



**Ligawa & another v Ochola (Sued as the Administrator of the Estate of Omoka Owino - Deceased)
(Environment & Land Case 102 of 2017) [2023] KEELC 676 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 676 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 102 OF 2017
MN KULLOW, J
FEBRUARY 7, 2023**

BETWEEN

MICHAEL ODHIAMBO LIGAWA 1ST PLAINTIFF

RUSELINA AUMA LIGAWA 2ND PLAINTIFF

AND

**PAMELA ADHIAMBO OCHOLA (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF OMOKA OWINO - DECEASED) DEFENDANT**

RULING

1. The defendant herein filed a notice of preliminary objection dated June 19, 2019 in response to the plaintiff's amended originating summons dated June 14, 2021, on the following grounds: -
 - a. The claimants/ plaintiffs cannot claim both purchaser's interest and adverse possession at the same time.
 - b. The plaintiff is barred by operation of *Limitations of Actions Act* Section 7, Cap 22 from instituting the said suit as the Defendant has been in occupation of the suit property for well over 12 years now. Consequently, the proceedings herein are a nullity.
 - c. The instant proceedings offend the provisions of Section 21 and 22 of the *Land Control Act*.
 - d. The instant proceedings and in particular, the orders sought, amounts to and/or constitutes an abuse of the due process of the court.
 - e. In any event, the suit herein is misconceived and otherwise mounted in vacuum. Consequently, the entire proceedings are a nullity ab initio.
 - f. On the other hand, the plaintiff herein is non-suited.



- g. At any rate, the instant suit does not disclose and/or capture any reasonable cause of action, either known to law or at all.
2. The preliminary objection was canvassed by way of written submissions; both parties filed their rival submissions which I have read and taken into consideration in arriving at my Ruling as hereunder;

Defendant's/ Applicant's Submissions

3. The defendant/ applicant majorly submitted on the requirements of a claim on adverse possession and the contents of the various supporting affidavits sworn by the plaintiffs on the claim of purchase. She maintained that one cannot claim purchase and adverse possession at the same time.
4. She relied on the following cases in support of her case; *Gulam Miriam Noordin vs Julius Charo Karisa* [2015] eKLR and *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR.

Plaintiffs'/ Respondents' Submissions

5. It was their submission that a preliminary objection should only be based on pure points of law; which can be heard and determined without reference to evidence or contested facts in a suit. It was their contention that the instant preliminary objection as filed is not based on pure points of law.
6. They further submitted that the issue of whether the plaintiffs have claimed both purchaser's interest and adverse possession at the same time are factually disputed issue which will need to be proved through evidence during the hearing of the main suit and not a pure point of law that can be dispensed in the present preliminary objection.
7. Further, with regards to section 7 of the *Limitations of Actions Act* and Sections 21 and 22 of the *Land Control Act* as referred by the Applicant; he submitted that the issue of who is in possession is a factual issue which will call for evidence particularly because both parties are claiming to be in possession of the suit land.
8. They relied on the following cases in support of their position; *Henry Wanyama Khaemba vs Standard Chartered Bank Ltd & Anor* [2014] eKLR, *Mukbisa Biscuits vs West End Distributors Ltd* [1969] EA 696 and *United Insurance Co Ltd vs Scholastica A. Odera* Kisumu HCCA No 6 of 2005.
9. The sole issue for determination before me is whether the notice of preliminary objection dated February 17, 2022 is merited.
10. The law on what constitutes a preliminary objection is now well settled. A preliminary objection cannot be raised if any fact has to be ascertained. In the case of *Mukbisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A. 696; the Court defined preliminary objection as follows;

“Law, JA.:

So far as I am aware, a preliminary objection consists of a pure 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.....

Newbold, P.:

“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.....”



11. The Supreme Court also addressed its mind on the issue of a preliminary objection in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR and stated as follows:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.”

12. The defendant has sought the dismissal of the plaintiffs’ suit on the basis the plaintiffs have sought both purchaser’s interest and adverse possession and further that the suit offends the provisions of section 7 of the *Limitation of Actions Act*. The said section provides as follows: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

13. He further contends that the plaintiffs’ suit offends the provisions of section 21 and 22 of the *Land Control Act* which provides as follows: -

“

“21. Any person who knowingly makes any false statement in an application or appeal under this Act, or who knowingly gives any false information to any person in connection with the determination of an application or appeal under this Act, shall be guilty of an offence and liable to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months, or to both such fine and such imprisonment.

22. Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—

(a) pays or receives any money; or

(b) enters into or remains in possession of any land,

in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

14. Applying the foregoing to the instant case; it is apparent that the issues raised by the defendant are factual issues and further a determination of the same would not only require the production and analysis of exhibits in support of the various claims but would also require the exercise of the court’s discretion in determining the same. a determination of the 12-year period as provided in section 7 of the *Limitation of Actions Act* above; would require the ascertainment of facts, particularly when time started running before the claim of adverse possession can materialize and/or accrue.

15. The preliminary objection as filed does not therefore amount to a pure point of law as envisaged in the *Mukbisa Biscuits Case* (supra). Further, a determination of the issues raised in the said preliminary objection can only be done at a full hearing and on merit and not in an interlocutory stage.



16. In view of the forgoing, I find that the notice of preliminary objection dated June 19, 2019 does not raise any pure points of law.
17. In the circumstances, I find that the defendant's preliminary objection dated June 19, 2019 is not merited and is hereby dismissed. Each Party to bear their own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 7TH DAY OF FEBRUARY, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Nonappearance for the Respondent/Plaintiff

Mr. Adawo for the Applicant/ Defendant

Court Assistant - Tom Maurice/ Victor

