



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO. 269 OF 2004**

**POLA MWAMANGA MATSAKI ..... PLAINTIFF**

**- VERSUS -**

**1. NZARO MUTSONGO MATSAKI**

**2. THE HON. ATTORNEY GENERAL ..... DEFENDANTS**

**RULING**

The 1st defendant has raised a Preliminary Objection in this case in which he seeks to have the plaint struck out on the following points.

(a) *That in para 7 of his defence he has argued that this case is resjudicatia by virtue of Kaloleni Civil Case No. 28 of 1972. A suit he claims was dismissed.*

(b) *That para 11 of the defendants statement of defence raises the issue that this suit is statute barred by dint of the provisions of the Limitation Act Cap. 22.*

(c) *That there is a misjoinder of the first defendant since the 1st defendant had not registered any interest on the suit land and that he had no authority or capacity to represent and or act for and on behalf of one Mtsonga Matsaki Mwmanga.*

(d) *That the suit is a first registration. That under Sec. 143 of the repealed act, their rights have been reserved, safeguarded, protected retained and continued under Sec. 104 (2) and 107 (1) of the Land Registration Act No. 3 of 2012.*

The plaintiff has stated in his submissions that para 5 of the plaint raised triable issues. He states that the plaint is capable of being amended. On limitation the plaintiff argues that he is challenging an error on record. That the error can be corrected at any time. He argues that, whether this is a first registration or whether the suit is resjudicatia is a matter of evidence.

What can be raised in Court as a Preliminary point is now well settled. Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have case tried by a proper trial where if necessary there has been discovery oral evidence subject to cross-examination.

The applicant argues that this suit is resjudicatia because of Kaloleni Civil Case No. 28 of 1997. Such case was not attached to the submissions at all. I am therefore in the dark as to what it was at all about. In any case such an issue will be a matter of evidence. The issue of the case being statute barred under

Limitations of Actions Act, Whether this is a first registration under the retained sections of the repealed Cap. 300 is also a matter of evidence.

Order 1 rule 9 of the Civil Procedure Act is clear that the suit shall not be defeated by reason of the misjoinder or nonjoinder of parties.

As for the 2nd defendants issue of notice under Section 13A of the Government Proceedings Act Cap. 40, the High Court has found that this Section is unconstitutional.

The issues raised herein are not within the purview of a Preliminary Objection. These are issues that should be canvassed in the suit itself.

The Preliminary Objection is dismissed as being misconceived with costs to the plaintiffs.

**Dated and delivered in open court at Mombasa this 27th day of June, 2013.**

**S.N.MUKUNYA**

**JUDGE**

**In the presence of:**

**Mr. Onyango Advocate for 1st defendant**

**Mrs. Umala Advocate for Mr. Magolo Advocate for plaintiff**

**State Counsel - present**

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1. Wenlock v maloney and another [1965] 1 WLR quoted in ICDC vs Daber Enterprises Ltd.

Mukisa Bisquit Co. v Westend Distributors Ltd [1969] EA 696 Page 700

2. See Nai. HCC.504 of 2008 Kenya Bus Service & ano. v Minister of Transport & 2 others.