



Mayfair Establishments Limited v Taib (Sued as the Legal Representative of the Estate of Sheikh Ali Taib Bajaber - Deceased) & 3 others (Environment & Land Case 99 of 2022) [2023] KEELC 18479 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 99 OF 2022**

**LL NAIKUNI, J
MAY 30, 2023**

BETWEEN

MAYFAIR ESTABLISHMENTS LIMITED PLAINTIFF

AND

ABDULLA ALI TAIB (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SHEIKH ALI TAIB BAJABER - DECEASED) 1ST DEFENDANT

KENNEDY ELLAM WEKESA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE ELLAM WEKESA - DECEASED) ... 2ND DEFENDANT

SELINA WEKESA 3RD DEFENDANT

CATHERINE WEKESA 4TH DEFENDANT

RULING

I. Introduction

1. Before this Honorable Court is a ruling on the Notice of Preliminary Objection dated 7th October 2022. The objection was raised by the 1st Defendant on the following grounds:
 - a. That this honourable court lacks jurisdiction to hear and determine this suit, the same having been filed outside the time period provided for under Section 7 of the *Limitation of Actions Act*.
 - b. That the Plaintiff's plaint dated 7th September 2022 and filed on the same date is time-barred and grossly offends the mandatory provisions of Section 7 of the *Limitation of Actions Act* Chapter 22 of the laws of Kenya, the same having been filed out of the prescribed time limit under the law.



- c. That from the foregoing the entire suit is incurably and fatally defective and the same having been filed without leave of court being sought and or granted as required under the law and the same shall be struck out with costs to the 1st Defendant.
- d. That the Plaintiff is therefore misconceived, bad in law and an abuse of the court process.

II. The 1st Defendant's case

2. The Law firm of Messrs. Khalid Salim & Company Advocates, filed submissions in support of the preliminary objection on 8th February 2023. The Counsel submitted that the preliminary objection raised was on a pure point of law, hence satisfying the criteria set in the case of "*Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* (1969) EA 696, that a preliminary objection has to be on a point of law.
3. Further, the Learned Counsel argued that the Plaintiff's case was outside the timelines provided for the provision of Section 7 of the *Limitation of Actions Act*, Cap. 22. It was submitted that the 1st Defendant acquired the suit property on 11th May 2002 and issued with a Certificate of Lease on 25th November 2002. While it was the Plaintiff's case that they acquired the suit property on 11th May 2010, prior to which there existed a lease on the suit property in favour of the 2nd Defendant who sublet to the 1st Defendant. The Learned Counsel submitted that prior to the Plaintiff's alleged purchase of the suit land in the year 2010, the Plaintiff was aware of the subsisting lease as admitted in the Plaintiff. The Learned Counsel argued that despite being aware of the supposed breach, prior to its purchase, the Plaintiff chose not to bring any action against the 1st Defendant.
4. The Learned Counsel submitted that the essence of Section 7 was stated out in the case of "*Mehta v Shab* (1965) E.A as "The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case." The Learned Counsel averred that since the Plaintiff was aware of the existence of the 1st Defendant at the time it purchased the suit property, purchased it and waited for over 12 years before initiating this suit then Section 7 comes into play. The Learned Counsel argued that the Plaintiff slept on its rights and contended that equity aids the vigilant and not the indolent and urged court to dismiss the Plaintiff's suit for being time barred.
5. The Learned Counsel also relied on the case of "*Iga v Makerere University* (1972) EA where the court stated that "A plaint which is barred by limitation is a plaint barred by law. Reading these provisions together it seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim an exemption, the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for and when a suit is time-barred the court cannot grant the relief sought." The Learned Counsel submitted that the Plaintiff had not sought leave of court to file the suit out of time and as such court could not grant them such an extension even if the same was sought. The Court was urged to dismiss the suit with costs since it lacks jurisdiction to hear and determine the matter.

