



**Mbugua v Karanja & 3 others (Environment & Land Case
E59 of 2022) [2023] KEELC 18185 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E59 OF 2022
FM NJOROGE, J
JUNE 14, 2023**

BETWEEN

DR JAMES GITHU MBUGUA PLAINTIFF

AND

DAVID MWANGI KARANJA 1ST DEFENDANT

POINT A COMMERCIAL AGENCIES LTD 2ND DEFENDANT

DIXON KIBET CHEBURET 3RD DEFENDANT

THE REGISTRAR OF LANDS 4TH DEFENDANT

RULING

1. This ruling is in respect of the 3rd defendant's notice of preliminary objection dated November 18, 2022 which was on the following grounds:
 - a. That this honorable court is bereft of jurisdiction to hear and determine this matter since suit before it is statute barred having been filed after 12 years from the date when the cause of action is alleged to have occurred and thus offends the provisions of section 7 as read with sections 37 and 38 of the *Limitations of Action Act* cap 22 Laws of Kenya.
 - b. That the instant claim is fatally defective, incompetent, bad in law, misconceived, a non-starter, devoid of any merit and a gross abuse of the court process and it ought to be dismissed with costs.
2. The preliminary objection was canvassed by way of written submissions. The 3rd defendant filed his submissions dated February 28, 2023 on the same date while the plaintiff filed his submissions on April 24, 2023 on April 25, 2023.
3. The 3rd defendant in his submissions identified the following issues for determination:



- a. Whether the grounds set out in the notice of preliminary objection are points of law;
 - b. Whether the preliminary objection (if successful) is capable of disposing of the suit;
 - c. Whether the honorable court has jurisdiction to hear and determine the suit herein;
 - d. Who should pay costs (if any).
4. On the first issue, the 3rd defendant relied on the cases of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696, *David Karobia Kiiru v Charles Nderitu Gitoi & another* [2018] eKLR, section 7 of the *Limitation of Actions Act* and submitted that he purchased land parcel No Nakuru Municipality Block 15/2022 which is the suit property on March 30, 2019. He also submitted that he has been in occupation of it to date and that the plaintiff brought the present suit in the year 2022 which was thirteen years since he allegedly bought the suit property.
 5. With regard to the 2nd issue, the 3rd defendant submitted that his preliminary objection is of such a nature that if successful, it will dispose of the suit once and for all and relied on the case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696.
 6. Coming to the third issue, the 3rd defendant submitted that the plaintiff's suit is statute barred and the court did not therefore have jurisdiction to hear and determine the matter. He relied on the case of *John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others* (citation not given) and submitted that he is the lawful owner of the suit property having bought it from the previous registered owner who was the 1st defendant. The 3rd defendant also submitted that the plaintiff alleged to have bought the suit property in March 2009 and only filed the present suit on 2022 after a period of more than twelve years which was in contravention of sections 7 and 8 of the *Limitation of Actions Act*. In support of his arguments, the 3rd defendant relied on the cases of *Damaris Kandoro v Gachanja Gitere & another* [2005], *Bosire Ongero v Royal Media Services* [2015] eKLR, *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] eKLR and submitted that the plaintiff's suit is statute barred and should therefore be struck out with costs.
 7. The plaintiff in his submissions relied on the cases of *Mukisa Biscuit Company v West End Distributors Limited* [1969] EA 696, Civil Appeal 250 of 2015 *Grace Mwendwa Munjuri v Trustees of the Agricultural Society of Kenya* and submitted that the 3rd defendant's preliminary objection did not raise a proper point of law and ought to be dismissed. The plaintiff also relied on the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR in support of his arguments. The plaintiff further relied on sections 7, 37 and 38 of the *Limitation of Actions Act* and submitted that the 3rd defendant bought the suit property in 2019 and so he cannot argue that he had been in occupation of the suit property for a period of over twelve years.
 8. The plaintiff relied on the case of *Kimani Ruchine & Anor Swift Rutherford & Co Ltd and another* [1980] KLR 10 and submitted that the period of limitation started to run afresh when there was a change in title. The plaintiff also submitted that at the time he was purchasing the suit property, the only title that was in existence was Nakuru Municipality Block 15/550 out of which the suit property was hived from on May 14, 2018 and later sold to the 3rd defendant in 2019. The plaintiff also submitted that from the date of issuance of the certificate of lease to the 3rd defendant to when the suit was filed was four years and so his suit was not time barred. The plaintiff concluded his submissions by praying that the preliminary objection be dismissed with costs.



Analysis And Determination

9. After considering the preliminary objection and the submissions, the only issue that arises for determination is whether the plaintiff's suit is time barred and offended the provisions of section 7, 37 and 38 of the *Limitation of Actions Act*.
10. The case of *Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Limited*, 91969) EA 696, defined a preliminary objection as follows:

“...a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”
11. 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. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
12. In the present matter, the 3rd defendant's preliminary objection is on the ground that the plaintiff's suit is statute barred and offends the provisions of sections 7, 37 and 38 of the *Limitations of Actions Act*. The plaintiff on the other hand argued that his suit is not statute barred as he had bought a portion of Nakuru/Municipality Block 15/550 which was subdivided and the portion registered on May 14, 2018 and sold to the 3rd defendant on May 16, 2019. The plaintiff further argued that he filed his suit in 2022 four years after the portion of the suit property was sold to the 3rd defendant and it was therefore not statute barred.
13. 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.”
14. Section 37 of the *Limitation of Actions Act* provides as follows:

“This Act applies to land registered under the Government Lands Act (cap 280), the Registration of Titles Act (cap 281), the Land Titles Act (cap 282) or the Registered Land Act (cap 300), in the same manner and to the same extent as it applies to land not so registered, except that—

 - (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;



- (b) an easement acquired under section 32 of this Act does not come into being until a copy of the judgment establishing the right to the easement has been registered against the title to the land affected thereby, but is, until that time, held by the person for the time being registered as proprietor in trust for the person who has acquired it.”
15. Section 38 of the *Limitation of Actions Act* provides as follows:
- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
 - (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
 - (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
 - (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
 - (5) The minister for the time being responsible for land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.”
16. The court in the case of *Sichuan Huashi Enterprises Corp Limited v Micheal Misiko Mubindi* [2019] eKLR held as follows:
- “13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial.
- On this see the case of *Oruta & Another v Nyamato* [1998] KLR 590, where the court held that limitation of action:-
- “...could only be queried at the trial but not by...a preliminary objection...The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”
14. See also the case of *Divecon Ltd v Shirinkhanu S. Samani* civil appeal No 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A, the leading judge in the *Oruta case* (ibid) that:
- “It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*...”
17. Upon perusal of the pleadings in this matter, it is my view that as it is not clear when the course of action arose and as was held in the above quoted case, a defence on limitation of time should be determined



at trial and cannot be dealt as a preliminary objection. Consequently, the 3rd defendant's preliminary objection lacks merit and it is hereby dismissed with costs.

18. Parties shall comply with the rules by ensuring their trial bundles are duly indexed and paginated before the next mention for issuance of a hearing date. The mention shall be on September 28, 2023 on Microsoft Teams platform.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 14TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

