



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO. 32 OF 2019

LOISIA LETOLUAL.....APPLICANT/APPLICANT

VERSUS

KAMOGI LIMITED.....RESPONDENT/RESPONDENT

RULING

1. Pursuant to the Applicant's application by way of Notice of Motion dated the 17th July 2019 seeking for inter alia temporal injunction restraining the Respondent, his agents and/or servants from interfering in any way with parcel No. Settlement plot 914 at Ex- P & D Settlement Scheme in Laikipia County pending the hearing and determination of the suit, the Respondent filed their replying affidavit dated 13th August 2019 as well as a Notice of Preliminary objection to the effect that the Applicant's suit and Application had been filed in contravention of the provisions of Section 7 and 38 of the Limitation of Actions Act.
2. On the 4th November 2019, by consent parties agreed to dispose of the Preliminary Objection in the first instance by way of written submissions to which parties complied and filed their respective submissions.
3. That Respondent's submission on their Preliminary objection dated the 13th August 2019 was that the Applicant's cause of action was time barred. That it was not in contention that the Respondent had been in continuous and uninterrupted possession of the suit land since the year 2006.
4. The Respondent framed their issues for determination as follows;
 - i. The nature of a preliminary objection based on adverse possession and the doctrine of laches.
 - ii. Whether the Respondent ought in the circumstance to be awarded title under adverse possession.
5. On the first issue for determination it was their submission that the Preliminary Objection was not solely based on the doctrine of adverse possession but more so on the doctrine of laches. They relied on the provisions of section 7 of the Limitation of Actions Act to submit that they had filed transfer of documents in the year 2006 wherein they had taken possession of the suit property, constructed a perimeter wall thereto and put up a ranch where they have remained in continuous and uninterrupted use.
6. That the Applicant only appeared after they had successfully obtained a discharge from the Government and were in the process of registering title.
7. That the doctrine of laches was not only embedded in the statute of limitation, but that has remained succinct law in the doctrine of common law and equity. Reliance was placed on the case in **Eastern Africa Court of Justice Appeal case No. 2 of 2012 Attorney General of Uganda & Another vs. Omar Awadh & 6 Others [2013] eKLR** to submit that equity aided the vigilant and not those who slumbered on their rights.
8. That the transaction that culminated in the alienation of the suit land from the Applicant to the Respondent occurred in the year 2006 and it would be impossible to call the Land Registrar who was in place at the time and/or to summon the necessary witnesses after such a long period of time.
9. That the Applicant, during this period of time had sole knowledge of the Respondent's possession but chose to do nothing or to ventilate his claim at any one time during the proceedings 13 years and therefore should not be allowed to drag the present litigants, on an endless litigation odyssey.
10. The Respondent's submission on adverse possession was that in accordance to Sections 7, 13 and 38 of the Limitation of Actions Act, an action for recovery of land could not be brought after 12 years. They further relied on the decided case in **Kahindi Ngala Mwangandi vs**

Mtana Lewa [2014] eKLR.

11. That the law on adverse possession was now settled and the essential requirements that one had to meet in order to succeed in an application for adverse possession had also been discussed by Courts. Here, reliance was placed on the case in **Celina Muthoni Kithinji vs Saiya Binti Swaleh & 8 Others [2018] eKLR** where the Court had considered several other cases in admitting adverse possession. That it was settled principle that a party claiming adverse possession ought to prove that his possession was *Nec vi, nec clam, nec precario*, that is peaceful, open and continuous. That the Respondent had not only shown the acquiescence of the Applicant in this matter but that it had satisfied every criteria established by the numerous statutes and the case law.

12. They beseeched the Court not to hesitate to stop the Applicant in his tracks because he was guilty of laches, was a dishonest litigant and one who had abused the Court's process. That the Court should exercise its discretion to ensure that this was brought to an end by finding in their favour and dismissing the suit with costs.

13. In response to the Respondent's preliminary objection, the Applicant's submission was that the Court should consider the prayers sought by the Applicant in their suits to wit:

- i. A declaration that the Applicant is the owner of settlement plot 914 at Ex- P & D Settlement Scheme in Laikipia County.
- ii. An injunction restraining the Respondent, its agents and/ or servants from trespassing, alienating, transferring and/or in any way adversely dealing in and settlement plot 914 at Ex- P & D Settlement Scheme in Laikipia County.
- iii. Cost of the suit
- iv. Any other relief that this honorable Court deems fit.

14. It was the Applicant's submission that he had been allotted the suit land in the year 2002 and the basis of the suit was that the Respondent had attempted to defraud him off the said suit land wherein he had pleaded the particulars of fraud at paragraph 4 of his plaint.

