

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C CASE NO. 73 OF 2017

JULIUS KIORIA WAMBUGU APPLICANT

VS

CHARLES GACHUHI RESPONDENT

RULING

1. The Applicant filed an originating summons seeking orders that he had by adverse possession acquired Land Reference Number Loc 9/Kanyenyaini/1611 (suit land). The grounds of his assertion of adverse possession inter alia is that he has been in continuous and uninterrupted possession of the land in excess of 12 years. That the applicant avers that though the respondent is the registered owner of the suit land, the said suit land was the entitlement of his brother Peter Maina Kimani now deceased. That on the 19th January 1993 the applicant entered into an agreement for sale with the said Peter Maina Kimani for the purchase of the suit land at the sum of Kenya Shillings Eighty-Five Thousand (Ksh. 85,000/-) after which he was given possession of the suit land. That both the Vendor and the Purchaser in the agreement were aware that the suit land was registered in the name of the respondent and that it was a portion created from the Block 9/Kanyenyaini/195.

2. In opposing the application, the respondent depones that he is the registered owner of the land and that he had allowed his late brother Peter Maina Kimani to live on the land and that he was neither a party nor had knowledge of the land transaction between his late brother and the applicant. In his counterclaim, he urged the Court to order for the eviction of the applicant as he is but a trespasser on the suit land.

3. In his defence to the counterclaim, the applicant pleaded that the counterclaim is time barred under the limitation of Actions Act and urged this Court to dismiss it. And true to his word on the 7th April 2017, he filed the preliminary objection which is the subject of this ruling. The grounds of the preliminary objection are couched in the following terms;

“The counterclaim is time barred under the limitation of actions Act in that it has been brought more than 12 years since the applicant got possession of the suit land”.

4. Both parties have filed their written submissions which I have considered in determining the preliminary objection. The issue before the Court is whether the preliminary objection is merited.

5. In the case of **Mukisa Biscuit Company Vs Westend Distributors Limited (1969) EA 696** stated that a preliminary objection if raised *in limine* must be in the nature of a demurrer. It must be a pure point of law to be 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. Law J stated as follows;

“ so far as I am aware, a preliminary objection consists of a point of law which has been pledged or which has arose by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. ...”

In **Oraro vs. Mbaja [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows; -

.....a “preliminary objection” correctly understood, is now well defined as, and declared

to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

6. In his submissions to the Court the applicant states that he has been in occupation of the suit land in excess of 12 years, and that that fact has been admitted by the respondent in his own pleadings. The entry of the land by the applicant is disputed by the Respondent. The applicant avers that his entry having been through an agreement of sale between him and the respondent's deceased brother, was lawful. The respondent holds the position that he had no knowledge of the agreement nor was he a party. Another disputed fact is whether or not the respondent held the land in trust for his deceased brother as to afford legitimacy to the transaction. No evidence has so far been adduced to support that contention by the applicant. The respondent alleges that he allowed his late brother to live on the suit land as he had another land in Kanjuu in Kirinyaga County where he lives. Even if this Court was to accept that the entry by the applicant was lawful vide an agreement of sale, at what point did the permission or consent cease as to afford the entry to be deemed as a trespass and adverse to the registered owner's right to the suit land. At what point did the occupation of the suit land come to the knowledge of the respondent? All these are points that will call for evidence to enable the Court to determine when the respondents cause of action and inversely that of the applicant arose.

7. In the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the case are deemed to be correct. In the instant case, the facts as alleged in the plaint and counterclaim are disputed and *prima facie* the claim in the counterclaim cannot be deemed hopeless and be summarily dismissed by way of preliminary objection.

8. Section 7 of the Limitations of Action Act cap 22 of the Laws of Kenya states that an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. As stated above there is no certainty as to when the cause of action arose on either the part of the applicant and that of the respondent. To reach a determination, evidence would have to be presented to this Court.

9. In the end, I find that the preliminary objection fails and is hereby dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI, THIS 19TH JULY 2017.

J. G. KEMEI

JUDGE