



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 450 OF 2017**

**IN THE MATTER OF REGISTRATION OF TITLE TO LAND BY ADVERSE POSSESSION**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT**

**AND**

**IN THE MATTER OF LAND PARCEL L.R No. MBOONI/KALAWANI/827**

**JEREMIAH WAMBUA..... PLAINTIFF**

**-VERSUS-**

**PIUS MBENGI MUSYOKI.....DEFENDANT**

**R U L I N G**

1. Through an Originating Summons dated 06/10/2016, the Applicant seeks a declaration that he has acquired land parcel Mbooni/Kalawani/827 (suit land), by adverse possession.
2. The Defendant seeks to have the suit struck out through a Preliminary Objection dated 19/11/2019 and grounded as follows;
  - a) That the suit as filed is incompetent and a non-starter for lack of the 12-year statutory period.*
  - b) The suit as filed offends section 37(a) of the Limitation of Actions Act, Cap 22 Laws of Kenya.*
  - c) The suit premises is a family land where the Plaintiff is a beneficiary and never a trespasser thus the Plaintiff's possession of it is not illegal and his occupation has not been adverse.*
  - d) The suit as filed offends Orders 37 Rule 7(2) of the Civil Procedure Act, Cap 21 Laws of Kenya.*
  - e) The suit is frivolous, vexatious and an abuse of the court's process.*
3. There was no response to the Preliminary Objection.
4. Directions were given that the Preliminary Objection be canvassed by way of written submissions.
5. The Defendant submits that the Originating Summons is incompetent because the Plaintiff did not annex a certified extract of title as required by Order 37 Rule 7 of the Civil Procedure Act 2010.
6. He cites the case of **Mtana Lewa –vs- Kahindi Ngala Mwangandi (2005) eKLR** where the Court of Appeal held that;

*“Adverse Possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”*

7. He submitted that time for adverse possession against him started running on 05/11/2010 and 12 years had not lapsed as at the time of filing this suit on 09/10/2017.

8. Having looked at the Preliminary Objection, the entire record and Defendant's submissions, the only issue for determination is whether the Preliminary Objection has merit.

9. In Machakos Succession Cause No. 558 of 2009; Estate of Musyoki Mwini (*deceased*) Nyamweya J delivered a ruling on 11/07/2016 and found as a matter of fact that the deceased was registered as proprietor of the suit land on 04/04/1990. The suit land was an asset of the estate hence distributed among the eight beneficiaries as per the certificate of confirmed grant. No appeal was ever filed against that ruling.

10. It is not in dispute that the Plaintiff is a grandson of the deceased as he is the son of the late Wambua Musyoki who in turn was the deceased's only son with his 2<sup>nd</sup> wife, Mwikali. Accordingly, the Plaintiff is an heir of the estate and it cannot be said that his presence on the suit land has been adverse and without permission. As already stated elsewhere, entertaining this suit will be tantamount to sitting on appeal in a matter determined by a Court of equal status.

11. In the Originating Summons, the Plaintiff claims to have been in adverse possession against the Defendant's title in the suitland. The Defendant is the sole administrator of the deceased's estate and was registered as such for onward transmission to the rest of the beneficiaries. For arguments sake however and as correctly submitted by the Defendant, his registration as the proprietor was done on 05/11/2010 and it is evident that a period of 12 years has not lapsed. Accordingly, the suit is premature.

12. Even if the period of 12 years has lapsed, entertaining the suit would still be a circumvention of the ruling by Nyamweya J. I am inclined to agree with the Defendant that the suit is frivolous, vexatious, an abuse of the Court process and I proceed to strike it with costs.

**Signed, dated and delivered at Makeni via email this 26<sup>th</sup> day of May, 2020.**

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Mr. G. Kwemboi