



IN THE HIGH COURT OF KENYA

AT NAKURU

ELC NO. 27 OF 2012

AHMED ABDI MURASA PLAINTIFF

VERSUS

ZAKARIA NJENGA KAMITI 1ST DEFENDANT

KONENE NARANKAIK 2ND DEFENDANT

RULING

This is a Preliminary Objection filed by Zakaria Njenga Kamiti to a Notice of Motion dated 17/10/2012 and to the entire suit. The grounds are as follows:

1. The plaintiff has no *locus standi* in this matter as against the 1st Defendant;
2. The Court has no jurisdiction to entertain the matter as against the 1st defendant;
3. The application and the entire suit is bad in law, fatally incompetent and unsustainable;
4. The plaintiff has no sustainable cause of action against the 1st defendant for adverse possession;
5. The application and the entire suit does not meet the legal requirements for a claim in adverse possession.

At the hearing of the objection, Ms. Magana, learned counsel for the Applicant, submitted that this is a claim for adverse possession and Limitation of Actions Act Cap 22. She argued that the plaintiff was not in possession of the suit land and as such the suit ought not to proceed as it will be futile. She relied on **Muraguri Githitho vs Mathenge Thiongo, High Court Civil Case No. 17 of 2006**, to support her argument that possession must be continuous and once interrupted then adverse possession ceases.

She further submitted that there having being a change of ownership from the 1st defendant to the 2nd defendant any claim against the 1st defendant was an exercise in futility. She stated that **Section 13 (1)** of the **Limitation of Action Act Cap 22** requires that the adverse possessor must be on the land. She also relied on **Wambugu vs Njuguna (1983) KLR p. 172** which sets the test for adverse possession. Counsel urged this court to allow the preliminary objection.

Mr. Thuita, learned counsel for the plaintiff, opposed the preliminary objection and relied on his written submissions dated 3/7/2013. He submitted that the preliminary objection was not on a point of law and was based on the discretion of the court. He stated that when the plaintiff filed the suit, he was in possession of the suit land. He relied on the decision in **Mukisa Biscuits Manufacturing Ltd vs West End Distributors Ltd (1969) EA 696** where the court held that a preliminary objection cannot be raised if any fact has to be ascertained or what is sought is exercise of judicial discretion.

Finally, counsel submitted that matters involving land should be heard on merit. He urged the court to be guided by **Section 19 (1) and (2)** of the **Environmental and Land Court 2011** on the principles of

natural justice.

I have carefully considered the oral submissions by counsels, list of authorities filed by the parties and written submissions of the 1st Defendant.

I am guided by the principles laid down in **Mukisa Biscuits**; a decision of the Court of Appeal. The court held that preliminary objections shall raise pure points of law. No facts particularly those that are or may be in contest are allowed to be referred to. The court cannot look at evidence when considering preliminary objections. For purposes of preliminary objections on points of law; it is deemed that the statements or allegations of fact made by the 1st defendant are correct or admitted.

It is in contention whether the plaintiff was in possession of the suit land when he instituted the suit. Consequently, I hold that the preliminary objection herein has no merit. The purported points of law are in fact not pure points of law. They are issues that can be challenged during the full hearing thereof.

As has been repeatedly advised in many decisions of the Court of Appeal and this court, the raising of preliminary objections must be done sparingly and only where there is merit, that the grounds raise pure points of law. An applicant ought not frame points which raise matters of fact and contention to appear to be points of law.

For the above reasons, I do hereby dismiss the preliminary objection dated 31st October, 2012 raised by the 1st defendant with costs to the plaintiff.

Dated Signed and delivered in open court at Nakuru this 20th day of September 2013.

L N WAITHAKA

JUDGE

PRESENT

Mr Githui holding brief for 2nd Defendant

Ms Omondi holding brief for Mr Thuita for plaintiff/Applicant

N/A for the 1st defendant

L N WAITHAKA

JUDGE