



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT CHUKA**

**ENVIRONMENT AND LAND CASE NO. 15 OF 2019**

**JOSEPH KIBAARA M'ICUGA.....APPLICANT**

**VERSUS**

**M'CHABARI KINORO.....RESPONDENT**

**RULING**

1. The Ruling in this matter was to be delivered on **24<sup>th</sup> March, 2020**. This could not be done because of complications brought about by the Corona Virus Crisis. Upon issuance of the apposite notice to the parties, the Ruling will be delivered in open court today. This is because this court lacks the necessary technological facilities to deliver the Ruling electronically. However, all precautions have been taken to ensure compliance with all measures necessary to obviate the spread of the Corona 2019 virus.

2. This ruling concerns a Notice of Preliminary Objection filed by the respondent which states as follows:

**NOTICE OF PRELIMINARY OBJECTION**

**TAKE NOTE** that the Respondent herein will at the hearing of the Suit dated 30<sup>th</sup> April, 2019 raise a preliminary Objection on point of Law on the following grounds; -

1. **THAT** the suit dated 30<sup>th</sup> day of April, 2019 seeking for Adverse Possession is **premature having been filed before the end of 12 years as the time started to run from 28<sup>th</sup> November, 2014** when the Respondent got registered as the Proprietor of the subject suit property contrary to provisions of **Section 37 and 38 of Limitation of Actions Act Cap 22 of the Laws of Kenya, See Patrick Magu Mwangi Kimunyu -Versus -Joreth Limited (2015)eKLR, Titus Kigoro Munyi -Versus-Peter Mburu Kimani (2015)eKLR**

2. **THAT** the suit is scandalous, frivolous and abuse of the court process for an attempt by the Applicant to create non-existence (sic) property rights.

3. **THAT** the Applicant (sic) suit dated 30<sup>th</sup> April, 2019 should be dismissed with costs to the Respondent.

**DATED AT NAIROBI this 24<sup>th</sup> Day of February, 2020**

**MURIMI MURANGO & ASSOCIATES**

**ADVOCATES FOR THE RESPONDENT**

3. The Preliminary Objection was canvassed by way of written submissions.

4. The proponent's written submissions are reproduced herebelow in full without any alterations whatsoever, including of spelling or any other mistakes, if they exist.

**RESPONDENT'S WRITTEN SUBMISSIONS ON THE NOTICE OF PRELIMINARY OBJECTION DATED 24<sup>TH</sup> FEBRUARY, 2020**

1. The Respondent has raised a preliminary Objection on point of Law against the Applicant's suit 30<sup>th</sup> April, 2019 on the following grounds; -

a. **THAT** the suit dated 30<sup>th</sup> day of April, 2019 seeking for Adverse Possession is **premature having been filed before the end of 12 years as the time started to run from 28<sup>th</sup> November, 2014** when the Respondent got registered as the Proprietor of the subject suit property contrary to provisions of **Section 37 and 38 of Limitation of Actions Act Cap 22 of the Laws of Kenya, See Patrick Magu Mwangi Kimunyu -Versus -Joreth Limited (2015)eKLR, Titus Kigoro Munyi -Versus-Peter Mburu Kimani (2015)eKLR**

b. **THAT** the suit is scandalous, frivolous and abuse of the court process for an attempt by the Applicant to create non-existence property rights.

c. **THAT** the Applicant suit dated 30<sup>th</sup> April, 2019 should be dismissed with costs to the Respondent.

2. The single issue for determination is whether the preliminary objection by the Respondent has merit, and should be allowed.

3. As to whether a preliminary objection is one of merit, the threshold is set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696**, in the case of **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others**, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

*“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’.*”

4. The **Joho** decision has been subsequently cited in **Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others**, Civil Application No. 23 of 2014, [2014] eKLR; and in **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others**, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

*“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. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”*

5. It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see **Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others**, Civil Application No. 14 of 2014, [2014] eKLR).

6. It is the Applicant’s contention in his affidavit in support of a claim of adverse possession that he has been occupation of the Respondent 2 acres of the suit property for over 70 years and he has annexed a certified copy of the Green Card official search of the Respondent suit property pursuant to Order 37 Rule 7 (2) of the Civil Procedure Rules, 2010 and marked as **JKM-1**

7. It can be deduced from the Green card and official search annexed by the Applicant, that the Respondent became the first registered proprietor of the subject suit property on **28<sup>th</sup> November, 2014** within the purview of Section 26(1) of the Land Registration Act No. 3 of 2012.

