



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**E.L.C CASE NO. 19 OF 2019**

**JEREMIAH OINO.....PLAINTIFF/APPLICANT**

**VERSUS**

**ROBINAH KERUBO**

**(Sued as the administrator of the estate of THOMAS ONGUBO.....DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1.This ruling pertains to the Defendant's Preliminary Objection raised vide the Notice of Preliminary Objection dated 2<sup>nd</sup> June 2020 in which he raises the following points:

1. That the subject of this suit is public land and the Defendant has only been given permission and/or licence to use it by the Kisii Municipal Council and the same cannot be the subject of litigation by way of adverse possession either as pleaded by the Applicant or at all.
2. That the present suit is untenable, misconceived, bad in law inept, incurably defective, mischievous and an abuse of this Honourable Court's process as it does not disclose any reasonable cause of action and the same should be struck out with costs.

**BRIEF BACKGROUND**

2. Before delving into the Preliminary Objection it is necessary to give a brief background of this case. The Plaintiff instituted this suit against the Defendant by way of Originating Summons dated 3.6.2019 under section 32 of the Limitation of Actions Act and Order 38 Rule 7 of the Civil Procedure Rules 2010, seeking orders that this Honourable court be pleased to extinguish and/or modify the title plot or easement registered by the Defendant on land reference number DARAJA MBILI MARKET PLOT No. 1A measuring 25 feet by 50 feet without payment of compensation to the Defendant and that the Plaintiff be registered as proprietor thereof by way of adverse possession in place of the Defendant.

3. The Plaintiff subsequently filed a Notice of Motion dated 8<sup>th</sup> June 2020 seeking an injunction to restrain the Defendant from entering, using, trespassing or constructing on the suit property.

4. The suit is opposed by the Defendant through her Replying Affidavit sworn on the 2<sup>nd</sup> June 2020 in which she gives the history of the suit property. She depones that the suit property was initially allocated to her late father-in-law Ongubo Moriasi by the defunct Kisii Municipal Council. Upon his death, the Defendant's husband Thomas Ongubo had it transferred to him through transmission upon obtaining a grant in respect of his late father's estate. The said Thomas Ongubo died in 2013 after which the Defendant filed Kisii CM Succession Cause No. 543 of 2017. After obtaining a grant in respect of her late husband's estate, she had the suit property registered in her name. She depones that the Plaintiff has been occupying the suit property over the years as a tenant and when he defaulted in paying rent he was evicted.

5. Turning back to the Preliminary Objection, the court directed that it be heard before the application for injunction and that the same be canvassed by way of written submissions. Both Parties complied by filing their submissions which I have considered.

**ANALYSIS AND DETERMINATION**

6. The main issue for determination is whether suit property herein is public land and if so, whether the same can be the subject of litigation by way of adverse possession.

7. I am satisfied that the Preliminary Objection raises a pure point of law in terms of the definition in **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd 1969 EA 696** where the court held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit”.*

Justice Newbold in the said suit argues that:

*“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” .....*

8. Article 62 (1) of the Constitution outlines the various categories of public land and under Article 62(1) (b) public land includes:-

*“Land lawfully held, used or occupied by any state organ except any such land that is occupied by the state organ as lessee under a private lease.”*

Article 62(2) of the Constitution provides as follows:-

**(2) Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under –**

**(a) clause (1) (a), (c), (d) or (e); and**

**(b) clause (1) (b), other than land held, used or occupied by a national State organ.**

9. It is common ground that the suit property is public land within the definition of public land under the Constitution of Kenya. The land was registered under the Government Lands Act (repealed) and administered by the defunct Kisii Municipal Council. Under the repealed Government Lands Act County and Municipal Councils could allocate market plots to individuals under certain conditions. The Defendant only holds a plot card meaning that the title is still in the name of Kisii Municipal Council and therefore time cannot run against her as she is not yet registered as the owner of the suit property.

10. Section 41 of the Limitation of Actions Act provides as follows:

This Act does not

(a) enable a person to acquire any title to or easement over

(i) Government land or land otherwise enjoyed by the Government;

(ii) (ii) mines or minerals as defined in [the Mining Act](#);

(iii) (iii) mineral oil as defined in the *Mineral Oil Act*;

(iv) (iv) water vested in the Government by [the Water Act](#);

(v) (v) land vested in the county council (other than land vested in it by section 120 (8) of [the Registered Land Act](#)); or

(vi) (vi) land vested in the trustees of the National Parks of Kenya; or

(vii) (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under [the Government Lands Act](#) or any Act repealed by that Act.

11. In the case of **Francis Kangogo Cheboi v Vincent Kaino & 4 Others (2013) eKLR** the court held as follows:

*“It will be seen from the above, that the Limitation of Actions Act, does not apply inter alia to land vested in the County Council (except for land vested in it by Section 120(8) of the Registered Land Act which was repealed in 1972). It follows therefore that one cannot claim the reliefs provided for in the Limitation of Actions Act, including the relief of adverse possession, for land vested in County Councils. The plaintiff cannot therefore claim the suit land by way of adverse possession”*

12. Counsel for the Plaintiff has cited the case of Independent **Electoral & Boundaries Commission v Jane Cheperenger & 2 Others (2015) eKLR** where the Supreme Court observed that:-

*“The true Preliminary Objection serves two purposes of merit: firstly , it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time so*

*it may be committed to deserving cases of dispute settlement.”*

**13.** The Court cautioned against the use of Preliminary Objections as a way of winning a case otherwise destined to be resolved judicially.

**14.** Having considered the Preliminary Objection, the rival submissions and the applicable law as well as relevant authorities, I am of the view that the Originating Summons dated 3.6.2019 is misconceived and is unsustainable. The Preliminary Objection is therefore merited and I uphold it. Consequently, I strike out the plaintiff's suit in its entirety. Each party shall bear their own costs.

**Dated, signed and delivered at Kisii this 3<sup>rd</sup> day of November 2020.**

**J.M ONYANGO**

**JUDGE**