

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 343 OF 2003

PATRICK NGANGA KAMAU.....PLAINTIFF
VERSUS
ISAAC RIBERO KAMEREDEFENDANT

RULING

This case by Originating Summons under Order 36 Rule 3D of the Civil Procedure Rules asking for a declaration that Plaintiff be registered as the owner as a result of effluxion of 12 years period of possession, through the principle of adverse possession of LR No. GITHUNGURI/GITHUNGURI/1310.

Section 21 and Section 38 of the Limitation Act Cap 22 show that when a person has been on land uninterrupted for 12 years he can be registered as proprietor of that land. This is called adverse possession but the same cannot be established unless there has been quiet and uninterrupted possession. Now the Defendant is saying that there was interruption because there have been cases against the possession.

He says that 12 years has not lapsed so application cannot be sustained. On this ground, Mr. Njau for the Defendant has taken out a Preliminary Objection for an order that the Plaintiff has no cause of action and that the suit ought to be struck out, but Mr. Ngeno for the Applicant says evidence has to be adduced to establish the date of accrual of cause of action.

The law, however, is clear on the raising of Preliminary Objections. Normally, Preliminary Objections are intended to shorten hearing of matters when the matter can be resolved without going through trial. A Preliminary Objection as was stated by Sir Charles Newbold in *MUKISA BISCUIT MANUFACTURING COMPANY LIMITED vs. WEST END DISTRIBUTORS LIMITED* (1969) EA 696

“..is 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.”

Here the time the possession started is not agreed nor is the fact whether the occupation or possession has been uninterrupted or not.

This is not a proper case to be resolved on Preliminary Objection and must fail.

Objection refused. Costs to the Plaintiff.

DATED this 17th September 2003.

A.I. HAYANGA

JUDGE