



REPUBLIC OF KENYA



KENYA LAW
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**Kathuli v Mwinzi (Miscellaneous Application E004 of 2022)
[2022] KEELC 4814 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
MISCELLANEOUS APPLICATION E004 OF 2022**

LG KIMANI, J

SEPTEMBER 21, 2022

BETWEEN

MOSES MUTIA KATHULI PLAINTIFF

AND

COSMUS KIMANZI MWINZI RESPONDENT

RULING

1. The respondent filed a Notice of Preliminary Objection dated May 24, 2022 based on the following grounds:
 1. The applicant has misapprehended the doctrine of adverse possession and the entirety of the suit is bad in law, lacks merit and is an abuse of the court process.
 2. The suit therefore lacks a reasonable cause of action against the defendant/respondent and ought to be struck out.
 3. The Chief Magistrate's Court at Mwingi has the requisite jurisdiction to hear and determine this matter pursuant to section 9 of the Magistrate's Court Act, section 26(3) of the *Environment and Land Court Act* and Gazette Notice no 1471 dated March 11, 2016 thus the matter ought to be heard and determined by the said court.
 4. The Chief Magistrate's Court at Mwingi is the nearest court to the parties and the court at the lowest grade with the jurisdiction to determine the matter and therefore ought to hear and determine the same.
2. The suit has been brought by way of an Originating Summons dated May 4, 2022 with the applicant seeking to be declared to be entitled by adverse possession for over 12 years to a one acre portion of Land Parcel Number Migwani/Kyamboo/2218. The said land is registered in the name of the



respondent Cosmus Kimanzi Mwinzi. The applicant further seeks an order that he be registered as absolute proprietor of the said land.

The respondent's written submissions

3. On the 1st ground of objection, counsel for the respondent cited the cases of *Celina Muthoni Kithinju vs Safiya Binti Swaleh & 8 others* (2018) eKLR, *Jandu v J=Kirpal & Another* (1975) EA 225, *Martin Mugo & Anor v Njeru M'utbi & 2 others* (2020) eKLR among other cases on the requirements in order to prove the doctrine of adverse possession including non-permissive or non-consensual occupation, continuity and publicity and that possession must be adverse to the owner. The respondent submits that contrary to this, the applicant describes his occupation as peaceful, continuous and without interruption.
4. The respondents also contend that the applicants possession was interrupted because his school was closed in 2017 and the applicant has not resided on the property since then. He stated that the applicant must demonstrate possession and utilization of the suit land to be declared as an adverse possessor.
5. On the 2nd ground, the respondents counsel cited order 2 rule 15 of the *Civil Procedure Rules* stating that the suit does not disclose a reasonable cause of action because the applicant has failed to present any evidence of purchasing the property from the defendant's father. Counsel relied on the holding in *DT Dobie & Co (K) Ltd vs Muchina* (1982)KLR. It is the respondent's submission that the applicant has failed to demonstrate which act on the part of the defendant gives them a cause.
6. On the 3rd and 4th grounds raising issues of jurisdiction, the respondents counsel submitted that this honourable court is not the court of the lowest grade competent to try the matter contrary to the provision of section 11 of the *Civil Procedure Act*. The counsel stated that by virtue of section 9 of the *Magistrate's Court Act* and section 26 (3) of the *Environment and Land Court Act* the Chief Magistrate's Court at Mwingi is the competent and nearest court to try this matter since the suit property is located in Migwani. They relied on a similar case *Patrick Ndegwa Munyua vs Benjamin Kiiru Mwangi & Ano*(2020)eKLR. It is their submission that the Chief Magistrate Court in Mwingi has the pecuniary as well as the geographical jurisdiction to hear the matter.

The applicant's submissions

7. The applicant submitted that he has enjoyed actual, visible, exclusive, open and notorious occupation of the one acre of land title number Migwani/Kyambo/2218 since 2007 for the last 15 years and without interruption from the defendant. According to the applicant, the issues raised are questions of evidence which cannot be resolved in the manner sought by the defendant.
8. Regarding the issue of whether the suit herein raises a reasonable cause of action, the applicant quoted section 7 of the *Limitation of Actions Act* cap 22 laws of Kenya on adverse possession and stated that he has structures on the land which the defendant has not refuted.
9. On matters jurisdiction, the applicant relied on article 162(2)(b) of the *Constitution* section 13 of the *Environment and Land Court Act* stating that this court has original and appellate jurisdiction to hear and determine disputes relating to the environment and the use and occupation of, and title to land. They added that section 38 of the *Limitation of Actions Act* provides that such claims relating adverse possession should be applied to the High Court. He also added that the value of the structures have not been stated to be below Ksh 20 million and as such, there is no basis to challenge the court's jurisdiction.



