



**Sammy v Ndonge (Environment & Land Case E025 of 2021)
[2023] KEELC 17314 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E025 OF 2021
CA OCHIENG, J
MAY 10, 2023**

BETWEEN

JOSPHAT KYALO SAMMY PLAINTIFF

AND

PETER KIAMBA NDONYE DEFENDANT

RULING

1. What is before Court for determination is the Defendant/Respondent's Notice of Preliminary Objection dated the August 29, 2022 in respect to the Originating Summons dated the November 5, 2021. It is premised on the following grounds:
 1. That the suit offends Section 13 of the *Limitation of Actions Act*.
 2. That the suit offends Section 26(c) of the *Limitation of Actions Act*.
 3. That the suit offends Section 7 of the *Limitation of Actions Act*.
 4. That the suit offends the maxim *Nec vi, nec clam, nec precario*.
2. The Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

3. Upon consideration of the Notice of Preliminary Objection dated the August 29, 2022 including the rivalling submissions the only issue for determination is whether the said Notice of Preliminary Objection is merited.
4. The Respondent/Defendant in his submissions insist that the Applicant/Plaintiff has no right of action to recover land parcel number Machakos/Nguluni/339 by virtue of adverse possession. He argues that from the Originating Summons, the Plaintiff bought a different parcel of land being No



396 Nguluni compared to Machakos/Nguluni/339 which he claims. He reiterates that the Applicant/Plaintiff cannot have a right to land which he cannot prove to have bought, on adverse possession since the court will not know when time started to run. Further, that he did not raise the issue of fraud in the pleadings. He contends that the Applicant/Plaintiff ought to have sought for leave before commencing the instant proceedings. Further, that the documents annexed to the supporting affidavit do not show any connection that the Applicant/Plaintiff ever purchased the suit land. To support his averments, he relied on the following decisions: *Edward Moonge Legusuranga Vs James Laniyara & Another* (2019) eKLR; *Bridges V Mees* (1957) Ch 475 and *Bosire Ongero vs Royal Media Services* (2015) eKLR.

5. The Applicant/Plaintiff in his submissions insists that the Notice of Preliminary Objection is not merited. He argues that the grounds raised in the Preliminary Objection are not merited and the suit does not violate the provisions highlighted therein. He explains that the Respondent/Defendant is attempting to mislead the court as Plot No 396 is the Land Adjudication Number and not the title number. He reiterates that the issue of time spent in occupation being an ingredient of adverse possession is an issue of fact and not a point of law. He contends that he did not need to seek leave to institute the instant suit. He avers that the issue of possession is a matter of fact and not a pure point of law. To support his averments, he relied on the following decisions: *Mukisa Biscuits Ltd vs West End Distribution Co Ltd* (1969) EA 696; *Maureen Waitbera Mwenje & Another V David Kinyanjui Njenga & 2 Others* (2021) eKLR and *Kibaara M'Icuga v M'Chabari Kinoro* (2020) eKLR.
6. From perusal of the Originating Summons, I note the Applicant/Plaintiff seeks to be declared owner of land parcel number Machakos/Nguluni/ 339 by way of adverse possession. Further, that the registered proprietor of Machakos/Nguluni/339 is the Respondent/Defendant.
7. The Respondent/Defendant proceeded to file the instant Notice of Preliminary Objection on grounds as enumerated above.
8. In the case of *Mukhisa Biscuit Manufacturing Co Ltd Vs West End Distributors Company Limited* (1969) EA 696; the Court held that:-

"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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

9. Further in the case of *Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others* Civil Application No 36 of 2014, the Supreme Court reiterated thus:

"A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.... it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion."



10. While the Supreme Court addressed its mind on the issue of raising Preliminary Objection in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR and stated that:

"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." [Emphasis added]

11. Insofar as the Respondent/Defendant raises important points, I note the issues he has raised are mainly matters of fact that require evidentiary proof. It is my considered view that the grounds raised in the Preliminary Objection are what the court is expected to determine once the suit is set down for hearing. Further, there are several contested facts which include entry as well as occupation of the suit land, which cannot be determined at this interlocutory stage.

12. Based on the facts as presented while associating myself with the decisions cited above, at this juncture I find the instant Notice of Preliminary Objection premature. I opine that this suit should be set down for hearing and determined on its merits.

13. In the circumstance, I find the Notice of Preliminary Objection dated the August 29, 2022 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

