



Pertet & another v Manche (Suing as the Administrators and Personal Representatives of the Estate of Samwel Waweru Manji - Deceased) & 3 others (Environment and Land Appeal 27 of 2020) [2023] KEELC 20974 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20974 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 27 OF 2020
CG MBOGO, J
OCTOBER 26, 2023

BETWEEN

ESTATE OF THE LATE STEPHEN LEIYAN PERTET 1ST APPELLANT
PERSONAL REPRESENTATIVE OF THE LATE STEPHEN LEIYAN
PERTET 2ND APPELLANT

AND

JAMES KENYUA MANCHE AKA JAMES KINYUA MANJI PETER
MANJI WAWERU (SUING AS THE ADMINISTRATORS AND PERSONAL
REPRESENTATIVES OF THE ESTATE OF SAMWEL WAWERU MANJI -
DECEASED) 1ST RESPONDENT
THE DISTRICT LAND REGISTRAR NAROK NORTH/ SOUTH
DISTRICTS 2ND RESPONDENT
ESTATE OF THE LATE FREDRICK SIMIREN NKURUNA .. 3RD RESPONDENT
PERSONAL REPRESENTATIVE OF THE ESTATE OF FREDRICK SIMIREN
NKURUNA 4TH RESPONDENT

(Being an appeal from the ruling of Hon. G.N. Wakahiu, CM delivered at Narok on 15th September 2020 in Narok CMCC No. 138 of 2019; James Kenyua Manche aka James Kiyua Manji & Peter Manji Waweru versus Estate of the late Stephen Leiyan Pertet & Others)

JUDGMENT

1. The appellants herein being dissatisfied with the ruling of the of the Hon. G.N Wakahiu, Chief Magistrate in CMCC No 138 of 2019 delivered on 15th September, 2020, appealed to this court against



the whole of the ruling vide a Memorandum of Appeal dated 8th October, 2020 on the following grounds: -

1. That the learned magistrate erred in law and in fact in failing to address, consider and make a determination on substantive preliminary points of objection raised by the appellants.
 2. That the learned magistrate erred in law and in fact in failing to consider and make a determination as to whether the suit was statutorily time barred as contended by the appellants.
 3. That the learned magistrate erred in law and in fact in failing and/or avoiding to find that the plaintiff's suit was statutorily barred by dint of provisions of Section 7 of the Limitations of Actions Act, Cap 22, the disclosed alleged cause of action having arisen in March 1991.
 4. That the learned magistrate erred in law and in fact in failing to consider and make a determination as to whether the 1st and 2nd defendants are proper parties capable of being sued.
 5. That the learned magistrate erred in law and in fact in failing and/or avoiding to find that the 1st and 2nd defendants are not proper parties capable of being sued and that no proper orders can issue against a non-existent and or unidentified party.
 6. That learned magistrate erred in law and in fact in failing to find that the action raised in the plaintiff's suit had already been determined in Nakuru HCCC No 417 of 1997; Samuel Waweru Manji v Stephen Leyian Pertet vide the order of dismissal given on 26th February, 2009 by the superior court (Hon. Lady Justice M.Koome) (hereinafter 'the superior court order').
 7. That the learned magistrate erred in law and in fact in failing to appreciate that the aforesaid superior court order has never been challenged either by review or an appeal, as would be expected of an aggrieved party.
 8. That accordingly, learned magistrate erred in law and in fact in failing to find that the plaintiff's suit is fatally defective and bad in law as it seeks to overturn the superior court order in blatant disregard of the hierarchy of judicial courts structure.
 9. That in totality of the foregoing, learned magistrate arrived at an erroneous conclusion that the plaintiffs' suit is competent.
2. The appellants pray for orders that: -
1. The appeal be allowed.
 2. The ruling of the subordinate court (Hon. G.N. Wakahiu, CM) delivered on 15th October 2020 in Narok CMCC No 138 of 2019; James Kenyua Manche aka James Kiyua Manji & Peter Manji Waweru v Estate of the late Stephen Leyian Pertet & others on the appellants preliminary objection dated 20th January 2020 be set aside.
 3. This honourable court substitutes the ruling of the subordinate court (Hon. G.N. Wakahiu, CM) delivered on 15th September 2020 in Narok CMCC no. 138 of 2019; James Kenyua Manche aka James Kiyua Manji & Peter Manji Waweru v Estate of the late Stephen Leyian Pertet & others on the appellants preliminary objection dated 20th January 2020 with its own decision and strikes out the plaintiff's plaint dated 29th October 2020.
 4. The 1st respondent pays the costs of this appeal and the costs in the subordinate court.



