



Maangi & 178 others v B2 Yatta Ranhing Co-operative Society Ltd (Environment & Land Case E002 of 2021) [2022] KEELC 2729 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E002 OF 2021**

**LG KIMANI, J
JUNE 29, 2022**

BETWEEN

MUANGE NZONGOI MAANGI & 178 OTHERS APPLICANT

AND

B2 YATTA RANHING CO-OPERATIVE SOCIETY LTD RESPONDENT

RULING

1. The Respondent filed an Amended Notice of Preliminary Objection dated 31st December and amended on 24th January 2022. The said objection claims to be on a point of law in respect of the amended Originating Summons dated and the Amended Plaintiffs application dated 20th January 2022 seeking that the said applications be struck out on the following grounds:
 - 1A. That the Originating Summons and Application is/are fatally defective and an abuse of the Court process as the orders sought do not lie in law.
 2. That the Plaintiffs/Applicants have no title or lease and cannot obtain the orders of injunction.
 - 3A. That even orders of adverse possession cannot issue since the land is leased to the Respondent by the County Government of Kitui who is holding the land in trust.
 4. That the Plaintiffs/Applicants have obtained interim orders based on misinformation and falsehoods, including concealment of material facts.
 5. That the Plaintiffs/Applicants have taken advantage of the ex parte orders obtained on the 16th December 2021 by carrying out criminal activities on the suit land including raiding the Respondent's property, workers and offices, killing and maiming livestock and other activities causing chaos.

That the Application is therefore fatally and incurably defective and should be struck out with costs.



The respondents case and submissions on the preliminary objection

2. The Originating Summons herein is a claim for adverse possession on the leasehold land LR NO.11802 registered in the Respondent's name. The Applicants claim that their parents were members of the Defendant society as well as its employees but the society ran into difficult financial crisis and their parents resorted to settling in various points within the larger LR 11802 where they engaged in peasant economic farming.
3. The Applicants claim that the Defendant all along knew that they were in occupation of the suit property but did not interfere with their quiet use and enjoyment of the suit property. They have constructed permanent homes, planted perennial trees and buried their deceased relatives on the land and therefore claim adverse possession over the portions that they occupy on the suit property.
4. The Applicants obtained interim orders of injunction on 16th December 2021 and later filed an Application 20th January 2022 seeking orders of contempt of Court against certain officials of the Respondent for disobeying the Court's orders.
5. The Defendant filed submissions on their Preliminary Objection and rely on Section 41 of the Limitation of Actions Act and on the case of Francis Kangongo Cheboi v Vincent Kiprono Kaino & 4 others (2013)eKLR: Where the Court gave exceptions from enabling a person to acquire title to land contained in Section 41 of the Limitation of Actions Act CAP 22 with one of the exceptions being land vested in the County Council. It is their submission that one cannot claim the reliefs provided for in the Limitation of Actions Act for land vested in the County Councils and the suit land in that case was vested in Elgeyo Marakwet County Council.
6. Counsel for the Respondent concluded that the suit land is registered in the name of Kitui County Government and leased to the Respondent and that means that they cannot claim adverse possession against them. Counsel for the Respondent also noted that the Kitui County Government is not enjoined to this suit and orders of injunction cannot lie herein this case. They therefore pray that the preliminary objection be sustained and the suit together with the application for injunction be dismissed with costs.

The applicant's case and submissions on the preliminary objection

7. The Applicant filed submissions as well in rebuttal of the Preliminary Objection and stated that the requirements of a claim for adverse possession is that they have been in occupation for uninterrupted period of 12 years without the consent and authority of the owner and that they have carried out acts and/or activities that any owner of a land parcel would be expected to do.
8. It is the Applicant's submission that there is no requirement for them to be the title/lease holders as their occupation is adverse to that of the owner.
9. The Applicant submits that that it is the cardinal rule in Evidence under S.107 that he who alleges must prove and that the Respondent's allegation that the land belongs to the County Government is not proven as they have not annexed any documents to that effect.
10. The Applicant added that a preliminary objection cannot be raised if any facts have to be ascertained since it is meant to be raised on a pure point of law. They submit that the preliminary objection at hand requires examination of facts and whether the land belongs to the County Government of Kitui, whether the Applicant obtained the interim orders based on misinformation and falsehood as alleged and the allegation of misuse of the orders to carry out criminal activities.



Analysis and Determination

11. The issue at hand is whether the Respondent's Notice of Preliminary Objection should be upheld, rendering the entire suit struck out or not.
12. The test of the true definition of a preliminary objection was well set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696.

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

13. The law requires that a Preliminary Objection be brought only on a point of law as Lady Justice Mary Kasango noted in *Kenya Breweries Limited & another v Keroche Breweries Limited* [2020] eKLR while quoting Mativo J in the case of:

"*J.N. & 5 others v Board of Management St G. School Nairobi & another* (2017) eKLR thus: Useful guidance can be obtained from the decision in *Omondi vs. National Bank of Kenya Ltd & Others* where it was held that:- "The objection as to the legal competence of the Plaintiffs to sue.....and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections...In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters...What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts..." Also relevant is the decision by Ojwang, J (as he then was) where he expressed himself as follows: - "A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.... 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 facts pleaded by the opposite side are correct."

