



Jackson (Suing on behalf of the Estate of Somet Ole Tanyaag) v Sigei (Environment & Land Case E021 of 2021) [2023] KEELC 16825 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E021 OF 2021**

CG MBOGO, J

APRIL 18, 2023

BETWEEN

**TANYAAG SHINANAI JACKSON (SUING ON BEHALF OF THE ESTATE OF
SOMET OLE TANYAAG) PLAINTIFF**

AND

JULIUS SIGEI DEFENDANT

RULING

1. Before this court for determination is a notice of preliminary objection dated 15th December, 2021 filed by the defendant seeking that the plaint dated 4th November, 2021 be dismissed on the following grounds: -
 1. That the suit is time barred under Section 7 and 9 of the *Limitations of Actions act*.
 2. That the plaintiff lacks *locus standi* to file the suit herein.
 3. That the suit is vexatious and an abuse of the court process and ought to be dismissed.
2. On 21st February, 2023 this court directed that the notice of preliminary objection be canvassed by way of written submissions. The defendant did not file written submissions.
3. The plaintiff filed written submissions dated 24th March, 2023. The plaintiff raised one issue for determination which is whether the preliminary objection raised is sustainable.
4. On this issue, the plaintiff submitted that the suit is based on the act of trespass which is a continuous act as is pleaded in paragraph 10-24 of the plant. The plaintiff relied on the case of *County Government of Laikipia v James Kimani Mburu & 3 Others* [2020] eKLR.
5. The plaintiff further submitted that a party raising a preliminary objection must confine itself to points of law and based on the statement of defence and counter claim, it is clear that there are contested



facts which must be adjudicated upon to ascertain whether the defendant is right by stating that he be declared the owner of 94 acres through adverse possession. The plaintiff further submitted that both parties have filed evidence to be brought to fore whether the whole parcel of land belongs to the estate of the plaintiff or the defendant and wonders why the defendant would want the case to be terminated at a preliminary stage. The plaintiff relied on the case of Oraro v Mbaja [2005] eKLR.

6. The plaintiff further submitted that the power of the court to strike out pleadings is a powerful one that should be exercised sparingly so as not to lock out parties from the seat of justice. The plaintiff relied on the cases of Silvester K. Kaitany v Nyayo Tea Zones Development Corporation & Another; National Land Commission & Another (Interested Parties) [2020] eKLR, Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR and Wilmot Mwadilo & 3 Others v Eliud Timothy Mwamunga & Another [2017] eKLR.
7. On ground 3 of the preliminary objection, the plaintiff submitted that for a court to make such a determination, it needs to carefully analyse the pleadings and call evidence to establish whether the suit is vexatious and frivolous. The plaintiff relied on the cases of James Mwangi Maina & 3 Others v Land Registrar of Mbeere District & Another [2022] eKLR, Muiruri v Kimemia [2002] 2 KLR 677 and Sirma v Kiprono [2005] 1 KLR.
8. I have considered the preliminary objection and the written submissions filed by the plaintiff herein and the issue for determination is whether the same is merited.
9. A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

10. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

11. It is also this court’s opinion that in determining a preliminary objection, the court will also take into account that the preliminary objection must stem from the pleadings and raise pure point of law. See



the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that: -

“ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

12. Before I embark on determining the merits of the preliminary objection, this court has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the Court determines whether what the defendant has filed amounts to a preliminary objection or not, the court will also be persuaded by the findings in the case of *Oraro v Mbaja* [2005] 1KLR 141, where the Court held that: -

“ 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”.

13. The defendant contended that the suit is time barred under Section 7 and 9 of the Limitations of Actions Act. In order to address this issue, there is need to reproduce relevant paragraphs of the plaint dated 4th November, 2021.

14. Paragraph 3 of the plaint reads as follows: - “There is a letter from the office of the chief, Nkorkorri location dated 7th September, 2020 forwarding the grievances of the family of the applicant over the estate of Somet Ole Tanyaag to the ACC, Mulot Division.”

15. Paragraph 5 reads, “On 27th September, 2021, the Assistant County Commissioner also wrote to the Deputy County Commissioner, Narok West Sub-County over the same land dispute between the respondent and the Somet Ole Tanyaag family.”

16. Paragraph 10 reads that “That notwithstanding, the lawful demand/order of 26/6/2021 the defendant/ respondent has defied, neglected and disobeyed the resolutions in the meeting chaired by the Assistant County Commissioner without any justifiable cause and is on riot cultivating the disputed land.”

17. Paragraph 11 reads “That unless this matter is heard and determined expeditiously and the orders sought herein are granted, the plaintiff stands to suffer substantial and colossal loss as its continuous trespass by the defendant.”

