

REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CIVIL APPEAL NO. 103 OF 1996
CORAM: GICHERU, KWACH & LAKHA, JJ.A.

BETWEEN

EUNICE KARIMI KIBUNJAAPPELLANT
AND
MWIRIGI M'RINGERA KIBUNJARESPONDENT

(Appeal from a ruling and decree of the High Court of Kenya at
Meru (Kuloba J) dated 4th March, 1993
in
H.C.C.C. NO. 126 OF 1992)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful plaintiff whose suit by way of an originating summons was dismissed by the superior court (Kuloba, J.) by his ruling delivered on March 4, 1993 on a so called preliminary point of law that the suit was time barred.

By her originating summons the plaintiff claimed a declaration that she had become entitled by adverse possession to 5 acres out of a parcel of land ABOTHUGUCHA/GITHONGO/494. Without any evidence or finding as to when the possession by the plaintiff became adverse to that of the defendant or when the suit became barred by limitation, the judge dismissed the plaintiff's suit.

We have carefully considered the appellant's complaint and find that the complaint is fully justified. The issue before court clearly required a full hearing and we reiterate that the practice of raising points, which should be argued in the normal manner, by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. A preliminary point cannot be raised if any fact has to be ascertained.

Accordingly and, for the reasons above stated, the appeal is allowed with costs here and in the court below and the case is remitted to the superior court for hearing on its merits.

Dated and delivered at Nyeri this 16th day of October, 1996.

J. E. GICHERU

JUDGE OF APPEAL

R. O. KWACH

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR