REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 3 OF 2015

TWO THIRDS INVESTIMENT LIMITED & 10 OTHERS.....PLAINTIFFS

-VERSUS-

KATANA SAID KALAMA & 3 OTHERS……..…..…..DEFENDANTS

RULING

1. The 1st defendant raised a preliminary point of law dated 28th January 2015 that the suit is time barred by virtue of section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. The parties filed written submissions in arguing the preliminary objection.

2. In his submissions, the 1st defendant stated that the right to file suit first accrued to the plaintiffs on 8th April 1993 when they became registered as owners of the suit property **CR No 122/MN/II/390.** The 1st defendant put reliance on the Court of Appeal decision of **Francis Gitonga Macharia vs Muiruri Waithaka (1998) eKLR** where it was held that ***"limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent. That time for adversity cannot run against a person who has no interest in the property."*** The 1st defendant also cited the cases of **Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR and Maweu vs Liu Ranching & Farming Co-operative Society Ltd (1985) eKLR** which took the same position as the **Francis Gitonga** case.

3. The defendants concluded that the cause of action accrued on registration of the plaintiff as against the defendants who are persons entitled to an action in adverse possession which had already taken place by the 1st defendant in filing ELC No 232 of 2014 in September 2014. That the replying affidavit of Said Kalama Katana dated 26/1/2015 refers to a meeting held on 9th March 1996 between the Plaintiff Company and representatives of the families hence the plaintiff cannot claim the cause of action arose in December 2014. He urged the Court to uphold his objection and dismiss the plaintiffs' suit.

4. The plaintiff opposed the preliminary objection by citing the case of **Mukisa Biscuit Co. Ltd vs West End Distributors (1969) Mwangi (2014) E. A 696** and **Samuel Waweru vs Geoffrey Mwangi (2014) eKLR** where it was held that Courts must consider whether what is raised in the preliminary objection are matters of fact or law. That to discern this, the Court has to be satisfied that there is no proper contest as to the facts as prima facie presented in the pleadings on record. The plaintiff also stated that affidavit does not constitute a pleading and its contents cannot be used to launch a preliminary objection like this one.

5. I have taken into consideration all the issues raised by the submissions of both counsels. To begin with, it is my opinion that the 1st defendant has misunderstood the meaning of section 7 of Cap 22. I say so because a registered owner's rights can only be extinguished as provided by law. Where nothing occurs that would extinguish those rights, they remain and infinitum. It is therefore a misapprehension to state the plaintiffs' cause of action accrued from 1993 when they became the registered proprietors. A cause of action is defined by the dictionary as ***"the fact of combination of sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party."***

6. It follows that the plaintiff's' right to sue accrued only when they wanted to enforce their rights against

the defendants. To prove whether there is a valid cause of action, you must do so by evidence. Further in a claim for adverse possession, possession has to be established by facts. In the case of **Titus Kigoro Munyi supra**, the trial Court quoted the case of **Kimani Ruchire vs Swift Rutherfords & Co Ltd (1980) KLR 10** at page 16 where Kneller J. held that *"……..…...so that the plaintiff **must show** that the company had knowledge (or means of knowing actual or constructive) of the possession or occupation."* Similarly in the case of **Gicharu Kariri vs Peter Njoroge Mairu, NBI C.A No 293 of 2002**, the Court of appeal stated thus, *"we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved."*

7. In the case of **Mukisa Biscuits Supra,** it was settled that a preliminary point of law should be a pure point of law which does not require to be ascertained through evidence. In this case, the plaintiffs have pleaded that the defendants got into the land in the year 2014. The 1st defendant on his part is putting reliance on a document annexed to an affidavit showing a meeting took place in 1996. The set of facts on when the defendants got into the land are therefore not agreed between the parties as per the pleadings. It would require evidence to ascertain whether the defendants have been on the suit land for more than 12 years or whether they got into the land in 2014. Therefore the point of law being raised by the 1st defendant requires to be ascertained by facts/evidence. This disqualifies it from meeting the standard of a preliminary objection.

8. Consequently I find the objection raised as unmerited as it will make the Court delve into facts without conducting a trial. It is hereby dismissed with costs to the plaintiffs.

Dated, signed & delivered at Mombasa this 14th February 2018.

A. OMOLLO

JUDGE