18. The plaintiff sought the following prayers in its judgment against the defendant: -

1. A declaration that the estate of Somet Ole Tanyaag is the legal owner of all that land parcel known as Narok/ Cis-Mara/ Ololulunga/ 1143 measuring approximately 165.00 Ha in Molo location within Narok County.
2. A permanent injunction restraining the defendant, whether by himself, or his servants or agents or otherwise howsoever, from remaining on or continuing in occupation of land parcel Narok/Cis-Mara/Ololulunga/1143 measuring 165.00 Ha in Molo location within Narok County and the eviction of the Defendant, his agents, servants from the suit property.
3. General damages for trespass to land and/ or illegal occupation of the plaintiff's land parcel Narok/Cis-Mara/Ololulunga/1143 measuring 165.00 Ha, together with interest at court rates.



4. Mesne profits for user of the estate land of the late Somet Ole Tanyaag, Narok/ Cis-Mara/ Ololulunga/ 1143 measuring 165.00 Ha from the month of September 2020 until the final determination of this suit, together with interest at court rates.
5. Costs of this suit.
19. The defendant filed a statement of defence and counter claim dated 21st March, 2022. In his defence, the defendant pleaded in paragraph 13 that he has been enjoying quiet possession since the year 1996 to date.
20. In paragraph 25 of his statement of defence, the defendant pleaded that: - “The defendant avers that he has been in continuous, quiet uninterrupted occupation of 94 acres of the suit property from the year 1996 to date to the exclusion of the deceased, plaintiff and his other family members.”
21. The defendant filed a counter claim and from paragraph 27 sought the following orders: -
 - “ 27. The defendant seeks a declaration to the effect that he has acquired ownership of 94 acres of Land Reference No. Narok/ Cis-Mara/ Olulunga/ 1143 through adverse possession.
 28. The defendant seeks an order that he be registered as the proprietor of 94 acres of Land Reference No. Narok/Cis-Mara/Olululunga/1143.
 29. The defendant seeks an order that the legal representative of the estate of Somet Ole Tanyaag or the Deputy Registrar of this court be authorised to sign all the requisite documents to facilitate the aforementioned registration.
 30. The defendant also seeks an order that the consent of the relevant land control board be dispensed with.
 31. The defendant also seeks an order that any inhibition, injunction, caution or restriction that may be subsisting in respect of Land Reference No. Narok/ Cis-Mara/ Olululunga/ 1143 be discharged.
 32. The defendant claims general damages for loss of use of 94 acres of the suit property from 17th November, 2021 when the court issued an order barring the defendant from using his portion of the suit property.”
22. A perusal of the plaint points to a claim of trespass which according to the plaintiff appears to have begun in the year 2020.
23. Section 7 of the *Limitation of Actions Act* provides as follows;
 - “ An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
24. A perusal of the defence shows that the defendant took occupation of the disputed land in 1996 which he has been in quiet possession since. The defendant wants this court then to assume that since he took possession of the disputed land in 1996, then, that would infer the period in which the cause of action arose.
25. In view of the above, there are glaring facts that are disputed by both parties. The issues raised by the plaintiff point towards a claim of continuous trespass. On the other hand, the defendant’s claim is bent



on adverse possession. On this ground alone, the preliminary objection cannot succeed for the reason that this court, in arriving at a just determination will require to hear both sides and this can only be done through trial.

26. The defendant also raised an objection as to the filing of the instant suit by the plaintiff. On this issue, I do note that the same has been filed by Tanyaag Shinanai Jackson. Attached to the plaintiff's list of documents is a copy of Limited Grant for Special Purposes issued on 15th October, 2021 to the plaintiff herein for purposes of prosecuting/ and or defending a suit. On this ground, I am satisfied that the plaintiff is properly before this court.
27. On ground three, the defendant was of the view that the suit is vexatious and an abuse of the court process and ought to be dismissed. In the case of *Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others* [2017] eKLR; Nairobi High Court, Constitutional & Human Rights Division, Petition No. 82 of 2016, Mativo J (as he then was) stated that:
- “The situation that may give rise to an abuse of court process are indeed inexhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-
- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
 - (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.
 - (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.
 - (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.
 - (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[8]
 - (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
 - (g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.
 - (h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[9]”
28. Where a party raises an objection that a suit is an abuse of the court process, in my view, this is a fact which has to be established by calling evidence or subject parties to cross examination. It is obvious in this case that the court has to dig deeper to establish the same. I also see no logic why the defendant would file the preliminary objection whereas he has filed a counter claim against the plaintiff.



29. Arising from the above, I find no merit in the notice of preliminary objection dated 15th December, 2021 and it is hereby dismissed. Costs in the cause. This matter to be mentioned on 25th April, 2023 to confirm compliance with Order 11 of the Civil Procedure Rules and to fix a date for hearing.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 18TH DAY OF APRIL, 2023.

MBOGO C.G.

JUDGE

18/4/2023

In the presence of:

CA:Chuma

