



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 366 of 2012**

**LAWRENCE KAMAU KARIUKI**

**(Suing as the Administrator of the Estate**

**Of the Late John Kariuki.....PLAINTIFF**

**VERSUS**

**PETER MBURU KAMAU.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR, KIAMBU.....2<sup>ND</sup> DEFENDANT**

**RULING**

This ruling is on a preliminary objection raised by the 1<sup>st</sup> Defendant to the Plaintiff's suit and application which is contained in a Notice of Preliminary Objection dated 2<sup>nd</sup> July 2012. The 1<sup>st</sup> Defendant objects to the Plaintiff's suit and application, which are both dated 21<sup>st</sup> June 2012, on the grounds that the said suit is statute barred under section 7 and section 17 of the Limitations of Actions Act (Cap 22), and offends the provisions of the Government Proceedings Act (Cap 40).

The Plaintiff has brought the suit and application as the administrator of the estate of John Kariuki Kamau (hereinafter referred to as "the Deceased"), and claims that the Deceased became the lawfully registered owner of a piece of property in Kiambu County known as Title Number Lari/Kambaa/281 (hereinafter "the suit premises"). Further, that the 1<sup>st</sup> Defendant who is a brother to the Deceased has unlawfully trespassed, continues to trespass and intermeddle with the suit premises without authorization by law to do so or by a grant of representation to the estate of the estate of the deceased. The Plaintiff has sought various mandatory, temporary and permanent injunctions against the 1<sup>st</sup> Defendant in the said suit and application.

The preliminary objection was heard on 3<sup>rd</sup> December 2012 and the Plaintiff requested for a ruling based on the on the written submissions filed. The 1<sup>st</sup> Defendant's Counsel argued in written submissions dated 4<sup>th</sup> September 2012 that his client had acquired adverse rights over the suit property as he has had exclusive and uninterrupted occupation of the suit premises for more than 12 years, and that any claim or rights by the Plaintiff have been extinguished by operation of the law and are statute barred under sections 7 and 17 of the Limitations of the Actions Act.

Further, that the Land Registrar of Kiambu, a Government employee, is included as the 2<sup>nd</sup> Defendant, and there is no evidence that a statutory notice has been issued to the Attorney General as required by the Government Proceedings Act under section 13A(1). The 1<sup>st</sup> Defendant also argued that the Plaintiff's suit and application were defective for non-disclosure of the adverse possession, and can only be properly determined in a succession case for the distribution of the estate of the Deceased.

The Plaintiff's Counsel filed submissions dated 19<sup>th</sup> July 2012 and argued that where a claim is based on adverse possession, the date when the cause of action accrued is a question of fact subject to proof, and relied on the decision of **Kimaiyo arap Tiony vs Fredrick Kemei & 4 Others (2006) eKLR** in this

respect. The Counsel also argued that even if a statutory notice ought to have been served on the Attorney General, the suit can only be claimed to be invalid as against the 2<sup>nd</sup> Defendant and not the 1<sup>st</sup> Defendant.

I have read and carefully considered the submissions by the parties to this application. The main issue before this court is whether the objections raised by the 1<sup>st</sup> Defendant are points of law, and if so whether they have merit and should be upheld. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, it was held that a preliminary objection cannot be raised if any fact has to be ascertained. Possession is a question of fact, and the relevant elements that qualify the possession as adverse have to be proved by the 1<sup>st</sup> Defendant before he can avail himself of this defence. This is therefore not a pure point of law and cannot be raised as a preliminary objection.

On the objection that there was no issuance of a statutory notice against the Attorney General I agree with the Plaintiff's submissions that this preliminary point of law is not available to the 1<sup>st</sup> Defendant. Section 13A(1) of the Government Proceedings Act provides that no proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings. The 1<sup>st</sup> Defendant is not an officer in Government neither has he been sued in that capacity. No notice of intention to sue is required to be served on him, and it is the finding of this Court that the suit and application herein are properly brought against the 1<sup>st</sup> Defendant.

I also concur with the Plaintiff that the remaining preliminary objections raised by the 1<sup>st</sup> Defendant on his uninterrupted occupation of the suit premises and non-disclosure of the same require certain facts to be established before they can lie, and are not therefore pure points of law.

The 1<sup>st</sup> Defendant's preliminary objection therefore fails for the reasons given in the foregoing, and the said Defendant shall meet the costs.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_15<sup>th</sup>\_\_\_\_ day of \_\_\_\_February\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**