



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 208 OF 2015 (OS)

JOSEPHAT AKHAYA OPANDA.....APPLICANT

VERSUS

BUNYALIA ONDACHI.....RESPONDENT

RULING

The respondent at the hearing of this suit raise a preliminary objection filed in court on the 25th August 2015 for determination and seek to have the application and the entire suit be struck out or dismissed for reasons that:

1. That the suit as filed and is fatally and incurably defective in law and as such cannot stand or be ventilated before this honourable court.
2. That the applicant does not have the requisite capacity/locus standi to bring this suit.
3. That the continued pendency of the suit is an abuse of the process of this honourable court.
4. That applicant's suit is misconceived, misdirected and misled and therefore the prayers sought cannot stand in law.

In Mukisa Biscuit Manufacturing Co. Ltd vs. West End distributors Ltd. (1969) EA 696, a preliminary objection was defined 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”.

In his judgment, Sir Charles Newbold in the same case, held as follows:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 had 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 issue. The improper practice should stop”.

As per the above finding of Sir Charles Newbold, “..... the assumption that all the facts pleaded by the other side are correct” From the grounds on the face of the originating summons and the supporting affidavit of the applicant, sworn on 15th July, 2015, the following facts are not in dispute.

- (a) The land subject of this suit, title No. E/Bunyore/Ebusamia/269 is registered in the name of the respondent;
- (b) The applicant came into possession of the aforesaid parcel of land, together with other family members, including his parents and siblings, by virtue of a transaction between his father Opanda Injili (deceased) and the respondent;
- (c) The applicant's father Opanda Injili is deceased.
- (d) The applicant has not obtained grant of letters of administration of the estate of his deceased father.

(e) The consent to possess and reside on the suit land was granted by the respondent to the applicant's father who is now deceased, and not to the applicant directly.

(f) There is a pending suit, being Vihiga PMCC No. 60 of 2015 as shown in paragraph 7, 8 and 9 of the respondent's replying affidavit.

Given the foregoing facts, it is clear that the applicant does not have the requisite capacity to bring this suit. The applicant ought to have obtained letters of administration of his father's estate before bringing the current suit. Justice Githinji (as he then was) in *James Kamau Kimani vs. James Gichuru Gaturu* [2000] e KLR while confronted with a similar scenario, held that where the plaintiff had not obtained letters of administration, he had no capacity to represent the estate. He stated thus:-

"Secondly evidence shows that plaintiff was occupying the plot with permission of his parents. He was living with his parents on the plot. He claims that the plot belongs to his father. In those circumstances he cannot validly make an independent claim for the land by adverse possession. It is his parents who would have made a claim to the land by adverse possession. Plaintiff's parent died without making the claim. Plaintiff does not claim to have a grant of letters of administration in respect of the estate of his deceased father.

So, he has no capacity to represent the estate of his father. He has not in any case claimed that claim for land by adverse possession is on behalf of the estate of his father.

Thirdly, the evidence of the plaintiff does not support claim of land by adverse possession. His evidence is that the plot belongs to his deceased father as it was given to his deceased father by defendant's deceased father."

Secondly, the applicant has admitted in his supporting affidavit that he lives on the suit land with the permission of his parents. He states in paragraphs 3 and 4 of the supporting affidavit that it is his father who purchased the parcel of land from the respondent, and that he grew up on the suit land. As was held in the court of appeal in *Joseph Mutafari Situma vs. Nicholas Makhanu Cherongo* [2007] e KLR, (Tunoi, Githinji & J. Onyango Otieno JJA) for the plaintiff's claim to succeed, "..... he must not only prove exclusive physical possession of an identifiable portion of the suit land independent of possession by his deceased father, but also requisite intention to the exclusion of the world at large, including the respondent." The Court of Appeal in finding that the appellant could not make a claim for adverse against the respondent, the Court of Appeal held as follows:-

"Although the appellant stated in the superior court that he had planted coffee, banana trees and that he built two semi-permanent houses, there was no evidence that deceased had sub-divided the land and allocated each member of his family a specific share of the suit land. Indeed, it seems that before the death of his father, the land was communally occupied by the members of the deceased's family who believed that the land legally belonged to the deceased. In the circumstances, we are of the view that the appellant did not have independent possession of the land from that of his father in his capacity as his son. Moreover, the appellant did not demonstrate that he had the requisite intention to possess the land to the exclusion of all persons including the respondent during that period."

For the foregoing reasons, they submit that the preliminary objection is upheld and dismiss the applicant's suit for being an abuse of the court process, and for want of capacity on the part of the applicant to institute this suit.

The applicant submitted that, the notice of preliminary objection is misplaced, lacks merits and it be dismissed. A preliminary objection has to be based on a point of law. In the instant objection, the respondent alleges that the applicant has no capacity to sue. He has supported this contention vide his submissions filed in court on 27th November, 2017. He says that he has no requisite letters of administration enabling him bring this suit. A look at the pleadings clearly shows that the applicant has brought this suit on his own behalf and not on behalf of anybody. He therefore does not need letters of administration to sue.

Further, they admit that an issue of adverse possession is an issue of fact and not law. The respondent therefore, cannot bring the notice of preliminary objection on adverse possession. The applicant is not party to Vihiga CMCC No. 60/2015. He cannot therefore be estopped from bringing this instant suit. They have perused the authorities cited by the respondent in support of the preliminary objection and they do not apply to this case. The facts are different to this instant one. Furthermore, the respondent wants this case determined on technicalities. This is against the spirit and intent of Article 159 (2) (d) of the Constitution. They pray that the preliminary objection is dismissed.

This court has carefully considered both the applicant's and the respondent's submissions herein. A Preliminary Objection, as stated in the case of **Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd(1969) E.A 696**,

"..... 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"

In the same case, Sir Charles Newbold said:

"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 had to be ascertained or if what is sought is the exercise of judicial discretion".

Locus standi, is defined in **Black's Law Dictionary 9th Edition** as the right to bring an action or to be heard in a given forum. Therefore the issue of locus standi and/or legal capacity raises points of law and is therefore a proper to raise it as a Preliminary Objection and

should be raised at the earliest opportunity as was held in the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & Others 2014 e K.L.R.** The issue of the plaintiff's locus standi to file this suit is therefore properly raised as a Preliminary Objection.

I have perused the pleadings and in particular the affidavit in support of the originating summons filed in court on the 16th July 2015. It is stated that, the land subject of this suit, title No. E/Bunyore/Ebusamia/269 is registered in the name of the respondent. The applicant came into possession of the aforesaid parcel of land, together with other family members, including his parents and siblings, by virtue of a transaction between his father Opanda Injili (deceased) and the respondent. In paragraph 4 it is stated as follows;

“I know of my own knowledge that I grew up as a child while staying on the land and when I attained the age of majority in the year 2002, I established my home on the parcel of land where I and my family have been staying to date.”

I find this a matter of adverse possession and the application is not filed on behalf of his deceased father but on his own behalf. The question of whether the stay has been peaceful or not is one of evidence which can only be established at the full trial. The authorities cited above on locus are not relevant to the instant case. I find that the preliminary objection has no merit and the same is dismissed with costs to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF MAY 2018.

N.A. MATHEKA

JUDGE