



Sile & another (Suing on Behalf and as Administrators of the Estate of Stephen Baron Sisimwo) v Moss (Being sued on behalf and as an Administrator of the Estate of Daniel Chepnoi Naibei Moss) (Environment & Land Case 4 of 2024) [2025] KEELC 2888 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEELC 2888 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 4 OF 2024
CK NZILI, J
MARCH 26, 2025

BETWEEN

SIMIMWO SILAS SILE 1ST PLAINTIFF
DAVID SIMIMWO STEPHEN 2ND PLAINTIFF
SUING ON BEHALF AND AS ADMINISTRATORS OF THE ESTATE OF
STEPHEN BARON SISIMWO

AND

SUSAN MOSS (BEING SUED ON BEHALF AND AS AN ADMINISTRATOR OF
THE ESTATE OF DANIEL CHEPNOI NAIBEI MOSS) DEFENDANT

RULING

1. What is before the court is a Preliminary Objection dated 17/12/2024 by the defendant that:-
 - (1) The Land Disputes Tribunal lacked jurisdiction to hear and determine issues relating to the ownership of Certificate of Title No. IR 27080 Reference No. 1948/10, original 1948/7/2.
 - (2) The magistrate lacked jurisdiction to hear and determine issues of ownership of the subject matter.
 - (3) The alleged acquisition of part of the subject matter by way of sale offended Section 4(1) (a), (b), and (c) of the *Limitation of Actions Act*.
2. The primary pleadings in this suit are the plaint dated 30/1/2024, the statement of defense dated 21/2/2024, and the reply to the defense dated 6/3/2024.
3. The plaintiffs seek:



- (a) Declaration that the late Stephen Baron Sisimwo is entitled to 125 acres out of 225 acres, owned by Musengi Group, of parcel No. Endebess/Endebess Block 4/Koitobos/2 and 3.
 - (b) Declaration that the plaintiff and their relatives are lawfully in occupation of the land as legal administrators and beneficiaries of the deceased's estate; hence, the eviction notice dated 2/11/2023 should be canceled under Section 152F of the Land Act.
 - (c) An order to issue directing the defendant to voluntarily sign all transfer forms to effect transfer to the name and estate of the deceased in default the Deputy Registrar to do so.
4. The basis of the claim is that there was a sale agreement made on 2/2/1983, which was confirmed by court orders dated 19/5/1982 and 16/12/1991, and an eviction order dated 16/12/1991, issued against the defendant and her family. It is averred that the orders were followed by a successful eviction and takeover of vacant possession by the plaintiffs' estate. It is averred that by a suit ELC No. 11 of 2011 (O.S), the plaintiffs' claim was based on adverse possession at the High Court, but the Court of Appeal overturned the decision. The plaintiffs aver that they filed Succession Cause No. 89 of 2002 at Bungoma, distributing the suit land to the beneficiaries.
 5. The defendant, in his defense, terms the suit as an abuse of the court process, a delaying tactic, and out to deny them from enjoying the fruits of their judgment. The defendant terms the eviction notice dated 2/11/2023 as lawful. The defendant avers that the sale agreement dated 2/2/1983 was never pursued and is time-barred, the claim for adverse possession was dismissed, the suit is res judicata, and the presumption of the suit land under third-party ownership is null and void.
 6. In reply to the defense, the plaintiffs term the cause of action as based on an eviction notice and not adverse possession. Further, the plaintiffs aver that they have a right under Section 152F (1) and (2) of the Land Act 2016 to commence proceedings for the court to determine whether or not they are legally in occupation of 125 acres of the suit land. The plaintiffs aver that the issue for determination as to whether 125 acres belong to the deceased's estate, is distinct from the one handled by the Court of Appeal. The plaintiffs further insist there is a valid sale agreement, which resulted in a decree in SRMCC Land Case No. 25 of 1986, which claims were never substantially and conclusively determined by the Court of Appeal, other than adverse possession.
 7. At the outset, the court takes judicial notice that by an initial preliminary objection dated 2/2/2024, the defendant had sought the court to find the suit brought by the plaintiffs as res judicata; lacking jurisdiction; incompetent; bad in law, and an abuse of the court process. The preliminary objection was heard and determined by a ruling dated 12/11/2024. Parties were directed to comply with Order 11 of the Civil Procedure Rules. Instead of complying, the defendant filed a fresh preliminary objection. It is unfortunate that the defendant is litigating his preliminary objections in installments. Res judicata also applies to applications as held in *Mburu Kinyua v Gachini Tuti* [1978] KLR 69 at 81 and reiterated by the Court of Appeal in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 Others* [1996] eKLR
 8. A preliminary objection, as defined in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributions Ltd* [1969] 696 consists of a point of law which has been pleaded or which arises, by clear implication out of the pleading, and which, if argued as a preliminary point, would dispose of the suit. In *IEBC v Jane Cheperenger & 2 Others* (Civil Appeal 36 of 2014[2015] KESC 2[KLR] (15th December 2015) (Ruling), the court cited *Hassan Ali John & Another v Suleiman Said Shabhal & Others* [2014] eKLR, that a preliminary objection should not be raised if any fact has to be ascertained or if what is sought is an excise of judicial discretion. The court cited *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* [2014] ECLR and in *Aviation & Allied Workers Union (K) v Kenya Airways*



Ltd & Others [2015] eKLR, that a preliminary objection may only be raised on a pure question of law and the court has to be satisfied that there is no proper contest as to the facts, and facts are deemed as agreed as presented in the pleadings on record. The court explained that a preliminary objection should be founded upon a settled and crisp point of law, with the intent that its application is to undisputed facts.

