



REPUBLIC OF KENYA



**Mugambi & 6 others v Opiyo & 13 others (Environment and Land Case Civil
Suit E018 of 2022) [2023] KEELC 17919 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND CASE CIVIL SUIT E018 OF 2022**

CK YANO, J

JUNE 14, 2023

BETWEEN

**CECILIA NYOROKA MUGAMBI 1ST PLAINTIFF
ALICE MUGAMBI 2ND PLAINTIFF
JAMES MBURUGU MUGAMBI 3RD PLAINTIFF
FELICITY KANANA MAINGI 4TH PLAINTIFF
SILAS MWOBODIA MBUI 5TH PLAINTIFF
AMBROSE MUNYUA 6TH PLAINTIFF
SABASTIAN NGARE MUGUONGO 7TH PLAINTIFF**

AND

**ANDREW ODERO OPIYO 1ST DEFENDANT
SHADRACK MWITI MUGUNA 2ND DEFENDANT
JOSEPH MUNYUA MURIUKI 3RD DEFENDANT
LAWRENCE KIAUTHA ARITHI 4TH DEFENDANT
ZIPPORAH K. KIAUTHA 5TH DEFENDANT
JORAM GICHINGA KAMENCU 6TH DEFENDANT
ISAAC KAIMENYI 7TH DEFENDANT
SAMWEL KATHURIMA RINGERA 8TH DEFENDANT
JANET MUKIRI MWENDA 9TH DEFENDANT
SOLUTION SAVINGS & CREDIT CO-OP BANK LTD 10TH DEFENDANT
CREDIT BANK LIMITED 11TH DEFENDANT**



**FORMER COUNTY COUNCIL OF MERU THRO THE COUNTY
GOVERNMENT OF MERU 12TH DEFENDANT
LAND REGISTRAR MERU COUNTY 13TH DEFENDANT
ATTORNEY GENERAL 14TH DEFENDANT**

RULING

1. This ruling is in respect to a notice of preliminary objection dated 3rd October 2022 by the 4th, 5th and 9th defendants/respondents seeking to have the notice of motion dated 15th September, 2022 and the entire suit dismissed/struck out with costs on the grounds:
 1. That under Section 7 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, the period for bringing actions to recover land is limited to twelve years from when the cause of action accrued to the claimant or when it first accrued to some person through whom that person claims.
 2. That the suit is otherwise non suited and an abuse of the court process.
2. The 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 9th defendants submitted that the preliminary objection is on point of law and relied on the case of *Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd* (1969) EA 696 and *Hassan Ali Jobo & another Vs Suleiman Said Shabal & others* [2014] eKLR and cited section 7 of the *Limitation of Actions Act*. Counsel for the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th 9th defendants submitted that the rationale of the law of limitation was set out in this case of *Gathoni Vs Kenya Cooperative Creameries Ltd* (1982) KLR 104 where the court stated that the Law of Limitation of Actions is intended to protect defendants against unreasonable delay to bringing of suits against them and the case of *Dickson Ngige Ngugi Vs Consolidated Bank Limited formerly Jimba Credit Corporation Limited & another* [2020] eKLR and the case of *Edward Moonge Lungusura Vs James Lanaiyara & another* [2019] where the courts held that under the provisions of Section 7 of the *Limitation of Actions Act*, an action for recovery of land cannot be brought after the expiry of twelve years.
3. Counsels for the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th and 9th defendants invited the court to peruse the supporting affidavit by Alice Mugambi sworn on her own behalf and other plaintiffs/applicants and in particular referred to paragraphs 17 and 19 which they submit are clear that the cause of action accrued on 21st July 1995, a period of over 27 years ago. The defendants questioned why the plaintiffs took too long to file the suit and submitted that no justifiable reason has been adduced by the plaintiffs. It is further submitted that no leave of court was sought to file the suit out of time. The defendants also invited the court to peruse paragraph 8 and 17 of the plaint herein.
4. The defendants also cited the provisions of Order 2 Rule 15 of the *Civil Procedure Rules* which guides the courts on when a suit can be struck out and submitted the suit is non suited and an abuse of the court process. They also relied on the case of *Trust Bank Ltd Vs HS Aruin Co. Ltd & Another* [2000] eKLR and submitted that the entire suit is frivolous, vexatious or otherwise an abuse of the court process and does not disclose any reasonable cause of action and urged the court to find merit and allow the preliminary objection and dismiss and/or strike out the suit with costs.
5. The 10th defendant associated themselves to the submissions by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th & 9th defendant.
6. In opposing the preliminary objection, the plaintiffs submitted that the grounds set out in the notice of preliminary objection do not constitute a true preliminary objection as the suit is founded on fraud



