



**Omollo v Nyamunga (Land Case 53 of 2020) [2023] KEELC 18553 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18553 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**LAND CASE 53 OF 2020**

**E ASATI, J**

**JULY 6, 2023**

**BETWEEN**

**DAVID AMANGA OMOLLO ..... APPLICANT**

**AND**

**ERICK NYAMUNGA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the preliminary objection raised by the Defendant vide the Defendant's preliminary objection dated November 14, 2022. The grounds of the preliminary objection are that: -
  - a. The applicant's claim is bad in law, misconceived, fatally defective and unsustainable.
  - b. The grounds relied upon by the applicant in the claim for adverse possession namely that the suit property belongs to him by virtue of being ancestral land are unknown to law and cannot found a claim under section 38 of the [Limitation of actions Act](#) or under Common Law tenets of adverse possession.
  - c. the cause of action lies under the *Law of Succession Act* and not the [Limitation of Actions Act](#).
  - d. no proof of succession has been provided to establish the applicant's claim over his deceased father's property.
  - e. the claim is time barred both under the *Law of Succession Act* and the [Limitation of Actions Act](#).
  - f. the applicant has not met the legal requirements that possession must be adverse against the rights of a proprietor.
  - g. the period of limitation has not accrued in favour of the applicant who all along encroached on a portion of the Respondent's property on his admitted mistaken belief of ancestral land/parental inheritance.



- h. The Respondent is the absolute legal owner of the suit property whose rights and title to the property are indefeasible.
2. The preliminary objection was argued by way of written submissions. Written submissions dated February 8, 2022 were filed on behalf of the Respondents by the law firm of Okumu, Miyawa and Wamwara Advocates. Relying on the case of *Mukisa Biscuits manufacturing Ltd v Wes End Distributors* [1969] EA 696, Counsel submitted that the preliminary objection is raised on a point of law which arises out of clear implication of the pleadings in paragraphs 2, 3, 5, 9 and 10 of the Supporting Affidavit. That the Plaintiff pleaded that the suit property is his ancestral land; previously owned by his father David Omollo Omanga, that the suit property is the portion his father gave him but is now registered in the name of the Defendant; and that the registration in the name of the Defendant must have been a mistake. That these facts cannot found a claim for adverse possession under sections 13 and 38 of the *Limitation of Actions Act*.
  3. That the court lacks jurisdiction to determine ancestral claims under section 38 of the *Limitation of Actions Act*. That the jurisdiction of the court set out in section 38 of the *Limitation of Actions Act* relates to adverse possession and not ancestral claims. Relying on the case of *Mbira vs Gachui* (2002)1 EALR, among others, Counsel submitted that for there to be adverse possession, the occupation for 12 years must be non- permissive, non-consensual or unlicensed either from the person claiming against or from those under whom he claims.
  4. Counsel further submitted that there cannot be a claim for adverse possession where the initial entry was in breach of the law. That the applicant’s entry onto the suit land was an act of trespass to the Respondent’s land and intermeddling with the estate of his father. Counsel relied on the case of *Mubiddin Mohamed Mubiddin (suing for and on behalf of the estate of Mohammed Mubiddin Mohamed Hatimy) v Jackson Muthama & 168 others* [2014]eKLR and the case of *Marpis Investment Company (K) Limited vs Kenya Railways Corporation* [2005]eKLR to support the submission.
  5. Counsel submitted further that the Plaintiff’s claim is governed by the *Law of succession Act* and not the *Limitation of Actions Act*.
  6. Written submissions dated April 26, 2023 were filed by the law firm of N. E. Mogusu & Associates Advocates on behalf of the Plaintiff. Counsel submitted that the evidence contained in the Supporting Affidavit has not been controverted through any pleadings. That the Defendant is seeking to challenge facts and evidence by way of preliminary objection. That that kind of procedure is alien to law. That the preliminary objection as raised is not an objection on pure points of law. That land matters are serious and that the law creating the ELC requires the court to administer justice without undue regard to technicalities. Counsel prayed that the P.O be dismissed.
  7. The threshold of a preliminary objection was set in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 relied on by the Respondent herein. In the case the court held that;

“...a Preliminary Objection consists 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 disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

The court further 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.”

From the foregoing, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

8. I have carefully considered the points raised by the Defendant both in the Notice of Preliminary objection and in the written submissions vis a vis the Originating Summons. The Respondents claim is that the grounds on which the claim for adverse possession is based namely that the land is ancestral land are unknown in law and cannot be the basis of a claim under section 38 of the *Limitation of Actions Act*. On the other hand, the grounds of the claim for adverse possession herein as set out on the face of the Originating Summons are inter alia that although the suit land is registered in the name of the Respondent, the applicant and his family have stayed thereon for more than 47 years, that the suit land is the applicant’s ancestral land, that the applicant has had exclusive and uninterrupted use of the parcel of land without interference from the Respondent since he was a young man, that the applicants use of the suit land has been open, without secrecy and without any interruption or resistance during the entire period and that the period within which the Respondent could claim the suit land has run out. It therefore cannot be said that the claim is based on the fact of ancestral land only.
9. The Respondent contends that the matters relied on in the Preliminary object flow from the pleading filed by the applicant. I have noted that the Respondent states that the matters raised are drawn from the Supporting Affidavit. Matters of fact will only be verified and validated through the trial process. Does an Affidavit constitute a pleading? Pleading is defined in section 2 of the Civil Procedure Rules to include a petition or Summons, and the statement in writing of claim or demand of any plaintiff, and of the Defence of any Defendant thereto and of the reply to any defence or counter claim of a defendant.
10. The Respondent further contends that the period of limitation has not accrued in favour of the applicant for a claim of adverse possession. My view is that this is a matter of fact to be adduced and proved in the hearing.
11. My finding is that the P.O is anchored on matters of fact which can only be verified and proved through production of evidence. The Preliminary Objection is dismissed. Costs to abide the main suit (O.S).

It is so ordered.

**RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 6TH DAY OF JULY 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

**Kevin - Court Assistant.**

**Dr. Miyawa for the Applicant/Defendant.**

**Mogusu for the Respondent/Plaintiff**