**8. The critical question for determination is when did the time start running for the Applicant to claim adverse possession of the Respondent suit property?**

9. In the case of **Patrick Magu Mwangi Kimunyu Versus Joreth Limited (2015)Eklr**, the Court of Appeal held that the holding by the court of Appeal in the case of **Titus Kigoro Munyi Versus Peter Mburu Kimani (2015)** reaffirmed the fact that one to succeed in a claim of adverse possession, he must show that he was aware that the land was registered in the name of a third party for time to start running. Time could not start running in a situation where a person was not aware that the subject property had an owner in the first place.

10. We submit that the Applicant time for adverse possession started to run from 24<sup>th</sup> November, 2014 when the Respondent got registered as the proprietor of the suit property up to 10<sup>th</sup> July, 2019 when the Applicant subsequently commenced the legal proceedings against the Respondent that effectively stopped time from running.

11. On that basis, a pure point of law has been raised and settled for one reason, the suit is premature having been filed before the end of 12 years contrary to provisions of Section 37 and 38 of the Limitation of Actions Act. That to say, the Applicant should have waited holding his breath up to 2026 to file the present suit.

12. It is our submission that the suit is scandalous, frivolous and an attempt by the Applicant to create non-existence rights over the Respondent subject suit property.

13. We pray that the whole suit dated 30<sup>th</sup> April, 2019 be dismissed with costs to the Respondent.

14. It is so prayed.

15. That's all.

**DATED AT NAIROBI this 28<sup>th</sup> Day of February, 2020**

**MURIMI MURANGO & ASSOCIATES**

**ADVOCATES FOR THE RESPONDENT**

5. The applicant's written submissions are reproduced in full herebelow without any alterations whatsoever, including of spelling or any other mistakes, if they exist.

**THE APPLICANT'S WRITTEN SUBMISSIONS ON THE NOTICE OF PRELIMINARY OBJECTION DATED AND FILED ON THE 24<sup>TH</sup> DAY OF FEBRUARY, 2020**

**YOUR LORDSHIP,**

The said preliminary objection is not a pure point of Law as alleged.

The Respondent got registered as the absolute proprietor of the Suitland on the **28<sup>th</sup> November, 2014** but the Applicant has been in occupation of the same for over **SEVENTY YEARS** as pleaded in the Originating Summons filed herein.

The fact and issue of registration is not a point of Law to warrant the dismissal of this suit. It is simply a matter of fact to be proved by any party who alleges. It should be left to the Court to determine at the trial.

The Respondent is alleging that the suit is premature and that the period of **Twelve (12) years** has not lapsed to warrant the filing of this suit but still that is not a pure point of Law. It is a fact which shall be tested at the trial of the suit.

It is common ground that for the Applicant to succeed in a claim for adverse possession he must prove that he has been in peaceful, open and uninterrupted possession of the land in question for a period of Twelve years and above.

In the likely event that the Court finds that the Applicant has been in possession of the land for **70 years** as pleaded, then it shall go without saying that the Respondent's land got extinguished very many years ago before filing this action.

It is vividly clear therefore that the Respondent's right to the suit property had been extinguished in favour of the Applicant long before this action was filed by virtue of **Section 37 and 38 (1) of the Limitation Actions Act** and the Applicant has therefore acquired the same by adverse possession. The Applicant's claim of adverse possession must stand by necessary implication.

Time for purposes of adverse possession started running long before this action was filed.

In a claim for adverse possession **under the Limitation of Actions Act**, time stops running either when the owner asserts his rights either by taking legal proceedings against the adverse possessor or when he makes an effective entry into the land, or when his right is admitted by the adverse possessor.

It is the Applicant's humble submission that the Respondent has not done either of foregoing and his rights to part of the suit land has already been extinguished.

