



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 220 OF 2015

SYOMBUA SAMMY (*Suing as the Legal Representative of the Estate of*

SAMUELMAITHA MUOKI ALIAS SAMMY MAITHYA.....PLAINTIFF

VERSUS

NANCY KIVINYA KIOKODEFENDANT

RULING

1. This Ruling is in respect to the Defendant's Notice of Preliminary Objection dated 9th November, 2016.
2. In the said Notice of Preliminary Objection, the Defendant has averred that the Plaintiff's suit is untenable in law because of the invalidity of the Title to the suit land and that the suit violates the provisions of the Limitation of Actions Act.
3. The Preliminary Objection proceeded by way of written submissions.
4. The Defendant's counsel submitted that one cannot maintain an action in trespass unless they can establish some form of unlawful interference with a person's property; that a deceased person cannot lawfully be registered as an owner of a property and that the registered proprietor of the suit land died on 14th September, 2008.
5. The Defendant's advocate finally submitted that the Limitation of Actions Act requires that suits predicated on tort should be filed within three (3) years; that the cause of action by the administrators of the deceased accrued after his death on 14th September, 2008 and that the prayers in the Plaint cannot be granted.
6. In response, the Plaintiff's advocate submitted that the Defendant encroached on the suit land in the year 2010; that there is a counter-claim for adverse possession and that the issues raised are not pure points of law as contemplated in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors ltd (1969) E.A 696*.
7. Counsel submitted that the validity of a title document is a question of fact and that the issue of the validity of the title document has not been pleaded in the Defence.
8. The Plaintiff's counsel finally submitted that the suit is not based on tort but it is for recovery of the suit land.

9. In the Plaintiff dated 29th September, 2015, the Plaintiff averred that she is the legal representative of the Estate of Samuel Maitha who was the registered proprietor of parcel of land number Ndalani/Mavoloni Block 1/357 (*the suit land*).

10. According to the Plaintiff, the Defendant wrongfully and unlawfully encroached on a small portion of the suit land. The Plaintiff is praying for the eviction of the Defendant from the suit land.

11. The Defendant filed a Defence and averred that although the deceased is the registered proprietor of the suit property, she is entitled to the land because she has occupied it continuously since 1988 and has acquired an interest in the land by way of adverse possession.

12. Indeed, as was held in the case of *Mukisa Biscuit Manufacturing Co. Ltd (Supra)*, a Preliminary Objection should only raise pure points of law. It cannot be raised if any fact has to be ascertained or if what is sought is an exercise of judicial discretion.

13. To that extent, I would agree with the Plaintiff's counsel that the validity of the title that the Plaintiff is relying on can only be ascertained by the court upon taking evidence from the parties. Such an issue is not therefore a pure point of law.

14. The Plaintiff's Plaintiff is not predicated on a tort, but rather for the recovery of the portion of the suit land.

15. Indeed, the Defendant has raised the Defence of Limitation of time by stating that the Plaintiff cannot recover the land because twelve (12) years have lapsed since she entered the land.

16. The limitation period for recovery of land is twelve (12) years, and not three (3) years.

17. For those reasons, I find the Notice of Preliminary Objection filed by the Defendant to be incompetent and I dismiss it with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF NOVEMBER, 2017.

O.A. ANGOTE

JUDGE