14. Ground 1A and 6 of the Notice of Preliminary Objection are similar and the Respondent claims that the Originating Summons and Application is/are fatally defective and an abuse of the Court process as the orders sought do not lie in law and the same ought to be struck out. I have considered the documents filed by both parties and submissions and find that the Respondent has not shown the way in which the Applicant has abused the courts process. It has not been shown that the applicant has for example filed multiplicity of suits, instituted vexatious litigation is involved in obstructive and dilatory proceedings or any other ground. I further find that this being a claim for adverse possession the Court requires to interrogate the facts of the case and make legal inference so as to arrive at the conclusion as to whether or not a claim of adverse possession is founded. I associate myself with the courts finding in the case of *Peter Ngigi Kangethe v Irene Wanjiru Muya & 4 others* [2021] eKLR where it was held that:

"The solemn question of adverse possession is the crux of the suit. It cannot be determined by way of summary proceedings. The question of adverse possession is a question of both facts and the law. A Court of law would require to interrogate the facts of the case and make legal inference so as to arrive at the conclusion as to whether or not a claim of adverse possession is founded. The claim of adverse possession must of necessity be left to the trial



Court to determine through due process. As to whether a matter is bad in law and an abuse of the due process of the Court cannot be in itself a pure point of law. The Court would have to examine the facts and circumstances of the case that are bad in law. What constitutes an abuse of the process of the Court is wide and innumerable. For example, filing multiplicity of suits, instituting vexatious litigation, obstructive and dilatory proceedings, the list is endless. These are not matters that do not of themselves to constitute a pure point of law.”

15. As to whether the suit and the application challenges are fatally defective, the said issue can be considered at the same time as consideration of grounds 2 and 3A. On ground 2 the Respondent claims that the Plaintiffs/Applicants have no title or lease and cannot obtain the orders of injunction. On this I find that the substantive claim in this suit is for adverse possession and the claim is in law based on possession of the land claimed. The Applicants are seeking a declaration that the Respondents title to the land has been extinguished by operation of the law and that they be registered as proprietors in place of the Respondent. The Applicants are thus not expected to have title to the suit land. Section 38 (1) of the *Limitation of Actions Act* provides that;

“Registration of title to land or easement acquired under Act Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

16. It is the Respondent’s submission that land subject matter of this suit is vested in the County Councils cannot be owned through adverse possession. However, they have not annexed any proof or evidence that the land belongs to the County Government of Kitui and even if they had, ascertaining whether the title is authentic would require a full hearing to determine the facts. Further, the Respondent claims that the said County Government holds the suit land in trust. In my view this is a fact that has not been pleaded and even if it were to be pleaded the same would require proof and/or ascertainment and the ideal place for such inquiry as would lead to proof of such a fact would be at the trial.

17. Grounds 3 and 4 of the Notice of Preliminary Objection deal with the application dated 20th January 2022 which is the application for contempt of court. The Respondent claims that the Applicants have obtained interim orders based on concealment of material facts and that they have been carrying out criminal activities on the suit land. The Applicants on the other hand deny service of the orders referred to. They also deny having carried out the actions they are accused of and they make adverse allegations against the Applicants with regard to the suit land. On these two allegations made under the two grounds, it is my view that for the Court to ascertain the truth of the said contradicting allegations and whether or not the facts proved amount to contempt of court, it would require determination based on evidence presented. These grounds in my view do not raise pure points of law and thus do not meet the requirements of a Preliminary Objection. Further, I am of the view that even if these grounds of objection were to be proved, ascertained and determined such determination would not culminate in the final disposal of the suit.

18. The Court found in *Kenya Breweries Limited & another v Keroche Breweries Limited (Supra)* that if facts must be proven, then this is not a true preliminary objection based on a point of law:

“It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be



blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.” (Emphasis added) Thus, a preliminary objection may only be raised on a “pure question of law.” To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

19. In conclusion, I find that the Respondent has not proved that;
- A. The Originating summons herein and Application dated 20th January 2022 is/are fatally defective and an abuse of the Court process and/or that the orders sought do not lie in law.
 - B. It is a requirement of the law for the Plaintiffs/Applicants to have a title or lease to the suit property in a claim for adverse possession in order to obtain the orders of injunction.
 - C. The suit land is leased to the Respondent by the County Government of Kitui or that the said County Government is holding the land in trust and orders of adverse possession cannot issue.
 - D. Further the Court finds that the question of whether or not the Plaintiffs/Applicants have obtained interim orders based on misinformation and falsehoods, including concealment of material facts is a contested fact that can only be determined during the hearing.
 - E. The Court also finds that the question of whether or not the Plaintiffs/Applicants have taken advantage of the ex parte orders obtained on the 16th December 2021 by carrying out criminal activities on the suit land including raiding the Respondent’s property, workers and offices, killing and maiming livestock and other activities causing chaos are contested facts that can only be determined during the hearing.
20. I therefore find that the Amended Preliminary Objection dated 24th January 2022 lacks merit and the same is hereby dismissed with costs to the Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 29TH DAY OF JUNE 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

C. Nzioka Court Assistant

..... Advocate for the Applicants

..... for the Respondent

