



**Chikove & 45 others v Mbogori & 2 others (Environment & Land Case (OS)  
E001 of 2021) [2022] KEELC 15671 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15671 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE (OS) E001 OF 2021**

**AE DENA, J**

**DECEMBER 6, 2022**

**BETWEEN**

**LILY MICHAEL MWANGUO CHIKOVE & 45 OTHERS ..... PLAINTIFF**

**AND**

**ZAKAYO MURIUKI MBOGORI ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KWALE ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**The Preliminary Objection**

1. The notice of Preliminary Objection subject of this ruling is dated 5/7/2022 and is based on the ground that this suit offends the provisions of section 38 of the *Limitation of Actions Act* Laws of Kenya and Section 7[d] of the *Land Registration Act 2012*. The Preliminary Objection is by the 1<sup>st</sup> defendant/respondent who seeks that the suit be struck out with costs to them.

**Brief Factual Background**

2. A brief background of the suit is necessary for a clear perspective of the backdrop against which the preliminary objection is raised. The suit was instituted by way of amended originating summons dated 20/6/2022. The applicants seek transfer of land parcel no Kwale/Majoreni/1289 measuring 51.5Ha [hereinafter referred to as the suit property] to them through adverse possession as prescribed under the *Limitation of Actions Act*. The originating summons is supported through an affidavit sworn by one Lily Michael Mwanguo Chikoye where it is averred that the 1<sup>st</sup> Defendant/Applicant is the registered owner of the suit property. A copy of official search is annexed. That the applicants have been in possession of the suit property for years ranging from 16 to 60 years and the said possession has been actual, non-permissive and adverse.



3. It is deponed that the applicants have lived on the suit property, made developments thereon which include construction of permanent houses as well as farming activities therein. That the said occupation has been without interruption and the same makes them entitled to be the legal and registered owners of the suit property under the doctrine of adverse possession. The 1<sup>st</sup> Defendant/Applicant filed the preliminary objection herein in response to the originating summons. On 19/7/2022 this court gave directions for the preliminary objection to be canvassed by way of written submissions.

### **1<sup>st</sup> Defendant/Respondent's Submissions**

4. The 1<sup>st</sup> Defendant filed his submissions on October 12, 2022. It is submitted that the 1<sup>st</sup> Defendant obtained registration of land parcel Kwale/Majoreni/1289 on 8/6/2021 and took physical possession of the same. That the 1<sup>st</sup> Defendant later leased the land parcel to Kwale Sugar International Company Limited. That the application for adverse possession and extinguishing of the 1<sup>st</sup> defendant's title to the property is premature since the applicants have not met the requirements of the provisions of Section 38 of the *Limitation of Actions Act* and section 7[1] of the *Land Registration Act* of 2012. The 1<sup>st</sup> defendant submits that actions to recover land can only be brought at the end of twelve years from the date on which the right of action accrued on a person, that the cause of action of limitation period against the 1<sup>st</sup> Respondent started running on 8/6/2021 and hence the preliminary objection should be allowed and the originating summons struck out. Reliance is placed in the case of *Mtana Lewa Versus Kabindi Ngala Mwagandi* [2015] eKLR.
5. The applicants did not file any response to the preliminary objection as well as submissions. I note that on 19/10/22 Mr Adede indicated that the respondent was extending an olive branch but Mr Mungai Counsel for the plaintiff was not picking his calls on the same. I granted Mr Adede a further 7 days to file his submissions which he did not.

### **Analysis and Determination**

6. Two issues emerge for determination, whether the preliminary objection raised is sustainable and whether the suit offends the provisions of section 38 of the *Limitation of Actions Act* and section 7 of the *Land Registration Act*. On the first issue raised I will revisit the decision in *Hassan Ali Jobo & Another v Suleiman Said Shabbal & 2 Others*, Petition No 10 of 2013, [2014] eKLR [paragraph 31] where the supreme court expressed itself as follows on preliminary objections;

“To restate the relevant principle from the precedent-setting case, *Mukisa Biscuit Manufacturing Co Ltd –vs- West End Distributors* (1969) EA 696:

‘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 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. It is clear from the above excerpts that a preliminary objection may only be raised on a ‘pure question of law’. In order 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. From the pleadings filed before court it is clear that



several facts are contested by the parties herein. The applicants state that they have been in occupation of the suit land for a long time ranging between 16 to 60 years within which it is alleged several developments have been made thereon. The 1<sup>st</sup> defendant and who is the registered proprietor of the land states that the assertions by the applicants are not true. That before purchasing the suit property from the previous owner Mbiu Waiharo, he undertook due diligence and established that the land was unoccupied. That after being registered as the owner of the same, he leased the land to Kwale Sugar Company Limited and who on their part also undertook due diligence to establish that the land was unoccupied. It is evident that the issue of occupation of the land is contested, and the court will definitely be called upon to establish this in order to determine the rightful ownership of the land. This can only be done at full hearing. On this limb the preliminary objection does not qualify to be one in law.

8. On the second issue, section 38 of the [Limitation of Actions Act](#) provides for the doctrine of adverse possession and the essential ingredients to be met for one to qualify to invoke the said doctrine. The 1<sup>st</sup> defendant states that any cause of action by the applicants to recover the land ought to be made 12 years from the date when the 1<sup>st</sup> Respondent became the registered owner. In my view, this notion raises one question; when does time start running in a claim for adverse possession on the part of the registered owner of the land. In response to this I am guided by an excerpt from Court of Appeal in Civil Appeal No 164 of 2011 [Gachuma Gacheru VS Maina Kabuchwa](#) [2016] eKLR, when quoting [Maweu Vs Liu Ranching & Farming Cooperative Society](#) [1985] eKLR held:

“Lastly, on argument by the Respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of the Court in, Maweu V Liu Ranching & Farming Cooperative Society, [1985] eKLR: “What logic is there in saying that this concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner’s predecessor. How is it lost at all?”

9. Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under [cap 300](#). I have noted the arguments advanced on indefeasibility of title and the extinguishment of adverse possession by virtue of the same which in my view should be left to the main hearing. This is to avoid delving into the merits of the case. I think from the facts surrounding this case, the allegations of previous occupation made, it is best to let the matter proceed into full hearing where the Plaintiff applicants evidence will be tested in cross examination and the substratum dealt with.
10. I believe I have said enough to demonstrate why the preliminary objection cannot stand. The same is hereby dismissed with costs in the cause.
11. It is noted that there are orders issued by this court for *status quo* to be maintained. It is important that focus should be on setting down the matter for hearing and determination on merit for closure.

It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 6<sup>TH</sup> DAY OF DECEMBER 2022**

**A.E. DENA**

**JUDGE**

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

Adede for Plaintiff/ Applicant



N/a for the 1<sup>st</sup> Defendant /Respondent

Mr. Alfred Mazerah - Court Assistant.