9. The question before this court is whether the facts, as pleaded by the plaintiffs and the defendant, are settled or admitted as accurate by the parties. The first issue raised is on the role of the Land Disputes Tribunal to hear and determine the issue of ownership of the suit land. The second one is the jurisdiction of the Magistrates Court to hear and determine the issue of ownership and the enforcement of a sale agreement, offensive of Section 4(1)(a), (b) and (c) of the [Limitation of Actions Act](#).
10. In Bernard Mugo Ndegwa v James Nderitu Githae & Others [2010] KEHC 3922 KLR, the court observed that under the Land Disputes Tribunal Act, the Land Disputes Tribunal was not seized of jurisdiction or competence to decide on matters based on specific performance. Section 3 of the repealed Land Disputes Tribunal Act defined the powers of the Land Disputes Tribunal as restricted to claims to occupy or work on land and trespass to land.
11. In M'Marete v Republic & Others Court of Appeal Nyeri Civil Appeal No. 259 of 2000 [2004] eKLR, the court found that the Land Disputes Tribunal acted ultra vires, when it purported to award parcels of land registered under the repealed Registered [Land Act](#) to the appellant. In Masagu Ole Nancio v Principal Magistrate Kajiado Law Courts and Another NRB High Court JR. 370 of 2013 [2014] eKLR, Odunga J, as he then was, held that the Land Disputes Tribunal had no powers to make a determination with respect to title to land.
12. In Iga v Makerere University [1972] EA, the court observed that the [Limitation of Actions Act](#) (Cap 22), does not extinguish a suit or an action itself, but operates as a bar to the claim or remedy sought, and when a suit is time-barred, a court cannot grant the remedy or relief sought.
13. Section 7 of Cap 22 provides that a claim for recovery of land may not be brought after 12 years from the date when the cause of action accrued. A cause of action is defined as an act on the part of the defendant that gives the plaintiff the right to complain, see D.T.Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR. The purpose of Cap 22 is to prevent a plaintiff from prosecuting stale claims on one hand and to protect the defendant after he has lost evidence for his defense, from being disturbed after a long lapse of time. See Mehta v Shah [1965] EA 321.
14. In Gathoni v KCC Ltd [1982] KLR 104, the court observed that Cap 22 is intended to protect the defendant against unreasonable delay in bringing suits against them, for the plaintiff is expected to exercise due diligence and to take reasonable steps in his interest.
15. In this suit, the plaintiffs have conceded that their claim is based on a sale agreement dated 2/2/1983, which, according to them, is still valid and enforceable. The plaintiffs plead that the court should find that they are lawfully on the land by virtue of their rights accruing out of the said sale agreement; hence, the notice of eviction is illegal.
16. A preliminary objection must stem or germinate from the pleadings filed by the parties based on pure points of law with no facts to be ascertained. See Avtar Singh Bhamra & Another v Oriental Commercial Bank HCC No. 53 of 2004. In Edward Moonge Lengusuranga v James Lenaiyura & Another [2019] eKLR, the court was of the view that under Section 7 of Cap 22, the 1st defendant, having bought the land in 1999 and taken possession of the same, the plaintiff could only seek to recover the land before 12 years had expired.



17. In *Diana Katumbi Kiio v Reuben Musyoki Muli* [2018] KECA 860 KLR, the court said a preliminary objection based on the plea of limitation was correctly raised. However, the court held that other than considering the date of the sale agreement, the court should have also considered the nature of the interest conveyed in the agreement, whether possession of the land was given, the conduct of the parties subsequent to the execution of the agreement and the point at which the alleged breach occurred in line with Sections 4(1) (a) and 7 of Cap 22. The court observed that a cause of action in a contract arises from a breach of the contract and not at the time the contract was executed.
18. In the pleadings before the court, it is not clear how the Land Disputes Tribunal handled the matter, the date of the award, and the conditions of the award, the date of the decree, and whether the defendant had sought the proceedings and the decree to be quashed for being ultra vires. As to the sale agreement, other than pleading that the sale agreement is stale, the defendant has not indicated the date it became stale and or unenforceable. The defendant has not denied that the plaintiff has been in occupation of the suit land throughout, since 1983.
19. The law applicable to sale agreements before 2003 required part performance and the taking of vacant possession. The concept of constructive trust thus comes into play.
20. Unanimity in the pleadings about the elements of the contract, breach thereof; impropriety on the part of the defendant; failure to complete the sale agreement; completion date, and issuance of notice of breach are issues that will need oral evidence to ventilate at the hearing.
21. The court is not satisfied that the preliminary objection by the defendant amounts to a pure point of law. The rights of a person in possession or occupation of land are equitable rights that are binding on land under Section 20(1) of the *Limitation of Actions Act*. See *Mwangi & Another v Mwenja* [1986] KLR 328.
22. In this matter, the instant preliminary objection is different from that which the defendant had previously raised. Times without number, courts have abhorred the practice of raising frivolous preliminary objections with a view of delaying the hearing of a suit on its merit. The defendant appears to be litigating his preliminary objection in piece meal. The issues raised in the preliminary objection require an evaluation of the evidence from both parties to be determined. See *IEBC v Jane Cheprenger & Others* (supra).
23. The upshot is that I find the preliminary objection dated December 17, 2024 lacking merit. It is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 26TH DAY OF MARCH 2025.

In the presence of:

Court Assistant - A. Ebenyo

Mutuma for the defendant present

Barongo for the plaintiff present

HON. C.K. NZILI

JUDGE, ELC KITALE.

