



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LAND COURT AT MERU**  
**ELC SUIT NO 173 OF 2016**  
**JOEL MUKARIA NKUBITU**  
**(Suing as the administrator of the estate of**  
**STANLEY NKUBITU M'MBUI.....PLAINTIFF**  
**VERSUS**  
**RICHARD RUKUNGA.....1<sup>ST</sup> DEFENDANT**  
**JALDESA TUKE .....2<sup>ND</sup> DEFENDANT**  
**JAMAL ALI .....3<sup>RD</sup> DEFENDANT**  
**ADAN ABDULLAHI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of the application of 22.09.16 as well as the preliminary Objection of 14:11:16.
2. Plaintiff has filed the suit as the administrator of the estate of Stanley Nkubutu M'Mbui who allegedly owned land parcel No. 7918/660 in Isiolo Town. Pursuant to a common practice in land matters, the plaint was filed along with an application for injunction to restrain defendants from utilizing the suit land. Defendant are apparently constructing on the land.
3. Defendant's case is that they are the ones who have been on the Suitland hence the claim for adverse possession in the Preliminary Objection.
4. Both parties have filed Submissions, in compliance with the Court's orders of 01.02.17

**Determination of the Preliminary Objection**

5. The preliminary Objection of 14.11.16 by the defendant is grounded on the following:-

- 1) That the application (of 22.09.16) and the entire suit are time barred and therefore affected by doctrine of laches.
- 2) That 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants are entitled to the land via adverse possession doctrine.

3) That the Plaintiff doesn't have a credible standing title.

6. In asserting their claim, defendants have urged the Court to look at the letter of allotment marked JMNI dated 1992, that an application for registration of title is dated 07.8.1995, that the title was issued to Stanley Nkubitu on 01.12.1992, and that deceased died on 27.12.1988. It is also averred that Plaintiff has never occupied the suit land. Plaintiff doesn't appear to have made any comments or rebuttals concerning the Preliminary Objection.

7. That notwithstanding, this Court has to look at the law applicable in so far as Preliminary Objections are concerned. In Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969) E.A, it was held that:-

***“a Preliminary Objection consist of a pure point of law which arises by clear implication out of pleadings, and which if argued as a Preliminary Point may dispose off the suit.***

8. This Court is being invited to allow the case for adverse possession through a Preliminary Objection. To this end, the Court has been urged to look at several documents including the title of deceased (Stanley), application for registration of title, and letter of allotment. The issues raised by the defendants are not pure points of law. They are issues that call for the rigorous process of litigation where the veracity of the evidence tendered can be put to test.

9. I therefore find that the preliminary Objection is unmerited and the same is dismissed with costs to Plaintiff.

10. Application of 22.09.16;

The prayers sought are for;

1) Orders of temporary injunction restraining the defendants either by themselves, their workers, agents or anybody acting on their behest from further construction, encroachment and activities /developments on parcel No. 7918/669 which is located in Isiolo Town pending inter-parties hearing.

11. Applicant has sworn an affidavit of 22.09.16 where he states that his father was the registered proprietor of the Suitland, that after their father's demise no family member continued to occupy the land but they kept a close watch on the land. Further applicant avers that his family has been paying all land rates and rent and that sometime back, they had embarked on the process of developing the land. However on 20:09:16, they discovered that a permanent structure was being put up by 4<sup>th</sup> defendant.

12. 1<sup>st</sup> Respondent is the one who has sworn on affidavit of 14.11.10 in opposition to the application. He avers that defendants are the ones who are in occupation of the Suitland. Further , 1<sup>st</sup> Respondent avers that 2<sup>nd</sup> Respondent Jaldesa Tuke was allocated a commercial plot at Jua Kali along with Abdi Wako Lukefar and they in turn sold the land to 3<sup>rd</sup> Respondent (Janali Ali). He further states that the 4<sup>th</sup> Respondent was also allocated land at Jua Kali by the County Council of Isiolo, that the aforementioned allocations resulted in plot reference numbers PDP No. 117/15/Vol.2/25, ISL 117/2000/23, ISL/117/98/229 being allocated to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and that the County is in the process of issuing lease documents.

13. It is averred by 1<sup>st</sup> Respondent that a letter of allotment cannot be issued after a title deed and that no lease documents were issued in the year 1992. Defendants are apparently the ones who have been paying the rates.

**Prima facie case:**

14. The Plaintiff has a title whereas defendants have an allotment letter. The argument by the defence is

that the title is not valid. That is an issue to determine at the trial. As rightly submitted by the applicant in *ELC No. 238/15 Nairobi, Kidbrooke Investment Ltd vs. Isaac Mwangi*,

***“a certificate of title .....shall be taken by all Courts as prima facie evidence that the person named as the proprietor of land is the absolute and indefeasible owner; Section. 26(1) land Registration Act”.***

The issue as to whether the title is authentic or not is one that invites arguments. Such arguments cannot be properly dealt with at the interlocutory stage. It is in a full trial that the opposing parties would get an opportunity to substantiate their claims as to whether the title is invalid or not. For now, I am of the view that the title along with the rate payment documents are an indication that applicant has rights of proprietorship to the land. He has therefore established a prima facie case.

### **Irreparable Damage**

15. The Court has seen photographs of the construction site where a building is coming up. The effects of such a monumental building, may be rather adverse. The building is apparently a rental one. If completed, tenants would be in the mix necessitating fresh responsibilities and obligations. The damage may be irreparable.

16. I need not interrogate the criteria of “balance of convenience”.

17. I note that the structure is already under way and if left in that state then complete structure would be exposed to vagaries of the elements like weather and vandalism. Against this background, I allow the application in the following terms:-

- 1) That the Court do issue order of temporary injunction restraining the defendants either by themselves, their workers, agents or anybody acting on their behest from further construction, encroachment and activities/ developments on parcel No. 7918/669 which is located in Isiolo for a period of 8 months.
- 2) The Plaintiff is also restrained from utilizing the Suitland in any manner.
- 3) Defendants are given 30 days in which they are to enter the land and secure the premises to ward of any wastage or vandalism.
- 4) The O.C.S Isiolo Police Station is to be served with the orders to ensure compliance.
- 5) Costs in the cause.

**DELIVERED, SIGNED AND DATED IN OPEN COURT AT MERU THIS 11<sup>TH</sup> DAY OF OCTOBER, 2017 IN THE PRESENCE OF:**

CA: Janet

Muriuki Ken for Plaintiff

**Hon. L.N. MBUGUA**

**ELC JUDGE**