

October 1996 and has been in occupation on the same since 12th November 1996. Counsel further submitted that the Respondent's title has been in existence for over 73 years and that the Respondent has been the Registered Proprietor for over 25 years. Counsel concluded that the Applicant filed this application on 1st June 2022 and this being an action for recovery of land, is time barred under Section 5 of the Limitation Act Cap.

Counsel further submitted that this being an application seeking for the opening of boundaries and demarcation of the parties' suit land without any substantive suit, the application cannot be maintained under the law as there is a dispute on the suit land which should only be entertained by Court by way of an ordinary suit and not the current application.

On the issue of the suit being time barred, Counsel for the Applicant submitted that the preliminary objection is misconceived and brought in bad faith to divert this court's attention from the orders sought in the Application as the Applicant does not claim trespass to land in any part of her application and affidavit in support.

On the substantive suit, Counsel for the Applicant submitted that there is no particular prescribed mode for obtaining a Court Order to clear, open boundaries and demarcate land that is why the Applicant preferred to bring this matter by notice of motion in compliance with Order 53 Rules 1 and 3 of the Civil Procedure Rules.

In rejoinder, counsel for the Respondent reaffirmed his earlier submission that the Applicant seeks to enforce her possessory rights which amount to an action for recovery of land and also contended that the Applicant had not disputed that the application is time barred.

Issues.

1. Whether the application is time barred.
2. Whether the application is barred in law for lack of an ordinary suit from on which it should be premised.

Decision

Whether the suit is time barred.

Counsel for the Respondent contended that the suit is one for recovery of land and is therefore time barred by virtue of Section 5 of the Limitation Act.



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I entirely disagree with Counsel for the Respondent. In determining whether a suit is for recovery of land, Court considers the essence of the action rather than the nomenclature adopted by the parties. **Refer to Gawubira Mankupias Vs Katwiita Stephen HCCA No. 130 of 2008.**

From the Notice of Motion, the order sought is,

“An order doth issue to the authorized government officer for clearing and opening boundaries and demarcation of land comprised in FRV JJA604Folio 5 Plot 6, factory Village, Jinja District belonging to the Applicant and the adjacent and neighboring plots 1-7 all situate at Factory Village, Jinja District belonging to the Respondent.”

Paragraph 4 of the Affidavit in support of the Application states that, “that I intend to do a boundary opening exercise in order to clear and know the exact demarcations and boundaries of my land comprised in FRV JJA604Folio 5 Plot 6, factory Village, Jinja District and that of the Respondent known as Plot 1-7 Jinja District since our plots are adjacent and neighboring.”

I have thoroughly read the Notice of Motion and the Affidavit in Support of the application and I have failed to see any pointer to support Counsel for the Respondent’s submission that the suit is for the recovery of land.

It is my finding that this is not an application for recovery of land but rather one seeking an order to clear, open and demarcate boundaries of the Applicant’s land and the Respondent’s neighboring land. The first preliminary objection is over ruled.

I now turn to the second issue.

Counsel for the Respondent contends that this is an interlocutory application which must arise from a substantive civil Suit. That there exists a land dispute between the Respondent and the Applicant whose remedy can only be determined in a proper suit.

I concur with Counsel for the Applicant’s submission that where a statute provides for an application to Court but does not specify the form in which it is to be made and the rules do not provide for any special procedure, the application is made by Notice of Motion in compliance with Order 53 Rules 1 and 3 of the Civil Procedure Rules. Court has relied on the case of **St. Beneist Plantations Ltd Vs Jean Emile Adrien Felix [1954] 21 EACA 105** cited with approval in **Isingoma Micheal Vs Law Development Centre HCMA NO. 234/2019** to support this position.



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I find no offence in the mode the Applicant took to institute this suit. The second objection thus fails.

Before I take leave of this matter, I wish to state that the matters which Counsel for the Respondent raised were matters outside the scope of preliminary objections.


In Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Limited (1969) EA 696 as applied in Republic Vs Eldoret Water and Sanitation Company Limited, Misc. Appeal No. 97 of 2003, Sir Charles Newbold P observed that, “A preliminary objection raises a pure point of law which is argued on the assumption that all 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.”

In the objections before Court, Counsel for the Respondent bases on totally new set of facts that were not in the Application before Court. Counsel for the Respondent instituted his suit in the Applicant’s suit and raised the objections basing on his facts. Following the case of **Mukisa Biscuits (supra)**, Counsel for the Respondent’s objections are improper and are an abuse of Court process.

I thus dismiss the preliminary objections.

Having considered the submissions of both parties with regard to the application, I find that the Respondent’s argument that the suit land had already been surveyed by a Government Surveyor and therefore should not be surveyed again untenable. Attached to the Respondent’s Affidavit in Reply is the Boundary Opening Report attached as **Annexure “E”**. The same report indicates on page 3 that some corners of Plot 6 were not accessed due to obstruction from the neighbour and his security guards. It is also observed in the same report on Page 10 that there is total encroachment on Plot 6 Factory Road by a one Mr. Baboo who claims to own both plots. This Boundary Opening Report therefore left some questions unanswered and is not conclusive on the issue of boundary opening.

In the interests of justice and in the spirit of deescalating any misunderstanding between the parties, I hereby grant the application for an order to the authorized Government Officer to clear, open boundaries and demarcate the land comprised in FRV JJA604 Folio 5 Plot 6, Factory Village belonging to the Applicant and the adjacent and neighboring Plots 1-7 all situate at Factory Village, Jinja District belonging to the Respondent.


03.03.2023

Each party to bear its own costs.

I so order.



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JUSTICE FARIDAH SHAMILAH BUKIRWA
Ruling delivered on 3rd March 2023.