



Safari v KCB Bank Kenya Ltd & another (Environment & Land Case E028 of 2022) [2022] KEELC 14943 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14943 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E028 OF 2022
NA MATHEKA, J
NOVEMBER 22, 2022**

BETWEEN

MARY MUKABADEGE SAFARI PLAINTIFF

AND

KCB BANK KENYA LTD 1ST DEFENDANT

SERAH KALUME KITSAUMBI 2ND DEFENDANT

RULING

1. That the honourable court lacks the jurisdiction to hear the plaintiff's suit filed by way of a plaint dated March 14, 2022 as the same is a nullity ab initio, bad in law and incurably defective as it offends the mandatory provisions of Order 37 Rule 7 (1) of the *Civil Procedure Rules*, 20 10.
 2. That the plaintiffs suit filed by way of the Plaint dated March 14, 2022 contravenes the provisions of the sections 7, 13, 17 had 38 of the *Limitations of Actions Act* cap. 22 Laws of Kenya and constitutes otherwise an abuse of Court process.
 3. That thus, this preliminary objection is for striking out of the plaint dated 14.0.3.2022 with costs to the 1st defendant and should be accordingly struck out in limine without further consideration.
2. The defendants submitted that this suit was commenced by a plaint. That the Plaintiff seeks to be declared the legal owner of the suit property by way of adverse possession. That a suit for adverse possession is specifically for in order 37 rule 7 of the *Civil Procedure Rules* which clearly provides that an application for adverse possession under Section 38 of the Limitation of Actions Act shall be made by originating summons which summons shall be supported by an affidavit to which an extract of the title to the land in question has been annexed.



3. The plaintiff states that her suit does not offend the provisions of order 37 Rule 7 (1) of the Civil Procedure Rules, section 7, 13, 17 and 38 of the Limitation of Actions Act as alleged by the 1st defendant. That due to the continued interference, threat of trespass and disruption of her peaceful occupation of the suit property by the defendants herein for the last one year, she filed the suit herein seeking for inter alia, an order of permanent injunction restraining the defendants from trespassing my property and interfering with my possession in anyway and an order directing the Land Registrar to transfer the title of the property to her name. That the suit herein is not one to be dismissed on procedural technicalities as prayed by the 1st defendant but rather be heard on its merits on the grounds that she is the beneficial owner of the suit property Subdivision MN/ Ill 6938 and has been in occupation of the suit property for over 35 years. This is duly confirmed in the Judgement and orders of the honourable court in Civil Suit No. 136 of 2013. (Attached and marked 'MMS-1' is a copy of the said judgement and Decree). That the suit property was registered on August 9, 2000 and she has been in occupation of the land way before the said registration to date when her peaceful possession and occupation of the land has been threatened by the respondents prompting filing of the suit herein. That she raised the issue of adverse possession in her defence and counter claim to 2nd defendant's suit CMC No. 136 of 2013 against her and the same was allowed by the honorable court. that the suit property though subdivided, was still registered in the name of the 2nd defendant at the time of filing of CMCC No. 136 of 2012 where the 2nd defendant sought to evict her and the same was defeated by her counter claim of adverse possession. That the statutory time limitation started running from August 9, 2000 when the land was registered and not when subdivision was carried out on the title on May 31, 2011 as indicated on entry number 2 on the mother title. (Attached and marked 'MMS-2" is a copy of the mother title issued August 9, 2000 with all the entries). That it is not disputed that the said subdivision plot which was subject to the litigation in CMCC No 136 of 2013 and in the current suit, was actually transferred two years after (the subdivision was carried out and the title of the land was all along in the name of the 2nd respondent even after the subdivision until the unlawful transfer during the pendency. That indeed her case of adverse possession was ongoing in CMCC No. 136 of 2013 against the 2nd respondent who was the registered title holder then before the suit property was transferred to the 1st respondent, hence the 1st respondent's instant defence innocent purchaser does not hold water. That as evidence by clauses 2.2, 6, and 10 of the sale agreement between the 1st and 2nd respondents dated March 7, 2012, the full purchase price was to be paid upon successful transfer and Grant of vacant possession of the property to the 1st respondents. (Attached and marked "MMS-3" is a copy of said agreement dated March 7, 2012). That the said sale agreement was entered in collusion with the defendants to illegally remove her from the property and permanently disrupt her occupation of the land. That despite the transfer of the suit property on June 12, 2013, the 1st respondent could not be granted vacant possession to date since she was in occupation of the land and consequently, the 1st respondent never, paid the 90% balance of the purchase price as provided in the said agreement. (Attached and marked "MMS-4" is a copy of letter dated February 4, 2022 from the 2nd respondent's advocates). That since the 1st respondent was aware of her adverse occupation of the suit property and the ongoing suit on the subject property and has actually only paid 10 % of the purchase price to date considering the risk involved, the 1st respondent was well aware of what it was engaging into hence does not qualify as an innocent purchaser for value. That without prejudice to the foregoing, the commencement of this suit by way of a plaint is not fatal or prejudicial on their case nor does it raise an issue regarding the jurisdiction of this court. That the overriding objectives provided in sections IA and 1B of the Civil Procedure Act confer the honorable court with considerable latitude in the interpretation of the law and giving effect to the rules at the same time.



4. The law on preliminary objection is now settled, it must be confined to pure points of law and not blurred by factual details, which may be disputed by the other party. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where it was held that:

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.

Sir Charles Newbold, P added,

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 the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

5. In the case of *Oraro v Mbaja* (2005) I KLR 141, the court held that;

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 divers’ weighty authorities carrying the message.”

6. This court has perused the pleadings filed by the plaintiff and finds that apart from the prayer for adverse possession the plaintiff seeks orders on trespass and damages stating that the matter be heard on merit on the grounds that she is the beneficial owner of the suit property Subdivision MN/ III 6938 and have been in occupation of the suit property for over 35 years. This is duly confirmed in the Judgement and orders of the honourable court in Civil Suit No 136 of 2013. (Attached and marked 'MMS-I' is a copy of the said judgement and Decree). From the circumstances of this case I find that article 159(2)(d) of the *Constitution* of Kenya, 2010 obligates the courts to administer justice without undue regard to procedural technicalities. That based on the foregoing, the 1st defendant's preliminary objection dated June 14, 2022 lacks merit and the same is dismissed with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF NOVEMBER 2022.

N.A. MATHEKA

JUDGE