III. The Plaintiff's case

6. Upon service, the Learned Counsel for the Plaintiff, the Law firm of Messrs. Asige Keverenge & Anyanzwa Advocates filed skeleton submissions in opposing the 1st Defendant's preliminary objection on 16th December 2022. The Learned Counsel submitted that the same should be dismissed for non-compliance with the directions of the court and for lacking the support of any evidence or legal



submissions. The Learned Counsel argued that the main objection was premised on the allegation of limitation of time as founded on Section 7 of the Limitations of Action Act, Cap. 22. Further, it was submitted that other than citing the provision of Section 7 of the Limitations of Action Act, the 1st Defendant had not provided any evidence that the suit by the Plaintiff was barred by reason of the provisions therein. The Counsel argued that there was no affidavit evidence in support of the objection and that the 1st Defendant had not filed any Defence to the suit instituted by the Plaintiffs.

IV. Analysis and Determination

7. The Honorable Court has considered the notice of preliminary objection dated 7th October, 2022, the submissions made and the authorities relied on by the Learned Counsels, the application, the relevant provisions of the Constitution of Kenya, 2010 and the statutes. In order to reach an informed, fair, reasonable and Just decision in the matter, the Court has framed the following three (3) for its determination. These are:
 - a. Whether the Preliminary Objection raised by the 1st Defendant herein meets the threshold of an objection based in Law and Precedent.
 - b. Whether the suit herein is time-barred as per the provision of Section 7 of the Limitations of Action act.
 - c. Who will bear the costs of the objection?

V. Analysis of the issues

Issue No. a). Whether the Preliminary Objection raised by the 1st Defendant herein meets the threshold of an objection based in Law and Precedent.

8. Under this sub – heading, the Honorable Court will deliberate on what constitutes a preliminary objection. This concept was well established in the famous case of “*Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited* (1969) EA. 696, where LAW J.A held on Page 700:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
9. It is trite law that an objection may be raised at any stage of the proceedings. The only emphasis is that it has to be purely on matters of law and not facts. The Honorable Court will spend a little bit of time to make this distinction from the case and the objection raised herein. The 1st Defendant challenges the suit on the basis of the pleadings filed by the Plaintiff. In so doing, the 1st Defendant maintains that the said pleadings were filed outside the statutory limitation period. As stated in Mukisa (*supra*) a plea of limitation is an example of a preliminary objection that has the capability of disposing the whole suit.



In the case of “*Joseph Mungai Wanene v Housing Finance Company of Kenya Limited* (2017) eKLR, the court held that:-

“The rationale for the limitation period cannot be overemphasized. In the case of *Gathoni v Kenya Co-operative Creameries Limited* (1982) KLR 104, the court (Porter J) had the following to say:

“The law on limitation is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

But more importantly, it is trite law that the issue goes to the jurisdiction of the court, without which the court cannot make one more step in a matter.”

10. In order to determine when exactly did the cause of action accrue in the Plaintiff’s case, I am guided by the provision of Section 7 of the *Limitation of Action Act*, Cap. 22.

Section 7 provides:

“An action may not be brought by any person to recover the 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.

11. In the Black’s Law Dictionary (Ninth Edition), a cause of action is defined as a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right by another person. While the Black’s Law Dictionary (10th Edition) the word “accrue” means “to come into existence as an enforceable claim or right.”

12. In the case of “*South Nyanza Sugar Company Limited v Joshua Aloo Aloo* [2021] eKLR it was held that:

“The question that begs is when did the right for the Respondent to claim from the Appellant accrue? There is overwhelming authority that in contract, a cause of action arises at the time of breach of the contract. In the case of, *Diana Kathumbi* (*supra*) the court stated :-

“According to the author in the Journal of International Banking and Financial Law, “What the Limit “(2007) 451BFL642, “in contract the cause of action accrues when the breach occurs when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage.”