Analysis and determination

10. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

11. The above legal definition has been cemented in the now famous case of Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd. [1969] E A 696. The court then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

12. The first ground of objection is that the applicant has misapprehended the doctrine of adverse possession and the entirety of the suit is bad in law, lacks merit and is an abuse of the court process. The respondent contends that the suit has not met the requirements for a successful claim of adverse possession and should be dismissed. The Black’s Law Dictionary defines adverse possession as follow:-

“The enjoyment of real property with a claim of right when the enjoyment is opposed to another *persons claim and is continuous, exclusive, hostile, open and notorious”

13. For the court to determine whether the elements required to prove adverse possession have been proved, it must weigh the facts of the case against the law which offends the principles of preliminary objections. Further a preliminary objection can only be raised on the assumption that all the facts pleaded by the other side are correct. In the present case there is contestation on the true facts and the said facts are for determination by the court. It is to be noted that the respondent has not filed a replying affidavit and some of the issues of fact raised in the submissions are unsupported. However even if the said issues were to be accepted then there is contestation of facts of whether the applicants occupation of the suit land has been non-permissive, non-consensual, open, notorious and exclusive. The fact of whether the applicant has occupied the land as a licensee or as an owner is also contested. This are all issues that can only be determined at the trial.

14. In my view this ground fails to meet the test of a preliminary objection on a pure point of law. The court found in *Oraro v Mbaja* [2005] eKLR that if facts must be proven using the rules of evidence, then this is not a true preliminary objection based on a point of law:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified 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, and 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. I am in agreement with learned counsel, Mr Ougo , that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as



there are diverse weighty authorities carrying the message..... As already remarked, 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. If the applicant's instant matter required the affidavit of Barak Eston Mbaja dated and filed on October 7, 2004 to give it validity before the court, then it could not be allowed to stand as a preliminary objection which must be on a pure point of law."

15. The 2nd ground relied on is that the suit does not raise a reasonable cause of action because the applicant has failed to present any evidence of purchasing the property from the defendant's father. It must be noted that a claim for adverse possession is one based on possession. The court will need to examine the facts and the evidence presented during trial to determine how such possession if any came about. This ground fails that test of what constitutes a preliminary objection since it does not raise pure points of law.
16. On the question of whether a reasonable cause of action has been established and whether the suit ought to be struck out the court in *D T Dobie & Company Kenya Limited vs Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it"
17. The 3rd and 4th grounds contend that the court with the requisite jurisdiction to hear and determine this matter is the Chief Magistrate's Court sitting at Mwingi because it is the court with the lowest competent pecuniary and geographical jurisdiction. It is noted that the respondent does not claim that this court does not have jurisdiction to hear this suit and the only contention is that this suit ought to have been filed in the Chief Magistrates Court at Mwingi.
18. This suit is brought under section 38 of the *Limitation of Actions Act* 21 of 1968 which provides that:

"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 (registered land), 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."
19. It is true that under section 11 of the *Civil Procedure Act* it is provided that every suit is to be instituted in the court of the lowest grade competent to try it. Further, section 9 of the *Magistrates court Act* no 26 of 2015 confers jurisdiction to the magistrates courts to hear and determine land disputes in exercise of jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* and is subject to the pecuniary limits under section 7 of the *Magistrates court Act*. The said pecuniary jurisdiction is subject to a maximum of 20 million shillings. Section 11 of the *Civil Procedure Act* provides that every suit shall be instituted in the court of the lowest grade competent to try it.
20. The respondent claims that the suit property is located in Migwani and the nearest court of competent jurisdiction is Mwingi. He further states that the land claimed is a one acre piece located in rural town of Migwani and that there is no possibility that the land could be valued at more than twenty million shillings. On the other hand the applicant claims that the land together with the value of the structures thereon have not been stated by the respondent to be below twenty Million shillings. In my view



these two grounds do not constitute grounds for preliminary objection. The value of the suit land together with the developments thereon has not been stated by any of the parties and the court is being asked to speculate and make an assumption on the said value. Further considering the definition of a preliminary objection earlier stated the 3rd and 4th grounds of objection if upheld, would not in my view render further proceeding before this court impossible or unnecessary since it has not been shown that this court lacks jurisdiction to hear and determine this suit.

21. Further jurisdiction of this court is under article 162(2) (b) of the Constitution of Kenya 2010 and section 13 of the Environment and Land Court Act states that this court has original and appellate jurisdiction to hear and determine all disputes in accordance with the said article 162(2) (b) of the Constitution. The conferment of jurisdiction to the magistrates court to hear environment and land disputes does not oust the jurisdiction of this court as conferred under the Constitution and the ELC Act.
22. For the foregoing reasons I do find that all the grounds raised in the notice of preliminary objection dated May 24, 2022 fail and the same is hereby dismissed with costs to the applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 21ST DAY OF SEPTEMBER 2022

HON L G KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

Musyoki: court assistant

M/S Ngala Advocate holding brief for Mwalimu for the applicant

No attendance for the respondent.