and cited paragraphs 37 and 45 of the plaint. The plaintiffs submit that the preliminary objection is an afterthought. The plaintiffs referred to the pleadings and pointed out that there was collusion between the 1st to 9th defendants and the 12th and 13th defendants to defraud the plaintiffs. That it is clear from the pleadings that one Francis Guantai Maingi (deceased) who was the biological father to the 4th plaintiff died on 12th April 2013 and that during collection of assets movable and immovable properties by the 1st to the 4th plaintiffs they discovered that their respective deceased fathers' suit land had been issued to the 1st and 2nd defendants herein with respective certificates of leases being granted to the said defendants. The plaintiffs submit that time starts to run from the time the plaintiffs discovered the fraud and cited the provisions of Section 26 of the Limitation of Actions Act. The plaintiffs submit that even a casual look of the plaint, that is sought to be struck out, there is no any clear averments that conclusively shows that the plaintiff's action is statute barred That at paragraph 37 of the plaint, the plaintiffs have averred that the suit property fraudulently exchanged hands, hence the conclusive decision on whether or not the plaintiffs action is time barred will depend on the construction of the list of documents availed before court and further evidence to be adduced at the hearing of the substantive suit.

7. The plaintiff's counsel submitted that the preliminary objection as filed does not meet the threshold set out in the case of Mukisa Biscuits Manufacturing Ltd (*supra*) and submit that the same is misplaced and not sustainable and urged the court to overrule it with costs to the plaintiffs.
8. I have considered the preliminary objection, rival submissions and the authorities relied on. The issue for determination is whether the issues raised in the notice of preliminary objection dated 3rd October 2022 are merited.
9. The law on preliminary Objection is now settled by the then Court of Appeal of East Africa in Mukisa Biscuits Manufacturing Co Ltd V West End Distributors Ltd (*Supra*) where Law J.A and Newbold P (both with whom Duffus V.P agreed) respectively at 700 and 701 held as follows:

Law J.A

“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.”

Sir Newbold, P:

“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 has 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 issues. This improper practice should stop”

10. The main ground of objection herein is that the suit is time barred for reasons that it offends the provisions of Section 7 of the Limitation of Actions Act which stipulates that the period for bringing actions to recover land is limited to twelve years from the date in which the right of action accrued. It is the defendant's contention that it is clear from the pleadings (particularly the plaint and the supporting affidavit on record), that the cause of action accrued on 21st July 1995 which is a period of over 27 years



by the time the suit was filed. The plaintiffs however oppose this argument by stating that the suit is based on fraud and submit that time started to run from the time the plaintiff discovered the fraud.

11. The court has perused the pleadings herein. In the plaint dated 15th September, 2022, the plaintiff claim is founded on fraud as pleaded in paragraph 45 of the plaint and the particulars of fraud are pleaded in paragraph 37. A cause of action is a combination of facts and circumstances that give rise to the right to file in a court of law for remedy. This includes all material facts that are necessary to the plaintiffs to prove their case on a balance of probabilities.
12. Section 26 of the *Limitation of Actions Act* provides as follows-;

“ 26 Where, in the case of an action for which a period of limitation is prescribed, either

- a. The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent, or
- b. The right of action is concealed by the fraud of any such person as aforesaid, or
- c. The action is for relief from the consequences of a mistake,

The period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it provided....”

13. In this case, the plaintiffs submitted that they discovered the fraud during the collection of assets of their respective deceased fathers including the 4th plaintiff's deceased father who is said to have died on 12th April, 2013. From the rival submissions and the material on record, it is clear that there is a dispute between the plaintiffs and the defendants as to when the cause of action arose. In order for the court to decide on when the same arose, there is need to make reference to evidence. Once a court relies on evidence to ascertain the claim in preliminary objection, it is no longer a point of law and it fails. This court is also mindful of the fact that the defendants are yet to file any defence to the plaintiffs' suit in which they have pleaded limitation of statute as a defence. It is trite law that cases must be decided on the issues pleaded. The defendants having failed to file defence in which they specifically plead to the issue of limitation they are not entitled to rely on that issue and base its preliminary objection on an issue not pleaded. In my view Limitation of statute is a defence that should be pleaded. Moreover, the court cannot properly make a finding on whether the suit is caught by limitation of time unless it investigates on evidence when the cause of action arose. The moment a court is invited to conduct a mini trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. This cannot be regarded as a pure point of law as it requires investigation of some facts. At this stage, I am only beholden to look at the pleadings rather than consider any statement of fact detailed in submissions. Instead, these are matters that are fit and proper for arguments in the substantive suit. In this regard, I would be persuaded by the sentiments of Mutuku J. in the case of *Municipal Council of Garissa Vs Ahmed Said Mohamed & another* HCCC No. 7 of 2011 (Garissa) where he sated thus-;

“ The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage.”



14. For the foregoing reasons, I am inclined to dismiss the preliminary objection with costs and decline to dismiss or strike out the suit as requested by the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th defendants.

15. It is so ordered

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JUNE 2023

In the presence of

Court assistant – V. Kiragu

Muthomi for 1st – 5th, 7th – 9th defendants – present

Kariuki for 10th defendant

Kanyemoo for 12th defendant

No appearance for A.G for 13th and 14th defendants.

C.K YANO

JUDGE

