



REPUBLIC OF KENYA



KENYA LAW
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**Faraj & 4 others v Halai & 17 others (Environment & Land
Case 198 of 2015) [2023] KEELC 21829 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21829 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 198 OF 2015
SM KIBUNJA, J
NOVEMBER 29, 2023**

BETWEEN

MUSA JUMA FARAJ & 4 OTHERS PLAINTIFF

AND

PARBAT LALJI HALAI & 17 OTHERS DEFENDANT

RULING

[Notices of Preliminary Objection by the 8th & 7th defendants dated the 20th February 2023 and 6th March 2023]

1. The 8th defendant's preliminary objection dated the 20th February 2023 raises four (4) grounds that:
 - a. The suit is time barred.
 - b. Plaintiffs lack *locus standi* to lodge this suit.
 - c. The suit is fatally defective and should be struck out in limine.
 - d. The suit is frivolous, vexatious and abuse of the court process.
2. The 7th defendant's preliminary objection dated the 6th March 2023 is premised on three (3) grounds that:
 - a. The suit has not complied with Order 2 Rule 15 of the [Civil Procedure Rules](#) and should be struck out as against the 7th defendant.
 - b. The 7th defendant is wrong sued as it is not the registered owner of the suit land and the remedies sought cannot lie against it.
 - c. The suit against the 7th defendant is frivolous, a non-starter, a glare abuse of the court process and should be struck out with costs.



3. On the 6th March 2023, 9th May 2023 and 26th June 2023 directions on filing and exchanging submissions and or replies were given. Then on the 19th September 2023, the court directed that the two preliminary objections be determined first. The learned counsel for the 8th defendant, 7th defendant and plaintiffs filed their submissions dated the 15th April 2023, and 26th May 2023 respectively which the court has considered.
4. The two sets of preliminary objections raise the following issues for determinations by the court:
 - a. Whether the plaintiffs' suit is statute time barred.
 - b. Whether the plaintiffs have the locus standi to file this suit.
 - c. Whether the plaintiffs' suit discloses a reasonable cause of action.
 - d. Whether the orders sought by the plaintiffs can issue against the 7th defendant.
 - e. Who pays the costs in each of the two preliminary objections?
5. The court has carefully considered the grounds on the two notices of preliminary objection, submissions by the parties' counsel, superior courts decisions cited thereon, the pleadings filed and come to the following conclusions:
 - a. The record confirm that this suit was commenced through the plaint dated the 26th August 2015 as amended on the 13th March 2020. The plaintiffs at paragraph 7 of the plaint state that "they are the legal proprietors of the suit property no /35 Mainland South Shelly Beach and subdivisions Plot no M/S/V/78, M/S/V/79 (which is further subdivided into various Plot no 163, 164, 165, and 166), M/S/V/SO, M/S/V/81, M//S/V/82, M/S/V/83, M/S/V/84 and M/S/V/85 having inherited from original owner Salim Bin Makuto (deceased) their ancestral grandfather. At paragraphs 8 and 11 of the said plaint, the plaintiffs avers that they have authority from other beneficiaries to file this suit; that the subdivision and acquisition of the suit land by the defendants was unlawful and fraudulent. The particulars of fraud are set out at paragraph 11 of the plaint. The prayers sought includes inter alia declaratory orders that the plaintiffs are the lawful owners/proprietors of the suit property and any registration of interests thereof contrary to their interest is invalid, null and void; eviction order and permanent injunctions against defendants; order for defendants to surrender title documents; Land Registrar to cancel the unlawfully issued titles over the suit property and re-issue the same to the plaintiffs; order that judgement in PMCC no 2304 of 1993 remains valid and costs.
 - b. The 7th defendant opposed the plaintiffs' claim through their defence dated the 10th January 2023 inter alia denying that any of the plaintiffs or their relations have ever occupied the suit land, and are therefore strangers to the suit; that the 7th defendant is a bona fide purchaser for value of MS/Block V/83 and has been in actual possession for years without any objection being raised, and that the suit be dismissed with costs.
 - c. I have perused the record and though I have seen other documents filed by the 8th defendants including the witness statement of Kenneth Michael Levi, list of witnesses and documents, there is no statement of defence seen. If one has been filed the counsel should ensure the court copy and the filing receipt are placed on record.
 - d. What constitutes a ground to be raised in a preliminary objection is one that raises a pure point of law that if upheld would determine the application or suit before the court as was held in the celebrated case of *Mukisa biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] 696. Such a ground that raises a pure point of law would not require evidence



to be called or considered for it to be determined. Where the ground raised would require evidence to be called or taken before the court can make a determination, or where the court's discretion is sought for, then it does not qualify as a pure point of law and should not be raised through a notice of preliminary objection but preferably through an application supported by affidavit(s) and served upon the other party to also have an opportunity to present their evidence if any. Thereafter, after hearing the parties in the application, the court would make its determinations on the issues raised.

e. On the grounds of the suit being time barred and the plaintiffs' *locus standi*/capacity, raised by the 8th defendants, the learned counsel for the plaintiffs has in her submissions detailed the steps and litigations taken by the plaintiffs since 1993 to 2015 and disclosed that the plaintiffs obtained the grant of letters of administration dated 24th September 2001 and authority to file suit on behalf of other descendants dated the 18th May 2014. Those details are meant to be considered by the court in determining the questions of limitation and the plaintiffs' capacity to file and prosecute this suit. It clearly shows that evidence would need to be considered in the process of making a finding one way or the other. That evidence has to be provided by the parties herein which they have not done as the grounds were raised through notice of preliminary objection as opposed to application. It is only through evidence being tendered that the court will be in a position to make findings for example who is or has been in occupation of the suit land and or subdivisions thereof, when the subdivision of the suit land took place, when the titles and leases were issued.

f. That on the grounds of whether the suit raises a reasonable cause of action and whether the orders sought would lie against the 7th defendant who is not the registered owner of M/S V/83, the court is of the considered view that the issues would also need evidence to be presented before determinations are arrived at. These are not matters to be canvassed by only looking at the pleadings filed and submissions on the law. One of prayers sought through the amended plaint is of eviction which if granted would affect all those in occupation of the concerned parcels of land, even if they are not the registered proprietors thereof. It is also important to remember the provisions of Order 1 Rules 5 and 9 of the [Civil Procedure Rules](#) that provides that:

“ 5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

.....

9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

g. The above conclusions lead the court to the finding that the preliminary objections raised by the 8th and 7th defendants are without merit and should be rejected. That under section 27 the [Civil Procedure Act](#) chapter 21 of Laws of Kenya the costs should follow the events unless otherwise directed by the court on good cause. In this matter, I am of the view that justice will be served better by directing that costs in the two preliminary objections be in the cause.

6. In view of the foregoing determinations on the two preliminary objections, the court finds and orders as follows:



- a. That the preliminary objection by the 8th and 7th defendants have no merits as they would require evidence to be considered before determinations and are therefore rejected.
- b. That the costs in the two preliminary objections to be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 29TH DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the Presence Of:

Plaintiffs: M/s Chesaro.

Defendants: M/s Oluta for 8th Defendant, Ms Kiti for 17 & 18th Defendants.

Court Assistant – Wilson.

