



REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL NO 34 OF 1992
WASIKE..... APPELLANT
VERSUS
KHISA.....RESPONDENT

(From the Original Civil Suit No 67 of 1990 of Senior Resident Magistrate's Court at Kitale – C C
Kanyangi, SRM)

JUDGMENT

In or about 27th March 1990 the respondent filed a suit against the appellant and prayed for a declaration that plot No 79 Nairitiri Settlement Scheme measuring 37 acres belonged to him and that the appellant be restrained by a permanent injunction from occupying and using 7 acres thereof.

A defence was filed and after a number of mentions the case was finally fixed for hearing on 20th of February 1992 but on that day counsel for the appellant raised two preliminary issues, namely, that the course of action was time barred by the Limitations of Actions Act and that the Court of the Senior Resident Magistrate Kitale had no jurisdiction to entertain the case as the suit land was situated in Bungoma District.

According to the counsel, the course of action arose in 1967 when the appellant was alleged to have encroached on the portion of land in dispute and that since that time 12 years had passed within which the respondent should have filed a suit in respect thereof. After arguments by both counsels, the learned Senior Resident Magistrate made a ruling in which he found that there was no time bar. His reason was that the case before him was a boundary dispute and that since the respondent had sought remedy from other avenues including arbitration then the case was filed in Court within the period required by section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

As to the preliminary point over jurisdiction the learned magistrate said his Court had jurisdiction because most of the cases heard before him were from all parts of the country including West Pokot, Turkana, Uasin Gichu and Elgeyo Marakwet Districts and that if he was to restrict himself to hearing cases emanating from Trans Nzoia District alone then the Court would stall.

The appellant appealed against that ruling and insisted that the case was time barred arguing that if the plaintiff claimed in paragraph 7 that the dispute started in 1967 then the 12 years period of limitation had actually passed.

On jurisdiction she insisted that Bungoma/Naitiri/93 was situated within Bungoma District and the Court

with jurisdiction was Bungoma Principal Magistrate's Court.

Before deciding on this issue it is important to describe what a preliminary point is.

In the case of *Mukisa Biscuits Co v West End Distributors* [1969] EA 696, Law, JA as he then was authoritatively stated 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 taking the dispute to arbitration”.

In view of the above authority, counsel for the appellant was perfectly in order to raise the issues of limitation and jurisdiction before the Court of the Senior Resident Magistrate Kitale. These are points of law of considerable magnitude as they go to the root of the matter raised in the suit: (See also *Raila Odinga v Francis Ole Kaparo and another* – Civil Suit No 394 of 1993).

A Court faced with a preliminary objection does not need to consider the evidence because at the time such an objection is raised no evidence would have been rendered. It considers only the averments in pleadings *per se*.

A preliminary point is and must always be an issue of law. It must be considered on the basis of the allegation on the pleadings and on the assumption that they are true.

The points raised here are of a legal nature as they must be. No evidence is admissible. The Court must examine only the pleadings in determining the issues raised.

On Limitation of Actions Act, it may not be as easy as counsels think to raise limitation in a case of this nature on a preliminary point taking into account in particular that the original allottees of these plots have died. At the same time it is not clear when the respondent realized that the disputed portion had been encroached upon by the appellant or when for the first time the respondent asked the appellant to leave that portion and/or that the latter refused so as for the limitation period to start running.

A number of authorities have been decided on this point the most celebrated one being that of *Sisto Wambugu v Kamau Njuguna* cited in the [1982-1988] KA R 218. According to the decision in that case, if one relies on adverse possession over a piece of land, time only starts running in favour of the defendant, when he proves that at the time he/she had an effective right to recover possession thereof from the opposite party otherwise if there is an indication that he/she was occupying that land by some kind of permission or license which had not been determined then the period of limitation does not run.

Adverse possession actually means that a person is in possession of land in whose favour time begins to run and it cannot run in favour of, say, a licensee.

There is some difference between the case of *Sisto Wambugu* and the present case in that in the former case the parties had entered into what appeared to be an agreement for the sale of land which apparently the former repudiated allegedly for non-completion of purchase price.

Here, however, it would appear each of the parties is laying a claim to the 7 acre portion in dispute in which case the issue of adverse possession where one party should claim the Limitation of Actions Act would be difficult to apply at the stage counsel for the appellant raised that point. See also *Mwangi Githu v Livingstone Ndeeto*, CA 74 of 1979 and also *Hosea v Njiru* [1974] EA 526.

As to the issue of jurisdiction, section 12 of the Civil Procedure Act states that subject to the pecuniary or other limitations prescribed by law, suits for the recovery of immovable property or partition of the same shall be instituted in the Court within the local limit of whose jurisdiction the property is situated.

There is no doubt that the plot in dispute, Bungoma/Naitiri/93 is situated in Bungoma District yet considering that the Court of the Senior Resident Magistrate has jurisdiction throughout Kenya, it would not be appropriate to decide this case on a preliminary issue raised over jurisdiction at that stage.

In the circumstances, I am of the view that the learned Senior Resident Magistrate was not wrong in dismissing the preliminary objections though on different reasons from mine.

Consequently I dismiss, this appeal and direct that the suit be remitted back to the Court of the Senior Resident Magistrate at Kitale for hearing on merits and final disposal. Costs of this appeal will be paid to the respondent.

Dated and Delivered at Eldoret this 18th day of March, 1993

D.K.S. AGANYANYA

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JUDGE