3. The grounds of appeal was canvassed by way of written submissions. On 13th September, 2023, the appellants filed their written submissions dated 25th August, 2023 where they raised four issues for determination as listed below: -
 - a. Whether the suit before the subordinate court, being Narok CM ELC No 138 of 2019; James Kenyua Manche & another v The Estate of the late Stephen Leiyan Pertet & others (hereinafter “the impugned suit”), is statutorily time barred?
 - b. Whether the impugned suit is fatally defective in so far as it seeks to overturn the decision of a superior court by means unknown to law other than by appeal or review?
 - c. Whether the 1st and 2nd defendants are proper parties capable of being sued?
 - d. Who should bear the costs of these proceeding?
4. On the first issue, the appellants submitted that the cause of action arose in the year 1991 when the alleged sale of the property occurred. Further, that a suit was filed in the year 1997 and dismissed in the year 2009 for want of prosecution being Nakuru High Court Civil Case No 416 of 1997, Samuel Waweru Manji v Stephen Leiyan Pertet and the order of dismissal has never been challenged by any party.
5. The appellants further submitted that the respondents’ being administrators of the estate of Samwel Waweru Manji then filed a suit seeking the same orders as those sought in Nakuru High Court Civil Case No 416 of 1997 where they allege fraudulent transfer of the suit property. The appellants relied on the case of Mildred Akoth Warrakah v Mwafumbiri Hamisi Mwatsami [2020] eKLR and submitted that the respondents’ argument that time stopped running in the year 2009 does not hold water as in the said year, the suit was dismissed for want of prosecution bringing it to a close unless the suit is reinstated, appealed or reviewed. They further submitted that the suit before the trial court is time barred by virtue of Section 7 of the Limitations of Actions Act and in fact, a period of 28 years has lapsed from the year of the alleged sale of the subject property in the year 1991.
6. The appellants further submitted that Stephen Leiyan Pertet (deceased) was registered as the owner of the subject property when Samwel Waweru Manji (deceased) was still alive and filed the suit in Nakuru when both parties were alive and although this question was raised in the appellants notice of preliminary objection dated 20th January, 2020, the court never addressed itself to that point of law contrary to the provisions of Order 21 Rule 4 of the *Civil Procedure Rules*. Reliance was placed in Civil Appeal No 3 of 2018, Nairobi, *Margaret Wairimu Magugu v Karura Investment Limited & 4 others* and *Kabecha v Njoroge* (Environment and Land Appeal 31 of 2020) [2022] KEELC 13734 (KLR) eKLR.
7. On the second issue, the appellants submitted that it is not in dispute that the orders issued on 24th March, 2009 are valid and still in force as they have never been challenged by way of an appeal or by review and that the trial court by entertaining the suit serves the purpose of overturning the decision of dismissal of Nakuru High Court Case No 416 of 1997.
8. On the third issue, the appellants submitted that the estate of the late Stephen Leiyan Pertet is not a person, natural or legal capable of suing and/or being sued and as such, they are not proper parties to the suit. The appellants submitted that the legal representative person must be specifically identified which the 1st respondent has failed to do. They relied on the cases of *Mohamed Abushiri Mkullu v Suleiman Abdala Hassan* [2012] eKLR and *Robert Meleya Ole Letoluo & 5 others v Synergy Industrial Credit Limited & 2 others* [2014] eKLR and submitted that the appellants lack legal capacity to be sued rendering the impugned the suit against the said improper parties defective.



9. On the issue of costs, the appellants urged the court to allow the appeal herein with costs.
10. By the time of writing this ruling, the respondents had not filed their written submissions. Be that as it may, I have considered the grounds of appeal and the written submissions filed by the appellants and in my view, the issue for determination is whether the trial court properly applied the law in determining the notice of preliminary objection dated 20th January, 2020.
11. This being a first appeal, the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni v Kenya Bus Service Ltd* 1982 – 88 I KAR 278.
12. The 1st respondent filed a plaint dated 29th October, 2019 against the appellants and the 2nd respondent as the 1st, 2nd and 3rd defendants and included the 3rd and 4th respondents as interested parties. The appellants filed a notice of preliminary objection dated 20th January, 2020 challenging the plaint on the following grounds: -
 1. The plaintiff's suit is bad in law, incompetent, incurably and fatally defective as: -
 - a. The plaintiff's claim is statute barred by virtue of Section 7 of the *Limitations of Actions Act*, Cap 22 Laws of Kenya.
 - b. Order of dismissal of suit in Nakuru HCCC No 416 of 1997, Samuel Waweru Manji v Stephen Leiyian Pertet given on 26th February, 2009 makes the proceedings herein fatally defective and bad in law as they seek to overturn a finding of a superior court.
 - c. This suit offends the provisions of Order 12 Rule 6 (b) of the *Civil Procedure Act*, 2010 (*sic*).
 - d. This honourable court does not have pecuniary jurisdiction over this matter.
 - e. The plaintiff's suit is a non-starter devoid of any merits.
13. The appellants stated that the administrators of the estate of the late Stephen Leiyian Pertet (deceased) therefore seeks that the plaintiff's (1st respondent) aforementioned notice of motion application be struck out with costs.
14. The preliminary objection was determined vide a ruling delivered by the trial court on 15th September, 2020. I have taken time to read and understand the said ruling and the trial court in analyzing what constitutes a preliminary objection noted that for a preliminary objection to succeed, it must concur with the following: -
 1. It must be a pure point of law.
 2. It must be pleaded by one party and admitted by the other.
 3. It must be a matter of law capable of disposing the suit.
 4. It must not be blurred by factual details calling for evidence; and
 5. It must not call upon the court to exercise discretion.



15. In applying the above to the preliminary objection before it and upon perusing the scholarly documents, case laws and issues raised in submission by both parties, the trial court found the issues for determination as follows: -
- a. Whether the suit is *res judicata*?
 - b. Whether this court has pecuniary jurisdiction?
16. On whether the suit is *res judicata*, the trial court agreed that the parties are the same in the suit and that the issues are the same as in Nakuru HCCC no. 416 of 1997 which was dismissed for want of prosecution. However, the court observed that the appellants failed to provide evidence as to the same and as such, they remained mere assumptions and agreed with the 1st respondent that in as much as the suit may be similar, it was not heard and finally decided by the court. The trial court found that the standards for proving *res judicata* had not been attained by the appellants.
17. On whether the court has pecuniary jurisdiction, the trial court, whereas he agreed with the appellants that the courts pecuniary jurisdiction is limited to Kshs. 20,000,000/- noted that no valuation report was tendered to show the value of land. The trial court made a finding that there is nothing in the suit to help the court determine whether or not the suit property falls within the pecuniary jurisdiction of the court.
18. 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 vs West End Distributors Ltd* (1969) EA 696, Per Law, JA the court stated as follows: -

"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"

19. 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."



20. Let me emphasize that for a preliminary objection to be maintained, the pure points of law raised must sprout from the pleadings. In the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank* HCC No 53 of 2004, the court stated as follows;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

21. In their grounds of appeal, the appellants stated that the suit was statutorily barred by dint of Section 7 of the *Limitation of Actions Act* as the alleged cause of action arose in March 1991. In my view, this was a pure point of law, which called for a perusal of the pleadings and not necessarily combing out evidence filed by the parties and it ought to have been considered by the court.

