



**Odida (Suing as the administratrix of the Estate of Ododa Majiwa) v
County Government of Migori & 2 others (Environment & Land Case
12 of 2023) [2023] KEELC 22532 (KLR) (29 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 12 OF 2023
MN KULLOW, J
DECEMBER 29, 2023**

BETWEEN

**MARIA ARIYO ODIDA PLAINTIFF
SUING AS THE ADMINISTRATRIX OF THE ESTATE OF ODODA MAJIWA**

AND

**COUNTY GOVERNMENT O MIGORI 1ST DEFENDANT
LAND REGISTRAR MIGORI 2ND DEFENDANT
NATIONAL LANDS COMMISSION 3RD DEFENDANT**

RULING

1. The 1st Defendant herein filed a Notice of Preliminary Objection dated 15th September, 2023 in response to the Plaintiff's suit premised on the following grounds: -
 - a. The suit herein is time barred for having been commenced outside the 12 years statutory period of limitation in light of section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - b. The Plaintiff's suit is in itself incompetent, bad in law, misconceived, frivolous, vexatious, fatally and incurably defective for having been filed out of time thereby rendering it an absolute abuse of the court process.
 - c. This Honorable Court lacks jurisdiction to hear and determine the suit for having been filed after the period of limitation had expired.
2. Consequently, they urged the court to dismiss the Plaintiff's suit with costs.
3. The Preliminary objection was canvassed by way of written submissions; both parties filed their rival submissions together with authorities which I have read and considered;



1st Defendant/ Applicant's Submissions

4. Mr. Olili, Counsel for the 1st Defendant/Applicant mainly submitted on whether the Plaintiff's suit was time barred by dint of section 3(1) of the [Public Authorities Limitation Act](#) and the section 7 of the [Limitation of Actions Act](#).
5. It was his submission that from a look at paragraph 7 of the Plaintiff; the alleged proprietor of the suit land died on 04/11/1977 and subsequently, the period of limitation started running from the date of his death and expired on 04/11/1989.
6. He further submitted that from the Plaintiff's annexed documents, she disclosed that the plot card in respect to the suit parcel was issued on the 29/01/1988. It was therefore his contention that the cause of action arose on the date when the said plot cards were allegedly issued to the plaintiff and he had until 29/01/2000 to bring an action for the recovery of any interest in the suit land.
7. It was also his submission that from paragraph 12 of the Plaintiff, the Plaintiff disclosed that she learnt of the Defendant's alleged intentions to alienate the suit property sometime in the year 2017. Thus, in light of section 3(1) of the [Public Authorities Limitation Act](#), the Plaintiff only had a period of 12 months from the year 2017 to bring any action against the 1st Defendant. Any resultant suit became time barred after the expiry of the said period run out.
8. He thus maintained that the plaintiff's suit was commenced outside the statutory period of limitation being 12 years and 12 months respectively. Consequently, the honourable court lacks the requisite jurisdiction to hear and determine the matter as filed. It was thus his claim that the court cannot grant the reliefs sought in a suit barred by law and urged the court to allow the Preliminary Objection and dismiss the Plaintiff's suit with costs.
9. Mr. Olili relied on the following cases in support of their claim; [Gathoni v Kenya Co-operative Creameries Ltd](#) (1982) KLR 104, [Dickson Ngige Ngugi v Consolidated Bank Ltd \(Formerly Jimba Credit Corporation Limited & another](#) [2020] eKLR, [Edward Moonge Lengusuranga v James Lanaiyara & another](#) [2019] eKLR, [Iga v Makerere University](#) [1972] EA and [Sohanaldurgadass Rajput & another v Divisional Integrated Development Programmes Co. Ltd](#) [2021] eKLR.

Plaintiff/ Respondent's Submissions

10. Mr. Oningo, Counsel for the Plaintiff, submitted on two main issues; whether the preliminary objection met the threshold of what amounts to a preliminary objection and whether the Plaintiff's suit is time barred.
11. On the first issue; it was his submission that a preliminary objection should neither deal with disputed facts nor derive its foundation from factual information which stands to be tested by rules of evidence. He submitted that there are contentious facts between the parties herein which may need to be ascertained on merit; for instance, the ownership of the suit parcel. That while the plaintiff contends that she is the owner of the suit land, the same having been allotted in the year 1982 and has been in actual possession and occupation of the parcel since then to date, the 1st defendant refuted the said claims and stated that the suit land was subdivided sometime in the year 2002 and allotted to its current owners.
12. To this end, counsel submitted that the 1st Defendant has clearly contested the facts as averred by the plaintiff in her pleadings and the court therefore has to determine the said facts on merit.



