



REPUBLIC OF KENYA



KENYA LAW
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**Kober & 2 others v Korkoren (Chairman) & another (Environment & Land
Case E012 of 2021) [2023] KEELC 18168 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18168 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E012 OF 2021**

**CG MBOGO, J
JUNE 15, 2023**

BETWEEN

**KIPKEMOI ARAP KOBER 1ST PLAINTIFF
DANIEL KEMNG'ENO KENDOIWA (BEING THE LEGAL REPRESENTATIVES
OF KENDOIWO BOR 2ND PLAINTIFF
TABUTANY TAMU 3RD PLAINTIFF**

AND

**MANYWELE KORKOREN (CHAIRMAN) 1ST DEFENDANT
CHESIMET ARAP KORKOREN 2ND DEFENDANT**

RULING

1. Before this court for determination is the notice of preliminary objection dated September 12, 2022 and filed by the defendants challenging the suit on the following grounds:-
 1. That the action has been brought after the statutory period of twelve (12) years without leave of the court.
 2. That this court lacks jurisdiction to entertain the same, as its contrary to provisions of The [Land Act](#).The defendant prays that the suit be struck out with costs.
2. On March 28, 2023, this court directed that the preliminary objection be canvassed by way of written submissions.
3. The defendants filed written submissions dated April 25, 2023. The defendants withdrew the 2nd ground of the objection and submitted on ground one only.



4. The defendants invited the court to look at two issues as listed below: -
 1. Whether what has been filed is a land claim.
 2. If so, whether the plaintiffs have sought leave of the court to file claim out of time.
5. On the first issue, the defendants submitted that the issues they have raised have come directly from the plaintiffs' pleadings. That the suit herein is a land claim as can be seen in paragraph 9 of the plaint and the written statements of the plaintiffs. Further, that this is a land claim that is tailored in such a way as to hoodwink this court into believing that it's a boundary dispute and the prayers sought are meant to assist the plaintiffs recover land so that they occupy the land through resurvey.
6. The defendants further submitted that the plaintiffs claim that they have titles with less acreage, and that they want the title deeds to tally with the land they occupy.
7. On the second issue, the defendants submitted that the title deeds annexed to the plaintiffs supporting documents show that they were issued with the same on October 25, 2001. Further, that they have been holding these title deeds for more than 21 years and as such, they are late in bringing such action to court and no leave has been sought to file the instant suit. Also, that the instant suit has no legs to stand on and even article 159 of the Constitution cannot cure it.
8. The plaintiffs filed their written submissions dated April 13, 2023. The plaintiffs submitted that the defendants filed their defence to the suit on July 13, 2021 and the preliminary points raised by the defendants are uncertain, undefined and not raised in the statement of defence. Further, that the plaintiffs are at a loss to determine what they are required to respond to in terms of the first preliminary objection which points to a period of twelve years. That this ground is not pleaded as it should have been in the statement of defence.
9. The plaintiffs further submitted that this court has jurisdiction, and the suit is properly before it. Further, that the preliminary objection is a waste of time and should be dismissed with costs. That the suit cites the defendants as the trustees for the plaintiffs for the suit land and as such, the defendants were bound to act in the best interest of the plaintiffs and not in violation of their trust.
10. I have considered the preliminary objection and the written submissions filed by both parties and the issue for determination is whether the preliminary objection is merited.
11. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors ltd* [1969] EA 696, the court stated as follows:-Per Law, JA

“So far as I'm 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.”

This was followed up by the judgment of Sir Charles Newbold, P in the same case:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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.”

12. In the case of *Lemitei Ole Koros & another v Attorney General & 3 others* [2016] eKLR, Munyao, J stated as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”

13. Having looked at the definition and what constitutes a preliminary objection considering the issue for determination before this court, I am satisfied that it raises a pure point of law which merits consideration by this court.

14. 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.”

15. The purpose of the law of limitation was stated in the case of *Mehta v Shah* [1965] E.A 321, as follows;

“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.”

16. In the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104 Potter, JA stated the rationale of the law of limitation as follows: -

“The law of limitation of actions 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.”

17. Also, the question of limitation is a question that goes to the jurisdiction of this court. It is a clear point of law, which if argued as preliminary point, may dispose of the suit. In the case of *Bosire Ongero v Royal Media services* [2015] eKLR, the court stated that “the question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the court would lack jurisdiction to entertain it. I therefore find and hold that the preliminary objection raised in the instant case is on a point of law, and the same is validly and properly taken.”

18. In this case, the plaintiffs filed a plaint dated June 18, 2021 seeking judgment against the defendants that:-

- a. That there be a complete resurvey of land parcel no. Narok/Cis-Mara/Lemek/11 in order to determine the acreage and location which each of the plaintiffs occupy.



- b. This honourable court be further pleased to cancel all the subdivisions relating to land parcel no. Narok/Cis-Mara/Lemek/11 and all titles issued pursuant thereto.
 - c. This honourable court be pleased to order that the plaintiffs be issued with fresh titles on the land they occupy.
 - d. Cause (sic) of the suit be awarded to the plaintiffs.
 - e. Any further or better reliefs this honourable may give.
19. Let me say that at this stage, this court will be confined to look at the pleadings only and not comb through the evidence as doing so would defeat the purpose of a preliminary objection. Flowing from this, I have perused the plaint and in paragraph 9, the plaintiffs pleaded that “The plaintiffs state that sometime in the year 2001 the defendants unlawfully and without informing the plaintiffs participated in subdivision exercise in the said land. They carried out subdivision and issued them with titles to the land namely;
- a) Kipkemoi Arap Kober-LR Cis Mara/Lemek/2431 measuring 3.65 Ha.
 - b) Tabutany Tamu-LR No Cis Mara/Lemek/2420 measuring 1.50 Ha.
 - c) Kendoiwo Bor-LR No Cis Mara/Lemek/2419 measuring 4.00 Ha.
20. In paragraph 10 the plaintiffs go on to plead their dissatisfaction that “The plaintiff disagrees with the defendants in the manner that the land had been subdivided as each plaintiff occupies land exceeding 40 acres. The defendant simply reduced their acreage of the plaintiffs land with the fraudulent intention of depriving them of the land.”
21. In their submissions, the plaintiffs informed the court that ground one of the preliminary objection was not pleaded. A look at the defendants’ statement of defence dated July 12, 2021 shows the intention of the defendants to raise a preliminary objection as can be seen in paragraph 8 which states:- “ The defendants jointly and severally in response to paragraph 15 of the plaint, deny the contents thereon and state that the orders sought have been settled in a high court matter and shall at the earliest opportunity raise a preliminary objection with a view of having this suit dismissed or struck out with costs.”
22. I also note that the plaintiffs were mute in their submissions on their statement in paragraph 9 of the plaint. It appears that indeed they knew, as they admitted the unlawful actions of the defendants accrued in the year 2001 but instead, opted to come to court twenty years later. Section 7 of the *Limitations of Actions Act* is very clear as to the period within a claim for land may be brought before court. Outside the time limits set by law, the other avenue available would be to seek for extension of time through leave of the court to bring forth the suit.
23. In this case, the plaintiffs did not do so. While I place reliance on the authorities cited in paragraphs 15-17 above, this court is constrained to further entertain the suit as it lacks jurisdiction.
24. Arising from the above, the notice of preliminary objection dated September 12, 2022 is upheld. The plaint dated June 18, 2021 is hereby struck out with costs to the defendants it is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 15TH day of JUNE, 2023.

HON. MBOGO C.G.

JUDGE

15/6/2023



In the presence of: -

CA:T.Chuma

