



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nimambeya v Mazzonetto (Environment & Land Case E003 of 2021)  
[2022] KEELC 14548 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14548 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E003 OF 2021**

**AE DENA, J**

**OCTOBER 19, 2022**

**BETWEEN**

**MWANAMKASI HAMISI NIMAMBEYA ..... APPLICANT**

**AND**

**ORAZIO MAZZONETTO ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the preliminary objection dated April 22, 2022 raised by the respondent/defendant on the following grounds;
  - a. That the suit offends the mandatory provisions of section 38 of the *Limitation of Actions Act* chapter 22 laws of Kenya and section 7[d] of the *Land Registration Act* 2012 in that a period of twelve (12) years has not lapsed since the date of the alleged occupation and the date of filing the suit at the High Court. The perimeter wall was constructed in 2010 a year after the purchase
  - b. That forty [40] years ago the respondent was not the registered owner of the suit property. The property was registered in the name of the applicant's brother Juma Ali Mwabako on December 17, 2002 who sold the property to the respondent on July 16, 2009. The applicant has not stated when she took possession considering the fact that the respondent bought the property on July 16, 2009 and erected a perimeter wall round it in the year 2010.

**Submissions**

2. The preliminary objection was canvassed by way of written submissions. Both parties submitted as summarized below.



## Respondent/Defendant Submission

3. The respondent's submissions were filed before court on July 8, 2022. The same curve out two issues for determination, whether the originating summons application before court is premature and whether the preliminary objection is merited. Highlighting the pre requisites for what constitutes adverse possession as laid in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR it is submitted the plaintiff applicant has failed to satisfy all the conditions. They seek for the suit to be dismissed.
4. On whether the preliminary objection is merited, it is simply submitted that the same has raised pure points of law as was espoused in the case of *Mukisa Biscuits Manufacturing Company v West End Distributors Limited* [1969] EA. The court is asked to uphold the preliminary objection and dismiss the suit.

## The Applicant/Plaintiff Submissions

5. The applicant has submitted that from the plaint filed herein and a plain reading of the preliminary objection, it does not raise any issues of law but facts failing to meet the threshold stated in the case of *Mukisa Biscuits Manufacturing Company* (*supra*). It is submitted that issues of when the respondent took possession of the suit property and when the perimeter wall around the property was constructed were issues of fact. That the respondent acquired registration of the title in July 16, 2009 and by July 16, 2021 the limitation period of 12 years had lapsed and he is therefore statute barred from filing a claim against the applicant to recover land by virtue of section 17 of *Limitation of Actions Act*. The court is urged to dismiss the preliminary objection with costs.

## Determination

6. I have considered the notice of preliminary objection, the rival submissions and the authorities cited by counsels. I need to start by setting out what a proper preliminary objection is, and I will heavily rely on *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR which captured the legal principle as follows:

“...A preliminary objection 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 is the exercise of judicial discretion...”

7. Further in *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 it is stated to mean :-

“So far as I am 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. 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.”

8. It is clear from the above cited case law that a preliminary objection should raise pure points of law and which are argued on the assumption that all facts are correct. The instant suit was commenced by originating summons dated November 9, 2021 seeking for a declaration that the title deed of the respondent/defendant Orazio Mazzonetto over the suit parcel number Kwale/Diani/390 has been extinguished by the applicant's occupation of the land for over 12 years.



9. According to the applicant, she has been in occupation of the suit parcel for over 40 years and is therefore entitled to ownership of the same through the doctrine of adverse possession. A copy of the title deed to the suit property is annexed which bears the respondents name. The applicant has further attached photographs indicating her alleged occupation of the suit property.
10. In response to the originating summons, the respondent/defendant filed grounds of opposition on April 22, 2022 pointing that the suit offends the provisions of section 38 of the Limitation of Actions Act and section 7[d] of the Land Registration Act 2012. That a period of 12 years had not lapsed since the date of the alleged occupation of the land and the filing of the instant suit. It is further stated that the applicant is a sister to one Juma Ali Mwabako who sold the suit property to the respondent at a consideration of Kshs 3,000,000/- on July 16, 2009. The respondent further states that the said Juma Ali Mwabako was registered as the owner of the suit property in the year 2002. Allegations that the applicant was in occupation of the suit property are denied, the respondent states that after purchase of the same he built a perimeter wall in order to secure the premises.
11. From the foregoing facts as outlined by each party, it is clear that issues of occupation of the suit property are highly contested. The applicant states that she has been in occupation of the land for over 40 years with her family and does qualify for grant of the orders sought in the originating summons. The respondent on the other hand states that he purchased the suit property in the year 2009 and from his record, the same was registered in the names of his vendor in 2002. Issues of facts play out largely from the brief summary of the case of each party. It is trite that a preliminary objection is on pure points of law, anything falling short of the same leads to interrogation of facts and calls for disqualification as preliminary objection. On this limb, the preliminary objection cannot stand as it is not properly raised.
12. On the other grounds as raised in the preliminary objection relating to the provisions of sections 38 of the Limitation of Actions Act and 7[d] of the Land Registration Act 2012, Section 38 of the Limitation of Actions Act provides as follows:
  - "38. Registration of title to land or easement acquired under Act.
    - (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.
    - (2) ...
    - (3) ...
    - (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section."
13. The above provisions of law are specific on the mode of filing a claim for adverse possession. It has been established that the facts as outlined by the parties herein are contested with each party giving a different narration of events. To enable an informed and just decision on who is the rightful owner of the suit property the court will need to interrogate the evidence further through the witness testimonies in substantiating the issues raised. The court is not at this point able to tell whether the applicant qualifies for grant of the orders sought as the facts presented are highly disputed. In my view the preliminary objection is premature at this point.
14. In the circumstances, this preliminary objection is dismissed with costs.



It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022**

**AE DENA**

**JUDGE**

**Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

**Mr. Mungai for the Plaintiffs/Applicants**

**Mr. Kingori H/B for Kimani for the Respondent**

**Mr. Denis Mwakina- Court Assistant.**

