



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL SUIT NO. 239 OF 2012

NTHIORI MWITHIGA.....PLAINTIFF

VERSUS

M'IKIAO ARACHI.....DEFENDANT

RULING

The Notice of Preliminary Objection by the plaintiff dated 15th August, 2013 has the following grounds:

- 1. No cause of action has been established**
- 2. The originating summons is fatally flawed.**
- 3. The originating summons does not disclose the requirement for adverse possession by the plaintiff against the defendant.**

The parties put in written submissions.

The defendant has submitted that it is not true that the plaintiff is in possession of the suit land as alleged. He says that developments on the suit land were done by him and his deceased father. He also says that he became the registered owner on 6.3.2007 and since this suit was filed in 2012, 12 years had not elapsed for there to be existence of adverse possession.

The defendant submits that the supporting affidavit of the plaintiff has annexed a copy of the Judgment of the High Court in HCC Misc Application No. 79 of 2011 (Marked as MAI) which clearly shows that there were previous proceedings between the defendant and the plaintiff. He argues that the plaintiff having lost in the miscellaneous civil application No. 79 of 2011, she ought to have filed an appeal and not this suit. The defendant has also argued that the Originating Summons is flawed as it is not supported by the mandatory supporting affidavit and that the supporting affidavit for the Notice of Motion dated 17.12.2012 does not suffice.

The Preliminary Objection is opposed by the plaintiff. She says that she entered the suit land in 1967 whereas the defendant was registered as owner of the suit land in 2007. She asks the court to be guided by the authority of **Kairu versus Gacheru – Civil Appeal No. 42 of 1987 (Court of Appeal, Nairobi)**, that a change in the registered owner of land is subject to the overriding rights of the adverse possessor. The plaintiff deems the defendant's assertion that the Originating Summons is fatally flawed because it shares a supporting affidavit with the Notice of Motion, as ridiculous and unsupported by any legal provisions of known jurisprudence.

I have considered the submissions, averments and all the materials proffered by the parties in support of their respective positions. Regarding the issue of adverse possession there are assertions and counter assertions. It is pellucid that if a Preliminary Objection succeeds, the challenged suit will fail. It must succeed on a point or points of law. But where the parties' assertions will require to be proved by the production of factual evidence, a Preliminary Objection will not be deemed to have been predicated upon a pure point or pure points of law. In this matter, the assertions and counter assertions will require the parties to adduce factual evidence. I find that this Preliminary Objection is not predicated upon pure points of law. In the circumstances, it is hereby dismissed.

Costs shall be in the cause.

It is so ordered.

Delivered in Open Court at Meru this 14th day of January, 2015 in the presence of :

Cc. Daniel/Lilian

Mutembei h/b Mutuma for Plaintiff

Mokua h/b Kaimenyi for Defendant

P. M. NJOROGE

JUDGE