



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwihike Farmers Company Limited v Karitu (Environment & Land  
Case 1172 of 2016) [2018] KEELC 4906 (KLR) (21 June 2018) (Ruling)**

*Mwihike Farmers Company Limited v Francis Kaigua Karitu [2018] eKLR*

Neutral citation: [2018] KEELC 4906 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE 1172 OF 2016**

**MM GITUMBI, J**

**JUNE 21, 2018**

**BETWEEN**

**MWIIHIKE FARMERS COMPANY LIMITED ..... PLAINTIFF**

**AND**

**FRANCIS KAIGUA KARITU ..... DEFENDANT**

**RULING**

1. Coming up before me for determination is the Notice of Preliminary Objection dated 4<sup>th</sup> November 2016 raised by the Defendant seeking that this suit be dismissed on the basis that:
  - 1) The Plaintiff's suit has no merit, is fatally defective, bad in law, incompetent, unmaintainable, frivolous and vexatious and merely meant and or intended to delay or circumvent the due process of law.
  - 2) The Plaintiff's advocates represented both parties in the purported sale agreement hence ought to disqualify themselves as they ought to appear as witnesses in the suit.
2. It was the Defendant's submission that this suit is fatally defective based on the fact that the Plaintiff does not have a good title to the suit property and that the Defendant acquired a legal title over the suit property on 14<sup>th</sup> February 2014 in common with his father who is now deceased. In its reply submissions, the Plaintiff stated that the question of lack of good title to the suit property is a matter of evidence which does not fit within the parameters of a preliminary objection. The test of whether a point is a proper preliminary objection has been stated in the case of *Equity Bank Limited -vs.- Bryan Yongo & another* [2014] eKLR where the court held that,

“ Any true Preliminary Objection should not be entangled with factual issues.”



3. Further, in the case of *Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributor Ltd* [1969] E.A 696, Law JA stated that,

“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.”

4. It is clear to this court that the point being raised by the Defendant as a preliminary objection being the question of the lack of a good title to the suit property on the part of the Plaintiff is not a preliminary objection. That is a factual issue that is to be proved at the trial of this suit by the production of evidence. That fails the test of a true preliminary objection as enunciated in the cases cited above.
5. The other point raised by the Defendant as a preliminary objection is that the Plaintiff's advocates, Kingara & Co Advocates represented the Plaintiff and the Defendant's father in the sale agreement over the suit property. The Defendant claims that that sale agreement was fraudulent as it did not include him as a tenant in common together with his father. In view of that assertion, the Defendant is of the view that that advocate ought to appear as a witness to be cross examined on the fraudulent transaction hence should disqualify themselves from this suit. To that point, the Plaintiff submitted that the Defendant was not a party to the sale agreement and this suit is not against his father but against him therefore the allegation that Kingara & Co. Advocates acted for both parties to this suit does not hold any water. The Plaintiff clarified that the Defendant is not sued as the personal representative of his father but in his own capacity as the current registered proprietor of the suit property. To this point, the court forms the view that the representation of parties by advocates is not a proper preliminary objection. It is not a point of law which upon determination may dispose off the suit. Further, this court also holds the view that this being a claim under the principle of adverse possession, the issue of reliance on a sale agreement does not arise. Overall, this court finds that the legal representation of the Plaintiff is not a proper preliminary objection.
6. Arising from the foregoing, this Notice of Preliminary Objection is hereby dismissed with costs to the Plaintiff.

**SIGNED AND DATED BY LADY JUSTICE MARY M. GITUMBI AT NAIROBI THIS 19TH DAY OF JUNE 2018**

**MARY M. GITUMBI**

**JUDGE**

**DELIVERED BY JUSTICE BERNARD EBOSO AT NAIROBI THIS 21ST DAY OF JUNE 2018**

**BERNARD EBOSO**

**JUDGE**