15. That from the pleadings herein, the bone of contention was whether indeed the Respondent had purchased the suit property from the Applicant, which is denied, and whether the Applicant had subsequently transferred the parcel of land to the Respondent on 16th February 2006 as alleged by the Respondent, which claim is also denied as fraudulent.

16. On the issue of limitation of actions, the Applicant submitted that having denied in his pleadings that a sale and/or transfer of the property ever took place, and further that the Respondent had not been in possession of the suit land from the year 2006, it was their submission that having discovered the Respondent's fraudulent actions on the 1st April 2019 upon visiting the subject suit and noticing a perimeter wall which had illegally encroached onto his parcel of land, the period of limitation of action began to run on the 1st April 2019. Reliance was placed on the decided case in **Daniel G Mwangi and Agnes Gathoni Gatungo vs Leiyian Tumuti [2018] eKLR**.

17. On the issue of adverse possession, and while relying on the decided case in **Alloys Mumia Anekea vs Wawire Wambongo [2019] eKLR** the Applicant submitted that having discovered the illegal encroachment on his land by the Respondent on the 1st April 2019, which was without prior knowledge of occupation if any by the Respondent, the Respondent's claim for adverse possession cannot succeed as the Applicant had disputed his allegation of continuous possession of the suit land. The Applicant sought for the preliminary objection to be dismissed with costs to them.

Determination.

18. Having considered the submissions herein submitted, and authorities cited thereof to the Preliminary Objection dated the 13th August 2019, I find the matter for determination as being:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the present suit is time barred and a contravention of Section 7 and 38 of the Limitation of actions Act.

19. A Preliminary Objection as was held in all-important case decided by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

"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."

20. In **Avtar Singh Bhamra & Another vs. Oriental Commercial Bank, Kisumu High Court Civil Case NO. 53 of 2004**, the Court held that:

"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."

21. From the above holding, it is clear that Preliminary Objection must therefore be raised on the assumption that all facts pleaded by the adverse party are correct. It should not raise substantive issues from the pleadings which must be determined by Court upon perusal of evidence. To this effect a Preliminary Objection should be raised on a point of law not on facts, which are yet to be ascertained. A point of law is therefore derived from statute. This means that a party cannot raise it claiming to question the truthfulness of a fact in a case. A Preliminary Objection raised on such grounds is from the face of it a breach of rules of procedure and amount to abuse of Court process.

22. The Respondent herein in opposing the Applicant's application seeking for interim injunctive orders barring it from interfering with the suit land has sought for the said Application and the Applicant's entire suit to be dismissed with costs on a point of Preliminary Objection to the effect that the suit is time barred and a contravention of Section 7 and 38 of the Limitation of actions Act but more so that the Applicant was guilty of laches.

23. That the Respondent, upon a sale and transfer of the suit land, had been in peaceful, open and continuous occupation of the suit land with the sole knowledge of Applicant since 2006 which was close to 13 years wherein the Applicant chose to do nothing to ventilate his claim and therefore pursuant to the provisos of sections 7, 13 and 38 of the Limitation of Actions Act, an action for recovery of land could not be brought after 12 years.

24. The Applicant on the other hand has denied vehemently there having been any purchase and transfer of the suit property from him to the Respondent on the 16th February 2006 as alleged. And that the said claim was fraudulent, the Respondent's fraudulent actions having been discovered on the 1st April 2019 when the Applicant visited the subject suit and noticed a perimeter wall having illegally encroached onto his parcel of land. That the period of limitation of action began to run on the 1st April 2019 and therefore his suit was not time barred.

25. Section 26 of Limitation of Actions Act provides as follows:'

Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the Respondent or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Applicant has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.'

26. It is trite law that to prove that adverse possession of 12 years, the burden is on the person claiming to be entitled to the land by Adverse Possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. The elements of Adverse Possession that Respondent has to prove and which have been denied include actual, open, exclusive and hostile possession of the land claimed.

27. From the submission herein submitted by the parties, the Applicant has claimed elements of fraud by the Respondent and further that the Respondent has not met the criteria that entitles it to the suit land by Adverse Possession.

28. I find that, pursuant to the provisions of the law coupled with the submissions herein submitted and the holding in the case in **Avtar Singh Bhamra & Another** (supra) that the preliminary Objection herein raised by the Respondent should fail for not being based on **pure points of law** but on facts which can only be ascertained at a full hearing where evidence has to be adduced to determine the truth of those facts.

29. To this extent the Preliminary Objection dated the 13th August 2019 lacks merit the same is herein dismissed with costs.

Dated and delivered at Nakuru this 6th day of August 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE