



**Hamisi v Mwangi (Environment & Land Case E054 of 2022)  
[2023] KEELC 18082 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18082 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E054 OF 2022**

**AE DENA, J**

**JUNE 12, 2023**

**BETWEEN**

**MOHAMED KOPA HAMISI ..... PLAINTIFF**

**AND**

**DAVE MUNYA MWANGI ..... DEFENDANT**

**RULING**

1. This suit is instituted by a plaint filed on November 24, 2022. The gist of the suit is that the Plaintiff is the beneficial native owner in use and occupation of title No Kwale/Shimoni/SS/686 (hereinafter referred to as the suit property). That prior to its registration the suit property was designated as native trust land and which was later converted to Shimoni Settlement Scheme and titles issued to the beneficial natives.
2. According to the Plaintiff, while awaiting to be issued with the title to the suit property he learnt that the same was registered in the name of the defendant. It is averred the Defendant is a stranger and is not entitled to the suit property as he does not even reside in Shimoni and is not a native. That the Defendant asked the Plaintiff to vacate the suit property sometime in September 2022 and hence the instant suit. The Plaintiff prays for judgement against the Defendant for an order directing the Land Registrar Kwale county to remove, cancel and revoke the name of the Defendant from title no Kwale/Shimoni/SS/686 and to have the Plaintiff registered as the legal and lawful proprietor of the suit property.
3. The Plaintiff further seeks for damages for trespass, costs and interest and any other further orders. The plaint is accompanied by a verifying affidavit sworn by the Plaintiff Mohammed Kopa Hamisi, a list of witnesses together with a witness statement and a Plaintiffs list of documents.
4. The Defendant has on the other hand filed a notice of preliminary objection dated February 17, 2023 opposing the suit. The Defendant states that the suit herein is not sustainable in law on grounds that



the court lacks jurisdiction on the basis that the suit is time barred vide Section 7 read together with Section 26 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya and the pecuniary value being way below this courts prescribed value.

5. This ruling is subject of the preliminary objection above and which was canvassed by way of written submissions.

### **Defendants Submissions**

6. The Defendant's submissions are filed on March 6, 2023. It is submitted the the preliminary objection is based on paragraphs 3,5 and 6 of the Plaint. The said paragraphs in summary elucidate the Plaintiff's claim that the suit property was issued to the beneficial native customary land owners in use and occupation of the same. That the Defendant has been issued with a title to the suit property despite not being a native and that the Plaintiff has been asked to vacate the suit property on claims that he is a trespasser. Referring to the provisions of Section 7 and 26[c] of the [Limitation of Actions Act](#) against the certificate of search attached by the Plaintiffs it is pointed that the title deed of the suit property was first issued to the Defendant on September 9, 2010 and the suit having been filed on November 18, 2022, making 12 years 2 months between the two events and which was past the statutory period provided for under the said Section 7.
7. The court is asked not to allow the suit as the Plaintiff has not been vigilant in having the same prosecuted within the statutory stipulated time.
8. On the court's jurisdiction it is submitted that based on the Plaintiffs documents, the suit property measures approximately 1.08 Hectares. That the suit property being situated in Shimoni area it was obvious that its value was within the pecuniary jurisdiction of the Magistrates Court as provided for under Section 7 of the Magistrates Court Act. The Defendant submits that this court is devoid of the requisite jurisdiction and relies on the holding in [Civil Appeal No 50 of 1989 Owners of Motor Vessel Lillian S versus Caltex Oil \[Kenya\] Ltd \[1989\] eKLR](#) and in [Justus Tureti Obara Versus Peter Koipetai \[2014\] eKLR](#).

### **Plaintiffs Submissions**

9. The Plaintiff's submissions were filed on March 24, 2023. It is submitted that there is nothing in the Plaintiff's pleadings that can trigger the invocation of Section 7 as read together with Section 26 of the [Limitation of Actions Act](#). That the issues raised in the said proceedings are matters of fact that can only be proved at the hearing of the suit. It is stated that the pleadings do not indicate when the action first accrued and as such Section 7 of the [Limitation of Actions Act](#) is inapplicable.
10. Counsel for the Plaintiff submits that the computation of 12 years has been pulled from a copy of the title deed but the right of action accrued to the Plaintiff when he discovered that the Defendant had fraudulently obtained title to the suit property and that was in September 2022 as pleaded at paragraph 7 of the plaint. That the preliminary objection does not raise a point of law as pronounced in the Mukisa Biscuit Case. That the title deed is part of factual evidence that the Plaintiff will tender at the trial. That ground 1 of the preliminary objection should therefore be dismissed.
11. On jurisdiction, it is submitted that the ELC court has both original and appellate jurisdictions to hear and determine this dispute as stipulated under Section 13 of the [Environment and Land Court Act](#) as read together with Article 162[2] [b] of the [constitution](#). That the value of the suit property has not been disclosed in the pleadings. Further that the Magistrates Courts Act does not oust the jurisdiction of this court to hear and determine cases filed before it whose value is below Kshs 20 million. The Plaintiff submits that this court has jurisdiction contemplated in the [Constitution](#) and the ELC Act



even if the value of the same is less than Kshs 20 million. The Plaintiff lastly submits that the preliminary objection has no merit and is totally misconceived. The court is urged to dismiss it with costs.

### Discourse

12. I have considered the pleadings filed, the Preliminary Objection raised and the submissions of the parties. The issue for determination is whether the preliminary objection is merited and if it should be upheld.

13. I will start by setting out what a proper preliminary objection is, guided by various decisions of the courts. In *Nitin Properties Ltd V Singh Kalsi & Another [1995] eKLR* the court stated thus;-

' A Preliminary Objection 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.'

14. The court in *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd (1969) EA 696* described a preliminary objection as hereunder; -

' 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 Charles Newbold, JA in the same case 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.'

15. But what is a demurrer? Justice MK Ebrahim as he then was stated in the case of *Republic v Eldoret Water & Sanitation Company Ltd Exparte Booker Onyango & 2 Others (2007) eKLR*,

In Blacks Law Dictionary, a 'demurrer' is defined as:-

'A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer.'

In the light of the foregoing, a party raising a preliminary objection on a point of law must proceed on the basis (only for the preliminary point) that all facts pleaded by the other side are correct and albeit this, the cause of action is not sustainable as a matter of law. The Objector in such a situation is deemed to accept the correctness of the other party's facts for the purposes of the application. To do otherwise would render the preliminary objection to be not a true demurrer. An objector cannot introduce any factual dispute or controversy and must stick to pure points of law.

16. It is clear from the above cited case law that a preliminary objection should raise pure points of law and which are argued on the assumption that all facts are correct.



17. 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.'

However, there are exceptions to the above, laid out in section 26 of the same Act as follows; -

'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:

18. The import of section 7 of the Limitation of Action Act is that an action can only be brought within 12 years for any party who seeks to recover land subject to the exceptions provided under section 26. The Plaintiff seeks to recover the suit property from the defendant who is registered as proprietor on the grounds which have already been set out. From the plaint there is no mention of any specific period of time from which the court can draw for purposes of computation of time. The defendant on the other hand referring to a certificate of search attached by the Plaintiffs points that the suit property was first issued to him the Defendant on September 9, 2010 which is 12 years 2 months of this suit filed on November 18, 2022. But it is also submitted on behalf of the Plaintiff that the title in the name of the defendant is a re-issued document. My perusal of the title attached indeed reveals it is a re-issued title and further that it is a subdivision. The Plaintiff in this case made a search over the suit property on August 31, 2018. The Defendant states that time started running at that point when he made the discovery that the land was allegedly registered by fraudulent means in the name of the Defendant that is to say when he was served with a demand notice.

19. Based on the above, it is this courts view that the issues raised are issues of fact and not law. The time within which the fraud was discovered is a factual issue that can only be ascertained upon hearing both parties where they will be allowed to produce evidence in support of their assertions. The defendant cannot introduce any factual dispute or controversy and must stick to pure points of law. The facts alleged by the Plaintiff have all been disputed by the Defendant. This is the essence of a trial and this ground in the Preliminary Objection is inadequate to strike out the suit.

20. It has also been urged by the Defendant that the Plaintiff is guilty of laches. The Court of Appeal in the case of Msa *Civil Appeal No 39 of 2020 James Archer & Joana Trent Vs Inger Christine Archer & 2 Others* stated that doctrine of laches will apply whether or not a suit is time barred, except that where the suit is not time barred, the delay needs to be demonstrated to have been unreasonable and prejudicial to the other parties. This therefore becomes an issue that can only be determined after hearing both parties and in any event the discretion of the court will also play a big part in realizing a determination. It is therefore not a pure point of law and also calls for the court to use its discretionary powers.

21. Based on the foregoing the 1<sup>st</sup> ground must fail.

22. It is trite that jurisdiction is everything and without it a court cannot take any valid step. The Plaintiff pleads that this court has the requisite jurisdiction to determine the instant suit while the Defendant states that the value of the suit property is way below the pecuniary jurisdiction of the ELC Court



which is of a similar level with the High Court and whose pecuniary jurisdiction is capped at Kshs 20 million. Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 provides:

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
  - (4) Subject to Article 169(2) of the *Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
    - a. Disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
    - b. Matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.
23. As a matter of fact, the former Chief Justice had by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011. Such gazette notices include Gazette Notice No 1472 dated March 1, 2016, Gazette Notice No 1475 dated March 14, 2016, Gazette Notice No 11930 dated December 5, 2017 and Gazette Notice No 2575 dated February 28, 2019. Thus, there exist within the magistrates' courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land.
24. But the fact that the above were gazetted does not oust the jurisdiction of the ELC Court as this court has original jurisdiction though it is always in order for cases to be filed in the lowest court taking into account pecuniary jurisdiction. The court will always transfer a suit in this regard to the lower court but not to strike out a suit as prayed on this basis. In any event in relation to this matter, the value of the suit property has not been pleaded. No evidence has been tendered by both parties herein to indicate the value of the suit property, as such the court cannot make assumption that the value of the suit property is below its pecuniary jurisdiction.
25. The upshot is that the Preliminary Objection is disallowed. Costs to abide the outcome of the suit.
- It is so ordered.

**DELIVERED AND DATED AT KWALE THIS 12<sup>TH</sup> DAY OF JUNE, 2023**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Asige for the Plaintiff

Mr. Chibanda holding brief for Ms Oketch

Mr. Daniel Disii Court Assistant