13. It was also his submission that the 1st defendant has raised a new ground of preliminary objection in its submissions dated 24/10/2023 contrary to the provisions of Order 51 Rule 14(1) (a) of the Civil Procedure Rules; that the suit is time barred pursuant to section 3(1) of the Public Authorities Limitation Act, the same has been improperly raised and he therefore urged the court to strike it out as the same has not been raised by way of notice to other parties.
14. He maintained that the plaintiff's claim against the defendants was based on fraud, given that they have arbitrarily began the process of subdividing the suit property.
15. On the second issue; counsel submitted that as stated in paragraph 13 of the Plaintiff; the plans of the 1st defendant of subdividing, alienating, allocating and/or disposing the suit land began sometimes in the year 2021. Upon such discovery, they lodged a complaint with the National Land Commission (3rd defendant) to inquire into the said actions, which complaint was received by the NLC on 3rd November, 2021. The 3rd defendant subsequently wrote a letter to the 1st defendant dated 28th June, 2022; the 2nd defendant and the surveyor were then instructed to investigate the allegations of land grabbing.
16. Counsel thus maintained that the cause of action that arose in the year 2021 was dealt with by the National Land Commission. However, the plaintiff only realized that subdivision and alienation was still ongoing sometimes in the year 2023, when she was approached by the 1st defendant. She then instituted the instant suit in May 2023, within the 12 months statutory period from 28/06/2022.
17. Further, it was his contention that the 1st defendant's acts of trespass into the plaintiff's land through various subdivisions and reallocations has been a continuous process.
18. It was his submission that the plaintiff's suit involves particulars of fraud which the plaintiff discovered in the year 2023 and thus section 7 of the limitation of actions act should not be read in exclusion of section 26 of the Act. Further, that the contentious matters could only be determined by both parties adducing evidence in support of their rival positions and consequently, the preliminary objection is not based on pure points of law.
19. In conclusion, he averred that the plaintiff's suit is well within timelines and the preliminary objection is therefore not sustainable; since the 12 years limitation period has not lapsed since the discovery of the acts of dispossession by the 1st defendant and further that 12 months have not lapsed since the plaintiff discovered that the 1st defendant was still ongoing with the acts of subdivision and reallocation.
20. He relied on the following cases in further support of their claim; *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, *Oraro v Mbaja* (2005) 1KLR 141, *Joseph Koech & another v County Government of Uasin Gishu & 3 others* [2022] eKLR, *Pius Kibet Tott v Uasin Gishu & 9 others* [2018] eKLR and *Republic v Eldoret Water & Sanitation Company Ltd ex-parte Booker Onyango & 2 others* (2007) eKLR.

Analysis and Determination

21. The sole issue for determination before me is whether the Notice of Preliminary Objection dated 15/09/2023 is merited.



22. The law on what constitutes a preliminary objection is now well settled. In the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 E.A. 696; the Court defined Preliminary Objection as follows;
- “...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”.
- (emphasis mine)
23. The Supreme Court in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR while addressing its mind on the issue of Preliminary Objection stated as follows:
- “Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”
24. The 1st Defendant has sought the dismissal of the Plaintiff’s suit on the ground that the same is time barred pursuant to the provisions section 7 of the *Limitation of Actions Act*. It is his contention that from a look at paragraph 7 of the Plaintiff; the proprietor died on 14/11/1977 and thus the limitation period started running upon his death and expired upon the lapse of 12 years.
25. It is further his claim that the cause of action arose when the plot cards were issued to the plaintiff sometimes on 29/01/1988 and thus the suit ought to have been filed by 29/01/2000.
26. The Respondent on the other hand dismissed the preliminary objection as not meeting the threshold of what amounts to a proper Preliminary Objection. It was his claim that there are contentious facts between the parties that may need to be ascertained on merit after a full evaluation of the evidence adduced in support of each position.
27. It was further his claim that as per paragraph 13 of the Plaintiff; the plans of the 1st defendant began sometimes in the year 2021 and maintained that his claim is primarily based on fraud. He outlined the steps he took in trying to resolve the dispute including reporting the matter to the National Land Commission (3rd Defendant). It was also his assertion that he later learnt that the plans by the 1st Defendant of subdivision and reallocation of the suit parcel were ongoing sometimes in the year 2023 hence the instant suit.
28. Section 7 of the *Limitation of Actions Act* provides that: -
- “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.”
29. It is also the 1st defendant’s claim that the suit is time barred on account of section 3(1) of the *Public Authorities Limitation Act*. However, I do note that this is a new ground which has been introduced at the submissions level but was not included in the grounds of preliminary objection. The Respondent urged the court to disregard the said ground and to strike it out since it was improperly raised at the submissions stage without notice to the other parties.
30. It is trite law that parties are bound by their pleadings, it is also not in dispute that this ground has only been introduced at the submissions level. Based on this fact alone, the new issue/ground raised at the submissions level should be disregarded. However, I will proceed and determine the same on merit since the same raises a point of law.