22. 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.”

23. 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.”

24. In the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, the Court of Appeal held as follows;

“...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

25. A suit barred by limitation is a claim barred by law, hence by operation of law, the court cannot grant the relief sought. In the case of *Iga v Makerere University* [1972] EA, the Court had this to say on the Law of Limitation;

“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 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 remedy or relief sought.”

26. Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. From a reading of the plaint dated 29th October, 2019, the dispute to an extent addresses an agreement for sale and the 1st respondent pleaded particulars of fraud, misrepresentation and mistake on the part of the appellants and the 2nd respondent. While pleading the particulars of fraud, misrepresentation and



mistake, the 1st respondent made mention of an agreement dated 21st March, 1991. The 1st respondent did not plead in the plaint when the cause of action arose but stated in paragraph 11 of the plaint that they learnt later of the fraudulent acts. In their statement of defence, the appellants pleaded in paragraph 9 that the cause of action arose in the year 1991. The 1st respondent filed a reply to defence dated 14th April, 2021 and countered the claims of the appellants. Having in mind the elements of what constitutes a preliminary objection and flowing from the pleadings, the issue of time was contested and, in my view, this could not be considered a pure point of law for the reason that the trial court would be called to immerse itself in the evidence to establish this position thereby defeating the essence of a preliminary objection.

27. On whether the appellants are proper parties to be sued, the 1st respondent filed suit against the appellants and the 2nd appellant was referred to as the personal representatives of the estate of the Stephen Leiyen Pertet. I find that this issue was not fatal to the suit as an amendment could cure the same. The trial court also made mention of the rules of natural justice which I agree with and I find that Article 159 (2)(d) of the Constitution would properly apply in the circumstance.
28. On the order of dismissal in Nakuru HCCC No 416 of 1997, the trial court observed that the appellants failed to provide evidence to establish the same and as such the averments were termed as mere assumptions. I have perused the record of appeal and the appellants herein supplied copies of proceedings said to have been filed in Nakuru HCCC No 416 of 1997 leading to the dismissal of the suit. Whereas this fact has not been disputed by the appellants and the 1st respondent herein, the said orders issued on 24th March, 2009 are in force and are still valid.
29. On pecuniary jurisdiction, again, the appellants did not provide a valuation report to support this claim and in the absence of the valuation report, this court cannot conclusively determine that the trial court did not have pecuniary jurisdiction.
30. I note that in the preliminary objection, the appellants herein did not plead *res judicata*, but the trial court went ahead and addressed itself on this issue. The trial failed to appreciate that the appellants pointed out that there is a decision of the High court in existence dismissing the suit for want of prosecution. Having said the above, it is my finding that the trial court did not properly address itself to issue no. 1 (b) raised in the notice of preliminary objection. More importantly, the trial failed to recognize the orders issued on 24th March, 2009 which no evidence was availed by the 1st respondent to confirm that it was reviewed or set aside. The only way available for the 1st respondent herein was to apply for review or set aside the said orders and in the absence of such, it was not possible for the trial court to proceed with the suit as it were.
31. Arising from the above, the memorandum of appeal dated 8th October, 2020 is allowed in the following terms: -
 - i. That the ruling of Hon. G.N. Wakahiu delivered on 15th September, 2020 is hereby set aside.
 - ii. That the notice of preliminary objection dated 20th January, 2020 partially succeeds in terms of ground 1 (b).
 - iii. The plaint dated 29th October, 2019 offends the provisions of Orders 12 Rule 6 (b) of the Civil Procedure Rules and it is hereby struck out.
 - iv. The 1st respondent to pay costs of this appeal and the costs in the subordinate court.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 26TH DAY OF OCTOBER, 2023.



HON. MBOGO C.G.

JUDGE

26/10/2023

In the presence of:-

CA: Meyoki

