



**Assemblies of Christ Evangelical Holiness Church-Kenya (Suing through its registered trustees Bishop Francis Ranogwa & Bishop John Sereka) v Machoka & another (Environment and Land Case Civil Suit 16 of 2021) [2023] KEELC 752 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 752 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 16 OF 2021  
LA OMOLLO, J  
FEBRUARY 13, 2023**

**BETWEEN**

**ASSEMBLIES OF CHRIST EVANGELICAL HOLINESS CHURCH-KENYA  
(SUING THROUGH ITS REGISTERED TRUSTEES BISHOP FRANCIS  
RANOGWA & BISHOP JOHN SEREKA) ..... PLAINTIFF**

**AND**

**JOHN MACHOKA ..... 1<sup>ST</sup> DEFENDANT  
ISAAC KIPKEMBOI TOWETT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction.**

1. This ruling is in respect of the 1<sup>st</sup> defendant's preliminary objection dated September 9, 2022.
2. The preliminary objection is on the following grounds:
  1. That the suit herein does not lie against the 1<sup>st</sup> defendant nor has it accrued against the 2<sup>nd</sup> defendant under the provisions of the *Limitation of Actions Act*.
  2. That the supplementary supporting affidavit of Peter Morigori Nyakundi filed on May 23, 2022 and the affidavits in support of the originating motion place the dispute herein beyond the purview of an originating motion as it raises contentious issues that can only be resolved by a suit filed by a Plaintiff.
  3. That the suit as framed is incompetent.



### **Factual background.**

3. The plaintiff commenced this suit through the Originating Summons dated August 20, 2021 where he seeks the following prayers:
  - a. The applicant be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1997 for all that parcel of land comprised in title number LR no Nakuru Municipality Block 24/753 situated in Nakuru.
  - b. The said applicant be registered as the sole proprietor of the said parcel of land namely LR no Nakuru Municipality Block 24/753 in place of Isaac Kipkemboi Towett in whose favor the land is currently registered.
  - c. An order do issue requiring and directing the land registrar Nakuru to register the applicant Assemblies of Christ Evangelical Holiness Church – Kenya as the proprietor of land parcel no Nakuru Municipality Block 24/753 in place of Isaac Kipkemboi Towett and in place of any other person succeeding the defendant.
  - d. Costs of this application be provided for.
4. The defendants have not filed a response to the Originating Summons.

### **Plaintiff's response To The 1<sup>st</sup> defendant's preliminary objection.**

5. In response to the preliminary objection, the plaintiff filed Grounds of Opposition dated September 19, 2022.
6. The grounds are as follows:
  1. That the notice of preliminary objection as presented is incompetent, ambiguous and gross abuse of the court process.
  2. That the preliminary objection filed is not based on any point of law as issues raised in the affidavit are matters of evidence which can only be tested in cross examination during hearing.
  3. That the issue at whether the suit lies against the 1<sup>st</sup> defendant or accrued against the 2<sup>nd</sup> defendant are matters evidence which can only be determined during hearing.
  4. That we urge the court to dismiss the notice preliminary objection with cost to the applicant since the same is frivolous and doesn't meet the threshold of a preliminary objection set out by law.

### **Issues for determination.**

7. The preliminary objection was canvassed by way of written submissions.
8. The 1<sup>st</sup> defendant filed his submissions on October 12, 2022, the 2<sup>nd</sup> defendant filed his submissions on October 24, 2022 and the plaintiff filed its submissions on October 24, 2022.
9. The 1<sup>st</sup> defendant cites the decision in the case of *Mukisa Biscuit Manufacturing Co Limited Vs West End Distributors Ltd* [1969] EA 696 and submits that he was registered as the owner of the suit property between the period January 27, 1998 to June 16, 2021 and that upon the registration of the 2<sup>nd</sup> defendant, he ceased to have any interest in the property.



10. The 1<sup>st</sup> defendant also submits that the plaintiff's right to sue under the doctrine of adverse possession foreclosed upon the plaintiff's failure to sue during the pendency of the 1<sup>st</sup> defendant's rights over the property.
11. The 1<sup>st</sup> defendant further submits that the Originating Summons seeks to impeach the 2<sup>nd</sup> defendant's title on the basis of fraud which is a complex issue that cannot be resolved under the provisions of the law that support adverse possession as a means of acquiring title to land.
12. The 1<sup>st</sup> defendant relies on the cases of *John W Wepbukbulu vs Secretary Board of Governors, Burn School* [2005] eKLR, *Mukesh Manchana Shar and another vs Priyat Shah and Another* [2015] eKLR, *Kibatiri vs Kibutiri* [1983] KLR 1 Law 8 and concludes his submissions by stating that there are sufficient grounds to allow the preliminary objection dated September 9, 2022.
13. The 2<sup>nd</sup> defendant submits that he supports the preliminary objection filed by the 1<sup>st</sup> defendant and adopts the submissions of the 1<sup>st</sup> defendant.
14. The plaintiff in its submissions identifies the following issues for determination:
  1. Whether the notice filed by the 1<sup>st</sup> defendant/applicant constitutes a competent preliminary objection.
  2. Whether the current suit filed before court lie against the 2<sup>nd</sup> defendant under the provisions of the *Limitation of Actions Act*.
  3. Whether the supplementary supporting Affidavit of Peter Morigori Nyakundi raises contentious issues that can only be resolved by a suit filed by a Plaintiff.
15. On the first issue, it submits that the grounds set out in the Notice of Preliminary Objection are not points of law and do not constitute a competent preliminary objection. The plaintiff cites the decision in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd (supra)* in support of its arguments.
16. On the second issue, the plaintiff submits that the cause of action in the suit is a claim of adverse possession over land parcel no LR no Nakuru Municipality Block 24/753.
17. The plaintiff also submits that it has a legal burden of proving that it has been in exclusive possession of the land openly and as of right for a period of over twelve years. The occupation ought to be open and notorious which are issues of fact that can only be canvassed during hearing.
18. The plaintiff further submits that the defendants cannot claim that the right does not lie or accrue against them without tendering evidence in support of the said position and which has to be subjected to cross examination.
19. The plaintiff relies on the cases of *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* Civil Application no 36 of 2014[2015] eKLR, *Nitin Properties Limited vs Singh Kalsi & Another* [1995] eKLR, *Andrew Kipkoskei Too vs Francis Arap Terer (Legal Administrator of the Estate of Sarah Kebor Kigen (Deceased))* [2021] among other cases.
20. The plaintiff submits that the 2<sup>nd</sup> defendant holds the title he acquired from the 1<sup>st</sup> defendant in trust for the plaintiff. It submits that this is because at the time the suit property was being transferred, the right to adverse possession had accrued and vested upon the Plaintiff and was never defeated by the said transfer.