13. The Court seeks to determine when the cause of action accrued to the plaintiff since from that time the limitation period of six years started running. From the Plaint dated 7th September 2022 the Plaintiff pleaded it became the registered owner of all that parcel of land known as Land Reference Numbers Mombasa/Block X/97 and a certificate of title was issued on 11th May 2010. Notwithstanding this, I have found out that most of the issues raised herein from the pleadings and the objection by the 1st Defendant are of factual nature which would require further interrogation during the full trial. For instance, the Plaintiff’s case is founded on the sub - lease entered between the late estate of George Ellam Wekesa, represented by the 2nd Defendant and the Sheikh Ali Taib Bajaber, represented by the 1st Defendant. The Plaintiff has averred that the 2nd Defendant in defiance of the lease between himself and the freehold proprietor of the suit property, which the Plaintiff had not named; illegally transferred the remainder of his lease to the 1st Defendant with effect from 25th November 2002.



14. Additionally, the Plaintiff's claim is that the transfer between the 2nd and 1st Defendants are null and void and therefore unenforceable. However, despite the transfer between the 1st and 2nd Defendant being effected on 25th November 2002, I am of the view that the Plaintiff only got 'the locus standi' to institute the suit against the Defendants on 11th May 2010 when it claims to have become the registered owner of the suit property. In my view, perhaps therefore, the Plaintiff's cause of action matured and started to run when it acquired title to the suit property which according to the Plaintiff was on 11th May 2010. All these are matters of pure conjecture and may not be adequately determined through a preliminary objection but from a full trial. For these reasons the objection fails.

Issue No. b). Whether the suit herein is time-barred as per Section 7 of the Limitations of Action Act.

15. The Plaintiff filed his claim on 7th September 2022 through a Plaint dated the same day, while he got registered as the proprietor of the suit property on 11th May 2010. If one was to strictly go by this measure, it therefore means that it was twelve years, 3 months and 27 days after the Plaintiff became the registered owner of the suit property. Should that have been the case then the provision of Section 7 of the *Limitation of Actions Act*, no actions may have been brought to recover the land after the end of twelve years from the date on which the right of action accrued. But as has already indicated above, all these are matters of facts and there will be need for the production of empirical documentary evidence to this effect.
16. I am compelled to fully concur with the Learned Counsel for the Plaintiff to the effect that the 1st Defendant would require to produce some evidence that the suit is barred by reason of Section 7 of the *Limitation of Actions Act*. Further, the Plaintiff has submitted that the set out criteria for a preliminary objection. The moment that happens, it means it is no longer an issue of pure law but facts to be proved.
17. Whether the preliminary objection is sustainable or not, the Court would have to be compelled to cause an analysis of the facts to establish whether the suit was filed outside the six years allowed under Section 7 of the *Limitation of Actions Act*. I find that the Court has no basis to indulge into that arena at all.

Issue No. c). Who will bear the costs of the objection

18. It is now well established that issues of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of a legal action and proceedings of any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, of 2010 holds that costs follow the events. By events it means the outcome or result of any legal action or proceedings. See the decisions of Supreme Court in "*Jasbir Rai Singh v Tarchalans*, (2014) eKLR; and "*Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited*, (2014) eKLR"
19. In the instant case although the Preliminary objection has not been successful, but taking that the matter is still on going to full trial, its just fair and reasonable that each party bears their own costs.

VI. Conclusion & Findings

20. In view of the foregoing, on a preponderance of probabilities, it is apparent that the objection by the 1st Defendant herein is not sustainable and thus the Honorable Court proceeds to make the following orders:-
- a. That the Notice of Preliminary Objection dated 7th October 2022 be and is hereby disallowed.
 - b. That the Defendants are ordered to fully comply with the provision of Orders 6, 7 and 11 of the *Civil Procedures Rules*, 2010 by filing their Defences, List of Documents and statements.



- c. That for expeditious sake this matter to be heard and disposed off within the next One Hundred and Eighty (180) days from the date of the delivery of this Ruling. There be a hearing on 5th October, 2023 and mention on 6th July, 2023 for compliance and conducting a Pre – Trial Conference on case management in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010.
- d. That each party to bear their own Costs.

It is so ordered accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30TH DAY OF MAY 2023

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JUSTICE HON. MR. LL NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Asige Advocate for the Plaintiff/
- c. M/s. Amina Advocate for the Defendant

