

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 63 OF 2019

JAMES ATSENGA MALIACHI.....APPLICANT

VERSUS

ZABLON ANZIMBO NANGOLI.....RESPONDENT

RULING

The respondent herein raised a Preliminary Objection on point of law in opposition of the entire suit on the following grounds:-

1. That the suit is statute barred as it has been filed in contrast to the mandatory provisions of Sections 4 (a), 7 and 13 (1) of the Limitation of Actions Act Cap 22 for the reason that the same is based on a claim for land based on an alleged agreement for sale of land dated 18th August, 2003.
2. That the suit being based on an alleged land sale agreement does not qualify for a suit for adverse possession under order 37 rule 7 (1) & (2).

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

On perusal of the pleadings in this case the applicant prayed for adverse possession. The issue as to whether the suit is statute barred as it has been filed in contrast to the mandatory provisions of Sections 4 (a), 7 and 13 (1) of the Limitation of Actions Act Cap 22 for the reason that the same is based on a claim for land based on an alleged agreement for sale of land dated 18th August, 2003 or that the suit being based on an alleged land sale agreement does not qualify for a suit for adverse possession under order 37 rule 7 (1) & (2) is a matter of evidence which cannot be determined at this preliminary stage. Indeed the applicant in their submissions maintain this is a suit of adverse possession. I find the preliminary objection is not merited and I overrule the same with costs to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH JULY 2021.

N.A. MATHEKA

JUDGE