21. On the third issue, the plaintiff submits that whether the issues are contentious or not, that is a matter that can only be decided at the hearing.
22. In conclusion, the plaintiff submits that upholding the preliminary objection at this stage would be prejudicial since there are substantial issues that need to be determined at the hearing of the main suit.
23. After considering the preliminary objection and the submissions, the twin issue that arises for determination are:
  - a. Whether the preliminary objection is merited.
  - b. Who should pay the costs of the preliminary objection.

### **Analysis and determination.**

24. In *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 a preliminary objection 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...”

25. It is imperative that this court considers, first, whether the preliminary Objection as raised by the 1<sup>st</sup> defendant meets the threshold as enumerated in the decision in *Mukisa Biscuits (supra)*.
26. A preliminary objection raises a pure point of law which is argued on an assumption that all the facts pleaded by the other side are correct. It cannot however be raised if any facts have to be ascertained from elsewhere or if the court is called to exercise judicial discretion.
27. The court in the case of *Oraro vs Mbaja* [2005] 1KLR 141 held as follows:

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

28. The first ground on the 1<sup>st</sup> defendant’s preliminary objection is that the suit does not lie against the 1<sup>st</sup> defendant nor has it accrued against the 2<sup>nd</sup> defendant under the provisions of the Limitation of Action Act.
29. The 1<sup>st</sup> defendant argues that he was the registered owner of the suit property from January 27, 1998 to June 16, 2021 and that upon the registration of the suit property in the name of the 2<sup>nd</sup> defendant, he ceased to have any interest in the property.
30. The 1<sup>st</sup> defendant also argues that the right to sue under the doctrine of adverse possession foreclosed upon the plaintiff’s failure to sue during the pendency of the 1<sup>st</sup> defendant’s rights over the property.



31. The 1<sup>st</sup> defendant further argues that the suit herein raises contested facts incapable of resolution under section 37 and 38 of the [Limitation of Actions Act](#).
32. The plaintiff on the other hand argues that this case being a case of adverse possession, the court has to invite facts supported by evidence to determine whether the suit lies against the 1<sup>st</sup> defendant or whether it has accrued against the 2<sup>nd</sup> defendant.
33. Bearing in mind the conflicting positions advanced by the parties herein as to whether a cause of action lies against the 1<sup>st</sup> defendant or accrues against the 2<sup>nd</sup> defendant and whether this suit is proper for determination under the provisions of the limitation of Actions Act are questions of fact which can only be determined after hearing evidence from parties herein. It is my view, therefore, that this ground as set out in the notice of preliminary objection does not raise a pure point of law.
34. The second ground in the preliminary objection is that the supplementary supporting Affidavit of Peter Morigori Nyakundi filed on May 23, 2022 and the affidavits in support of the Originating Motion place the dispute herein beyond the purview of an Originating Motion as it raises contentious issues that can only be resolved by a suit filed by a Plaintiff.
35. It is worth noting that the orders sought by the plaintiff are, among others, that this honourable court declare that the applicant has become the legal owner entitled by adverse possession of over twelve (12) years since 1997 all that parcel of land comprised in title number LR no Nakuru Municipality Block 24/753 situated in Nakuru.
36. The mode prescribed for instituting a claim of adverse possession is found in order 37 rule 7 and it provides as follows;

An application under section 38 of the [Limitation of Actions Act](#) shall be made by originating summons.
37. I do not, therefore, agree that the orders sought can only be granted on instituting action by means of a plaintiff.

**b. Who shall bear the costs of the preliminary objection?**

38. The general rule is that costs shall follow the event. This is in accordance with the provisions of section 27 of the [Civil Procedure Act](#) (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

**Disposition.**

39. In the result, I find that the 1<sup>st</sup> defendant's preliminary objection lacks merit and the same is hereby dismissed with costs to the plaintiff.
40. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 13<sup>th</sup> DAY OF FEBRUARY, 2023.**

**L A OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr Smith for Mburu for the plaintiff.**



**No appearance for the 1<sup>st</sup> defendant.**

**Mr Oumo for the 2<sup>nd</sup> defendant.**

**Court assistant; Monica Wanjohi.**

