



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC NO. 81 OF 2001**

**IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**-BETWEEN-**

**JOSHUA SILU MUKUSA.....1<sup>ST</sup> APPLICANT**

**ESTHER ITHAU..... 2<sup>ND</sup> APPLICANT**

**MARY NDUNGA.....3<sup>RD</sup> APPLICANT**

**-VERSUS-**

**TITUS TALI KIOKO.....1<sup>ST</sup> RESPONDENT**

**PHILIP MASILA MUIA.....2<sup>ND</sup> RESPONDENT**

**WILSON MAUNDU NDETO**

**(Being sued on behalf of the Management Committee for**

**Katanga Primary School.....3<sup>RD</sup> RESPONDENT**

**BENSON KIMUNDU MUIA.....4<sup>TH</sup> RESPONDENT**

**KIKOMO MWALILI.....5<sup>TH</sup> RESPONDENT**

**MASAKU COUNTY COUNCIL.....6<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION:**

1.This Ruling is in relation to a Notice of Preliminary Objection dated 2<sup>nd</sup> June 2021 filed by the 4<sup>th</sup> Defendant, seeking to have this suit struck out for being fatally defective on grounds that it offends Article 62 of the Constitution of Kenya, and Section 41 of the Limitation of Actions Act Cap 22 Laws of Kenya.

2.The preliminary objection was canvassed by way of written submissions and on record are submissions of the Plaintiffs dated 29<sup>th</sup> September 2021. The 4<sup>th</sup> Defendant submissions are not on record.

**THE PLAINTIFFS' SUBMISSIONS**

3.The Plaintiffs' Counsel submitted that land parcel number Kalama/Katanga/628 (hereinafter referred to as the "suit property") was initially registered in the name of the 6<sup>th</sup> Respondent as the 1<sup>st</sup> Registered proprietor, however according to the recent search dated 9<sup>th</sup> August 2017, the suit property's ownership has since changed hands.

4.Counsel submitted that vide the Council's works, Town Planning and Markets Committee meeting, it was resolved vide minute no. WTPM

31/98 that the title of the suit property be transferred to Katanga Primary School.

5. Counsel submitted that the replying affidavit of the 4<sup>th</sup> Respondent dated 24<sup>th</sup> January, 2002, in response to the Applicants' Amended Originating Summons confirms in paragraph 3 that it is indeed true that on 3<sup>rd</sup> March, 1983, the Management Committee of Katanga Primary School and that of Katanga Village Technology Centre entered into an agreement allowing the Applicant to enter and appropriate the suit property for purposes of establishing Katanga Village Technology Centre. That the Plaintiff herein through Utooni Development Project funded and established the Katanga Village Technology Centre as was agreed in the agreement that allowed them vacant possession and the liberty to construct buildings provided in paragraph 1 of the agreement dated 3<sup>rd</sup> March, 1983.

6. Counsel stated that the defunct County Council of Masaku relinquished its trusteeship over the said parcel of land and the suit land had since changed hands as demonstrated vide the official search and agreements done between the parties herein. That the land that was vested in the defunct County Council is community land and by agreement of the Defendants in the presence of the defunct County Council, they agreed that a plot be allotted to the Plaintiffs to include Utooni Development project to have vacant possession.

7. The Plaintiffs relied on the *locus classicus* case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** in respect to preliminary objections. They stated that what brought them to court was a dispute in relation to ownership of the suit land. That the Defendants were aware that the 6<sup>th</sup> Defendant extinguished its trusteeship rights over the suit property and the same was registered under another entity which is not the 6<sup>th</sup> Defendant. Counsel contended that the preliminary objection raised by the 6<sup>th</sup> Defendant was not purely on a point of law, because the facts as to the change of ownership and the agreement allotting the Applicants a portion of the suit property ought to be ascertained by calling evidence. The Plaintiffs maintained that issues as to whether the suit property is public land, whether its ownership changed hands and whether an agreement was entered allocating the Plaintiff the suit property, cannot be canvassed at the preliminary stage of the suit; but can only be canvassed at the main hearing.

8. Counsel maintained that under Section 38 (1) of the Limitation of Actions Act, where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, he may apply to the High Court for an order that he be registered as proprietor of the land. Counsel stated that the Defendants filed a preliminary objection dated 26<sup>th</sup> June, 2001 which they abandoned, hence the instant preliminary objection should be dismissed.

#### **ANALYSIS AND DETERMINATION**

9. I have considered the preliminary objection, the submissions by counsel and authorities cited. In my considered opinion, the only issue that arises for determination is whether the preliminary objection dated 2<sup>nd</sup> June, 2021 is merited.

10. A preliminary objection must be based only on a pure point of law and must be anchored on facts that are not in dispute. If there is need for any or both parties to adduce evidence so as to ascertain the facts to be relied upon for the preliminary objection, then such a preliminary objection cannot be sustained. In the case of **Mukisa Biscuits Manufacturing Company Limited v West end distributors (1969) E.A 696**, the Court of Appeal stated the principle of what constitutes a preliminary objection in the following terms;

**“So far as I am aware, 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”**

11. In the case of **Avtar Singh Bhamra & Ano. v Oriental Commercial Bank HCC No 53 of 2004**, the court held as follows;

**“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”**

12. In the instant suit, the 4<sup>th</sup> Defendant's preliminary objection is to the effect that the suit ought to be struck out on account of offending Article 62 of the Constitution and Section 41 of the Limitation of Actions Act. Article 62 of the Constitution defines what constitutes public land and makes reference to several categories of land that may be termed as public land. It also provides that public land may be held either by a County Government or National Government and shall be administered on behalf of the people resident within the County or in trust for the people of Kenya, as the case may be, by the National Land Commission. It further provides the manner of disposal of, or use of public land.

13. On the other hand, Section 41 of the Limitation of Actions Act, provides that public land is excluded from the Application of the Limitation of Actions Act, which means that the said Act cannot be relied upon by a person to acquire public land, neither can the Act affect the government's right to rent, principle, interest or any money under any lease, licence or agreement.

14. In view of the above provisions of the law, I note that the 4<sup>th</sup> Defendant has not itemized and or particularized the specific points of law he is raising in the preliminary objection. By merely citing Article 62 of the Constitution, as well as Section 41 of the Limitation of Actions Act, the 4<sup>th</sup> Defendant is not clear as to what specific provisions of the law he seeks to rely on, making his preliminary objection ambiguous, vague and blurred. A preliminary objection must be precise and to the point, in terms of the intersection between undisputed facts and the law. It is my opinion that the preliminary objection herein is ambiguous and vague. In **Bashir Haji Abdullahi v Adan Mohammed Nooru**

& 3 others [2004] eKLR, while emphasizing the need for precision of a preliminary objection, the Court held as follows;

**“...the preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the preliminary points of law to be raised.”**

15. In the case of **Agnes Mukami & 5 Others vs. Ngewahi and Company (2005) e KLR**, the court stated as follows;

**“a clear and well taken preliminary objection may expedite disposal of matters before a court, on the other hand, a vague preliminary objection often causes delay in determination of matters.”**

16. According to the Plaintiffs', they acquired the suit property through adverse possession. This position is contested by the Defendants who claim that the suit land is public property and therefore cannot be acquired in that manner by an individual. The Plaintiffs on the other hand have denied that the suit land is public property.

17. It is my finding that the above issue among other substantive issues, cannot be determined at the preliminary stage and *viva voce* evidence needs to be adduced when the suit comes up for hearing so as to ensure that each issue is determined on its own merit.

18. Section 107 of the Evidence Act provides that;

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”**

Section 109 of the aforementioned Act further provides:

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

19. The general principles which guide a Court in exercising its discretion on whether or not to strike out a pleading is stated in **DT Dobbie vs Muchina [1982] KLR 1** where it was held that; -

**“...a pleading should only be struck out if it is manifestly hopeless that it amounts to an abuse of the court process. Indeed, a pleading should only be struck out if it so hopeless that no amount of amendment could sustain it to set out a case.”**

20. It is now 20 years since the suit was filed in 2001. In 2021, the 4<sup>th</sup> Defendant decided to file the preliminary objection herein. The objection is based on contested facts. I find that the preliminary objection is meant to delay the hearing and determination of this matter.

21. In view of the reasons above, I proceed to dismiss the preliminary objection dated 2<sup>nd</sup> June 2021 with costs to the Plaintiffs.

22. This suit being an old matter, I order that a hearing date be fixed within 21 days of this ruling.

23. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 8<sup>TH</sup> DAY OF DECEMBER, 2021.**

**A. NYUKURI**

**JUDGE**