REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI

(Coram: Akiwumi, Shah and Lakha, JJ.A.)
CIVIL APPEAL NO. 29 OF 1996

BETWEEN

JOHN KARINGA KIMANGA.....APPELLANT

AND

1. SAMUEL KAMAU KAMUNGE

2. JOSEPH NJOGU KAMUNGE.....RESPONDENTS

(Appeal from the judgment and order of the High Court of
Kenya
at Nyeri (Tunoi, J.) dated 23rd February, 1993
in
H.C.C. CASE NO. 154 OF 1990)
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JUDGMENT OF THE COURT:

This is an appeal by the unsuccessful plaintiff against the decree of the superior court (Tunoi, J., as he then was) delivered on February 23, 1993 whereby he struck out the plaintiff's suit on a so called preliminary point of law that it was res judicata.

By an Originating Summons filed on December 5, 1990 the plaintiff sought orders, inter alia, for the register concerning three Land Parcels Number MUTIRA/KAGUYU/1266; MUTIRA/KAGUYU/1267 and MUTIRA/KAGUYU/1268 to be rectified to its original title Number MUTIRA/KAGUYU/449 and for the defendants' names to be deleted from the three Land Parcels on the ground of adverse possession. At the hearing of the summons, the defendant's advocate, without any notice whatsoever, argued that the suit was res judicata and the learned judge held that there were three suits prior to the instant one where the matter raised in the summons was substantially in issue and that the plaintiff could not therefor raise the issue of adverse possession.

At the hearing of the appeal the respondents' advocate conceded and, in our opinion rightly, that two of the three prior suits did not support a finding of res judicata. It follows that the learned judge was, with great respect, in error in basing his judgment on those two prior suits. As far as the Embu R.M.C.C. 109 of 1983 in which the plaintiff was sued for eviction it was held that he had no interest in the land which belonged to the first respondent.

There is no finding if the plaintiff was in fact in possession of the land in question in that case. The

ascertainment of that fact was essential to the finding of the learned judge that the present suit was barred. But there was no such finding and, in the absence of thorough investigation, there could be none. There was, therefore, no material before the learned judge on which a finding as to possession could be properly made.

Accordingly, in our judgment, the decision of the learned judge was, with respect, made in error. The issue before the superior court clearly required a full hearing and we reiterate that the practice of raising points, which should be argued in the normal matter, by way of preliminary point of law does nothing but unnecessarily increase costs and, on occasion, confuse the issues as it certainly did in this case. A preliminary point cannot be raised if any fact has to be ascertained.

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 merits.

Dated and delivered at Nyeri this 18th day of October, 1996.

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL