



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 153 OF 2018**

**PETER KIMANI CHEGE.....PLAINTIFF**

**VERSUS**

**DAVID SALIM MWARANGU GITHIOMI.....DEFENDANT**

**RULING**

What is before me for determination is the Defendant's Notice of Preliminary Objection dated the 9<sup>th</sup> November, 2018, which states as follows:

1. Take Notice that Counsel for the Defendant/Respondent shall raise a preliminary objection on a point of law on the hearing of the Application by the Plaintiff/ Applicant dated 4<sup>th</sup> October, 2018 and filed on 8<sup>th</sup> October, 2018 that is materially defective and incapable of being heard by the Court as it does not comply with the mandatory provisions of the laid down procedure of the law.
2. That, in the event the Preliminary Objection on a point of law is upheld, the entire suit be dismissed with costs and the Plaintiff/ Applicant do vacate the property known as NGONG/ NGONG / 8592 ONGATA RONGAI with immediate effect as he is a trespasser with no legal or beneficiary possession.

Both the Plaintiff and the Defendant filed their respective submissions in respect of the Preliminary Objection, which I have considered.

**Analysis and Determination**

Upon consideration of the Notice of Preliminary Objection dated 9<sup>th</sup> November, 2018, pleadings filed including the submissions, the only issue for determination is whether this suit should be dismissed for failing to comply with the mandatory provisions of the law.

The Plaintiff had filed this suit seeking orders of adverse possession claiming he has been in possession of the land parcel number NGONG/ NGONG / 8592 ONGATA RONGAI hereinafter referred to as the 'suit land' for a period in excess of twelve (12) years. The Plaintiff also filed an application seeking for injunctive orders against the Defendant in respect of the suit land. The Defendant filed a Notice of Preliminary Objection and his main contention is that the suit herein should be dismissed because the Plaintiff failed to attach an extract of the title in his Originating Summons. The Plaintiff opposed the Preliminary Objection and argued that failure to annex an extract of the title cannot stop the court from continuing to hear the case herein. He relied on the following cases to buttress his argument: **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696; Independent Electoral & Boundaries Commission Vs Jane Cheperenger & 2 Others (2015) eKLR; Aviation & Allied Workers Union Kenya Vs Kenya Airways Ltd & 3 others; Josiah Njoroge Njuguna Vs Ingobor Farm Co. (Registered Trustees) & 3 Others (2018) eKLR and Anne Itumbi Kiseli Vs James Muriuki Muriithi (2013) eKLR**

Order 37 rule 7 of the Civil Procedure Rules provides that: ' (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons. (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. (3) The court shall direct on whom and in what manner the summons shall be served.'

Article 159 (2) (d) of the Constitution provides that: 'In exercising judicial authority, the courts and tribunals shall be guided by the following principles— (d) justice shall be administered without undue regard to procedural technicalities'

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop. '

Further in the case of **Ann Itumbi Kiseli Vs James Muriuki Muriithi (2013) eKLR**, Justice Angote held that: ' **The production of the title or a certified extract of a title, in my view, can either be by way of an affidavit or during the hearing of the viva voce evidence. What is critical is that at the end of the trial, the Plaintiff must place before court a title document or a certified copy of the extract of the title to prove that the person he has sued is the registered owner.**'

In the current scenario, the Plaintiff failed to annex an extract of the title to his pleadings. The Defendant has not demonstrated what prejudice he stands to suffer if the Plaintiff was allowed to annex a copy of the extract to the title before the suit is set down for hearing. In being persuaded by the above cited judicial authority, it is my considered view that the Plaintiff can produce the extract of title before the suit is set down for hearing. I opine that the Court as an independent arbiter is expected to administer substantive justice and not rely on technicalities to defeat it.

In the current Constitutional dispensation and pegging my observation on Article 159 (2) (d) of the Constitution, the question of reliance on procedural technicalities in the administration of justice is a defeated avenue.

It is against the foregoing that I find the Preliminary objection is unmerited and will disallow it.

Costs will be in the cause

**Dated signed and delivered in open court at Kajiado this 25<sup>th</sup> day of February, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**