



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC NO. 70 OF 2018

FRANCIS MASINDE MUMIAAPPLICANT

VERSUS

JOSEPH KOECH1ST RESPONDENT

JOSHUA KIPKEMBOI CHEPSIROR2ND RESPONDENT

RULING

1. This suit was commenced by way of Originating Summons (OS) filed on 18th October 2018. The applicant averred in the OS that he had exclusively, peacefully, continuously, openly and uninterruptedly occupied the parcel of land known as Kakamega/Sango/131 from 1976 to the date of filing of the OS. He therefore sought to be declared the owner of the said property by virtue of adverse possession.

2. The respondents reacted to the OS by filing Notice of Preliminary Objection dated 19th February 2020. This ruling is in respect of the said objection.

3. The objection is on the following grounds:

1. THAT the mandatory legal prescriptive time of 12 years has not lapsed from the time the Respondents became the registered owners of the suit land.

2. THAT the suit is premature, incompetent and should be struck out with costs to the Respondents.

4. The objection was canvassed through written submissions. The respondents, besides their submissions, sought to rely on a replying affidavit that they filed simultaneously with the submissions. As will become apparent later in this ruling, there is no room for adducing evidence so as to prop up a preliminary objection. Among the documents the respondents annexed to the replying affidavit was a copy of a green card in respect of the suit property. They argued that the registered proprietors of the suit property are Dinah C. Chepsiror and Seii Kogo both of whom became owners on 3rd October 2019 and that the applicant had sued wrong parties. They added that a period of 12 years had not lapsed from 3rd October 2019 and urged the court to strike out the suit.

5. On his part, the applicant argued that whether or not a period of 12 years had lapsed is a question of fact and not one of law.

6. I have considered the objection and the submissions. The law relating to preliminary objections is settled. A preliminary objection is a pure point of law which is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

7. I have perused the affidavit in support of the OS herein. No green card was annexed to it. It is obvious that the green card that the respondents are referring to is the one they annexed to their own replying affidavit which they filed after raising the objection. As noted earlier and as was emphasised in the **Mukisa Biscuit** case (supra), it is not permissible to raise a preliminary and then seek to prop it up by adducing evidence. Whether a period of 12 years not lapsed and whether the applicant had sued wrong parties are all matters that require to be established by evidence. Clearly, the preliminary objection herein has no merit and is for dismissal.

8. The foregoing notwithstanding, **Order 37 Rule 7 (2)** of the **Civil Procedure Rules** makes it mandatory that an originating summons such as the present one be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. The applicant did not comply with that rule. I will give directions to ensure compliance.

9. In the result, I make the following orders:

a) Notice of Preliminary Objection dated 19th February 2020 is dismissed with costs to the applicant.

b) The applicant to file and serve within 30 (thirty) days from the date of delivery of this ruling, a supplementary affidavit to which a certified extract of the title to the parcel of land known as Kakamega/Sango/131 is annexed.

c) In default of compliance with (b) above, this suit shall stand struck out with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED IN OPEN COURT IN THE PRESENCE OF:

APPLICANT PRESENT

RESPONDENTS PRESENT

COURT ASSISTANT: E. JUMA