that the plaintiff has acquired title to the suit land known as **Kiambogo/Kiambogo Block 2/2103 (Mwariki)** by way of adverse possession and that the 1st defendant is holding the title in trust for her.

3. The 1st defendant filed submissions in support of her preliminary objection on 17/11/2021 and the plaintiff filed hers on 23/11/2021. I have considered the written submissions of both parties.

4. In respect of the first ground of objection the 1st defendant submitted that the suit was filed on 15/6/2020 yet the requisite 12 year period of adverse occupation can only be computed from the date of registration of title. It is submitted that if possession is interrupted then a claim under adverse possession under **Sections 7, 13 and 17 of the Limitation of Actions Act** ceases to lie; further it was stated that the 1st defendant became the registered proprietor of the suit land on 18/6/2019 and immediately took possession thereof and has been in such possession to date. Computation of the adverse possession period should therefore be with effect from 18/6/2019. It is submitted that as at 1/6/2020 the 1st defendant had been in occupation for one year. It is further submitted that perchance it was assumed the plaintiff had been in occupation it would only have been for a period of one year. Also, it is stated that the manner of the plaintiff's possession and whether the 1st defendant took possession after her registration, would have to be established at the hearing if the matter proceeded that far.

5. While citing the renowned case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd 1969 1EA 696**, the submission of the plaintiff is that the court has to interrogate evidence as to whether the 1st defendant's title to the land commenced on 18/6/2019 and the cause of action if any under **Sections 7, 13 and 17 of the Limitation of Actions Act** accrued against her from the said date; the court has to also establish whether the 1st defendant bought the suit land and immediately took possession thereof and whether the plaintiff is in adverse possession of the land. The plaintiff urges that the foregoing tests of proof call for establishment of facts through evidence.

6. Further, citing a litany of cases: **Mwangi Githu Vs Livingstone Ndeete 1980 eKLR, Lenaola Nelima Karani Vs William Wanyama Ndege 2012 eKLR, Alex Njonjo Karu & 3 Others Vs John Kamau Gitungo 2014 eKLR, Gachuma Gacheru Vs Maina Kabuchwa 2016 eKLR, Douglas Mbugua Mungai Vs Harrison Munyi 2019 eKLR, Peter Gichuki Wanjohi Vs Juliah Mumbi Muturi 2021**

eKLR, and **Abdulkhall Mohamed Abdulkhalik Mazuruii & 2 Others Vs Josiah Kafuta J Mtila & Anor 2021 eKLR**, the plaintiff submitted that mere change of ownership of land which is adversely occupied by another person does not interrupt such adverse possession and that this court is bound to that position by the doctrine of *stare decisis*.

7. I think that whereas the second point may be relevant at later stages of this litigation, the first point raised by the plaintiff is sufficient to dispose of the preliminary objection by the 1st defendant.

8. The Court in the *locus classicus* case of **Mukisa Biscuits (supra)** observed as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.” (Emphasis mine.)

9. The allegations regarding purchase and possession by the 1st defendant have to be proved before a proper determination on the preliminary objection is arrived at, otherwise the court may arrive at a faulty verdict. Establishing those facts has to be by way of evidence and it is as clear as day that that evidence is not available as at the present moment. Proof therefore has to be at the hearing and by way of evidence.

10. Consequently, this court finds that the 1st defendant’s preliminary objection dated **18/6/2021** is not well founded and it is hereby dismissed with costs to the plaintiff.

11. The main suit shall be mentioned on **2/2/2022** for further directions.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF JANUARY, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU