



**Oluoch v Tindi (Environment & Land Case 3 of 2022)  
[2023] KEELC 385 (KLR) (30 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 385 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND CASE 3 OF 2022  
GMA ONGONDO, J  
JANUARY 30, 2023**

**BETWEEN**

**NASHON OCHIENG OLUOCH ..... APPLICANT**

**AND**

**CHARLES ONYANGO TINDI ..... RESPONDENT**

**RULING**

1. The instant ruling is in respect of a preliminary objection dated October 5, 2022 and duly filed on October 6, 2022 by the defendant, Charles Onyango Tindi through Aluoch Odera and Nyauke Company Advocates founded upon the grounds as follows;
  - a. The suit is an abuse of the process of court pursuant to order 2 rule 15 of the *Civil Procedure Rules* as it seeks to enforce a contract on the one hand and at the same time is seeking orders of adverse possession.
  - b. The contract to be enforced is time barred and offends the provisions of section 4 and section 7 of the *Limitation of Actions Act*.
  - c. The suit is thus scandalous and vexatious.
2. It is important to point out that the plaintiff, Nashon Ochieng Oluoch through learned counsel, L K Obwanda generated this suit by way of an originating summons dated February 23, 2022 claiming adverse possession over the suit land, LR no Kanyada/Kotieno/Katuma A /1481 measuring approximately Two decimal Seven hectares (2.7 Ha) in area subsequently sub divided into land reference numbers Kanyada/Kotieno/Katuma "A"/3063, 3264 and 3327. The original land was LR no Kanyada/Kotieno/Katuma A/909.



3. The defendant opposed the originating summons by way of his replying affidavit of eight paragraphs sworn on March 2, 2022. He is seeking to have the plaintiff's claim dismissed for want of a proper cause of action.
4. On October 17, 2022, the court ordered and directed that the preliminary objection be heard by way of written submissions.
5. By the submissions dated October 24, 2022 and filed on October 25, 2022, learned counsel for the defendant relied on, *inter alia*, *Mukisa Biscuits Manufacturing Company Ltd vs West End Distributors Ltd* (1969) EA 696 on preliminary objection. He lamented that the suit is an abuse of the process of the court as per order 2 rule 15 of the Civil Procedure Rules, 2010 on the grounds that the plaintiff claims adverse possession over the suit land as well as seeking to enforce a contract of sale of land. Further, that the contract is time barred under section 7 of the [Limitation of Actions Act](#) chapter 22 Laws of Kenya.
6. In the plaintiff's submissions dated October 28, 2022 and filed herein on November 4, 2022, reference is made to the grounds of the preliminary objection, the originating summons and authorities including *Oraro vs Mbaja* (2005) eKLR and *Mukisa Biscuits case (supra)*. Counsel for the plaintiff submitted that the agreement is listed as part of the documents to be relied upon to show the manner of entry into a portion of the suit land. That the preliminary objection is misconceived and not sustainable thus, should be dismissed with costs.
7. I have thoroughly considered the preliminary objection, the originating summons, the replying affidavit and the parties' respective submissions. Therefore, is the preliminary objection sustainable?
8. It is trite law that a preliminary objection is a threshold question best taken at inception. The same calls for definitive, determinative and prompt pronouncement; see *Kakuta Maimai Hamisi-vs-Peris Pesi Tobiko and 2 others* (2013) eKLR.
9. Moreover, it is well settled that a preliminary objection must consist of a pure point of law, *inter alia*, a plea on limitation, jurisdiction of court; see *Mukisa Biscuits case (supra)*.
10. The plaintiff's claim per the originating summons is disputed by way of the defendant's Replying Affidavit. The parties are yet to adduce evidence as indicated at paragraph 6 of the said affidavit. The court is conscious of sections 107 to 110 of the [Evidence Act](#) chapter 80 Laws of Kenya in respect of burden of proof and I proceed to approve the decision in *Oraro case (supra)*.
11. I take into account order 2 rule 15 (*supra*) which provides for striking out pleadings on grounds, *inter alia*, disclose no cause of action and an abuse of the process of the court.
12. Actions of contract and tort and other actions are provided for under section 4 of the [Limitation of Actions Act](#) chapter 22 Laws of Kenya. Section 7 of the same Act is in regard to actions to recover land.
13. Bearing in mind the entire record, in this suit, it would be wrong and unjust to sustain the preliminary objection which contains disputed points which call for hearing of this suit on merit; see also *Philip Chemwolo and another vs Augustine Kubende* (1986) eKLR.
14. A fortiori, the preliminary objection, be and is hereby disallowed with costs in the cause.
15. Orders accordingly.

**DATED AND DELIVERED AT HOMA BAY THIS 30TH DAY OF JANUARY 2023.**

**G M A ONG'ONDO**

**JUDGE**



**Present:**

**Mr Achola holding brief for Obwanda, learned counsel for plaintiff/respondent.**

**Mr Nyauke, learned counsel for the defendant/applicant**

**Luanga, Court assistant.**