31. Section 3(1) of the *Public Authorities Limitation Act* states that: -
- “(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”
32. In order to clearly ascertain whether the suit as filed is indeed time barred, it is important to consider when the cause of action arose. The parties herein seem to differ on when the cause of action arose which in my view is a question of law. The Applicant contends that the cause of action arose when the proprietor died on 24/11/1977 and when the plot cards were issued to the plaintiffs in 29/01/1988. The Plaintiff on the other hand avers that the cause of action arose sometimes between the year 2021 and 2023.
33. According to the Black’s Law Dictionary 10th Edition at page 266, cause of action is defined as follows; -
- “a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”
34. The Court of Appeal in the case of *Attorney General & another v Andrew Maina Gitbinji & another* [2016] eKLR; Waki JA briefly defined cause of action as follows: -
- “a Cause of Action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”
35. The Plaintiff has maintained that his claim against the Defendants is on fraud and the cause of action arose sometimes between the year 2021 and 2023. I have looked at the Plaintiff critically and I have confirmed the averments made by the Plaintiff.
36. From a look at the plaintiff, it is clear that the cause of action arose in the year 2021 and the same is centered on the issue of an alleged fraudulent subdivision and allocation of the suit parcel. The Plaintiff has gone further to outline the various steps taken including reporting the dispute to the National Land Commission (3rd Defendant) with the view of solving the matter amicably and she adduced the various documents in support of the said claims. To this end therefore, I am persuaded by the argument put forward by the plaintiff and accordingly find that the cause of action arose in 2021 and was reported to the 3rd defendant but had continued until sometimes in the year 2023 when the Plaintiffs discovered that the defendants are still continuing with their fraudulent activities.
37. Owing to the foregoing, it follows that the plaintiff’s suit cannot be said to be time barred pursuant to section 7 of the *Limitation of Actions Act*; having found that the cause of action arose in the year 2021, 12 years have not lapsed since the cause of action arose. The Respondent has also urged the court not to read section 7 in isolation from section 26 of the *Limitation of Actions Act*.
38. Section 26 of the Act further provides that: -
- “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:

39. The Plaintiff/Respondent avers that he discovered the fraudulent actions of the defendants sometimes in 2021, he reported the same and lodged a complaint with the 3rd Defendant on 3/11/2021. The 3rd Defendant thereafter wrote a letter to the 1st Defendant on 28/6/2022; asking that the allegations of land grabbing be investigated. It is further his claim that he only learnt of the continued fraudulent acts of subdivision and alienation in the year 2023, when he was approached by the 1st defendant hence the instant suit.
40. While section 4 of the *Limitation of Actions Act* provides that an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued, section 26 of the Act outlines instances of continuing tort and provides that time starts running upon the discovery of the said fraudulent activities. It is the Plaintiff's claim that having reported the initial fraud to the 3rd defendant herein and an investigating thereto instigated by the 3rd defendant vide a letter dated 28/6/2022, it was his assumption that the issue had been addressed. He was however shocked to discover sometimes in the year 2023 that the said acts were still ongoing. He thus maintains that the cause of action amounts to a continuing tort and time started running in the year 2023 when he discovered the continued fraudulent acts by the defendants.
41. In *Gathoni v Kenya Co-Operative Creameries Ltd* [1982] KLR 104, Potter JA expressed himself 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.”
42. From a totality of the foregoing, it is not in dispute that there are contentious facts between the parties herein that can only be clearly ascertained upon full examination of facts and evidence that can only be adduced at the hearing of the suit. It is also well settled that the cause of action herein arose in the year 2021, the plaintiff outlined the various steps taken in trying to solve the matter and he later discovered that the alleged fraudulent activities were still ongoing sometimes in the year 2023. Upon discovery of the said acts by the defendants, the plaintiff lodged the instant suit, which is within a year after the discovery. It cannot therefore be said that the suit offends the provisions of section 3 (1) of the Public Authorities Limitations Act since 12 months had not lapsed since the discovery of the alleged fraudulent acts by the defendants.
43. In the circumstances, I find that the 1st Defendant's Preliminary Objection dated 15th September, 2023 is not merited and is accordingly dismissed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 29TH DAY OF DECEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

for the Applicant/1st Defendant

for the Respondent/ Plaintiff

Tom Maurice - Court Assistant