**It is cardinal principle of Law that for one to succeed in a claim of adverse possession, it must be proved that one was in exclusive possession of the land openly and notoriously as of right with such possession being adverse to the rightful owner and without interruption for a period of Twelve (12) years.**

It is clear from the pleadings that the Applicant has established his claim for adverse possession to the required threshold and his action should not be defeated by a mere Preliminary Objection

**Your Lordship,**

The query as to whether the Applicant filed this action prematurely as alleged by the Respondent in his frivolous preliminary objection is a matter of evidence which cannot be determined by way of preliminary objection. He who alleges bears the burden of proof in a trial.

**It has been held severally that adverse possession is a question of both law and fact to be proved by tendering acceptable evidence. The Respondent has not filed or tendered any evidence to support his objection.**

From the uncontroverted pleadings herein, it is clear that the Respondent's rights were extinguished a long time ago at the expiry of **Twelve (12) years** in terms of the provisions of **Section 17 of the Limitation of Actions Act**. The Applicant's presence on the suit land was not founded and does not arise from permission or consensual entry by virtue of lineal consanguinity and affinity.

The Applicant shall demonstrate and prove factually and legally at the hearing that he has been in open occupation for a period exceeding **Twelve (12) years**.

**Your Lordship,**

It is worthy noting that the Respondent has not filed any Replying Affidavits to oppose the Applicant's action and none has been served to date. In the absence of any documents on record by the Respondent, this court is left with nothing to persuade it to allow the vexatious preliminary objection but to dismiss the same with costs for lack of legal merit.

In the case of **MUKISA BISCUITS MANUFACTURING CO.LTD -VS- WEST END DISTRIBUTORS (1969) EA 696**, the Court said that a Preliminary Objection consists of a point of Law and cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion. The date and time of registration is a matter of evidence and not a point of Law.

**ARTICLE 159 (2) (a) (d) (e) says that "Justice shall be done to all, irrespective of status and that the same shall be administered without undue regard to procedural technicalities and that the purpose and principles of the constitution shall be protected and promoted."**

**SECTIONS 1A(1) (2) (3), 1B (1) (A) (B) (C) (D) OF THE CIVIL PROCEDURE ACT**

The said sections emphasizes the overriding objective of the Act and the rules made thereunder and that is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act and the duty of the court to seek to give effect to the said overriding object.

The court for the purpose of furthering the overriding objective is also called upon to handle all the matters presented before it with the aim of timely disposal of the proceedings at a cost affordable by the respective parties.

**YOUR HONOUR,**

It is our humble submission that in the light and strength of the foregoing factual and legal principles, we urge the court to disallow the Respondent's preliminary objection dated and filed on **24<sup>TH</sup> FEBRUARY, 2020** with costs.

**DATED AT NANYUKI THIS...4<sup>TH</sup>..DAY OF.....MARCH.....2020.**

**BWONWONGA & CO.**

**ADVOCATES FOR THE APPLICANT**

6. I have considered the submissions filed by the parties to buttress their diametrically incongruent assertions. I have also considered the authorities the parties have proffered in support of their assertions. They are good authorities in their facts and circumstances.

7. In the facts and circumstances of this case, two issues arise. The 1<sup>st</sup> one is if or if not the applicant has achieved the threshold for the period of occupation of the suit land for a declaration that adverse possession has accrued. Obviously, this issue invites arguments which can only be resolved at the hearing of the suit. The second one is the framing of ground 2 of the Preliminary Objection which states: "That the suit is scandalous, frivolous and abuse of the court process for an attempt to create non-existence (sic) property rights". Veritably, this ground invites arguments which can only be properly canvassed at the hearing of the main suit.

8. In the circumstances, this Notice of Preliminary Objection is dismissed.

9. Costs shall be in the cause.

10. To facilitate the expeditious hearing and determination of this suit, it is ordered as follows:

a. The Applicant is to fully comply with Order 11 of the Civil Procedure Rules within 30 days of today.

b. The respondent is to fully comply with Order 11 of the Civil Procedure Rules within 30 days after receipt of the applicant's compliance documents.

c. The main suit will be heard on **14<sup>th</sup> October, 2020**

**Delivered in open Court at Chuka this 5<sup>th</sup> day of May, 2020**

in the presence of:

CA: Ndegwa

Parties and their advocates not in court

**P. M. NJORGE,**

**JUDGE.**