



REPUBLIC OF KENYA



**Limangura v Palit & another (Environment and Land Case 28 of 2023)  
[2023] KEELC 22305 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22305 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 28 OF 2023  
FO NYAGAKA, J  
DECEMBER 19, 2023**

**BETWEEN**

**ELIZABETH LIMANGURA ..... PLAINTIFF**

**AND**

**JAMES PALIT ..... 1<sup>ST</sup> DEFENDANT**

**JOHN MWOK KOMOLKAT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

On a Preliminary Objection on *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya

1. The Plaintiff filed this suit on 09/06/2023. He claimed that the 1<sup>st</sup> Defendant was his younger step-brother from the same mother but different fathers, and the 2<sup>nd</sup> Defendant her cousin. She averred that the 1<sup>st</sup> Defendant was the registered owner of land parcel No. West Pokot/Kanyarkwat/‘B’/130 (herein also referred to as Parcel No. ‘B’/130) measuring approximately 44.0 hectares and the 2<sup>nd</sup> Defendant the registered proprietor of land parcel No. West Pokot/Kanyarkwat ‘B’/96 (herein also referred to as Parcel No. ‘B’/96) measuring about 31.5 hectares, which parcel was transferred to him by the 1<sup>st</sup> Defendant. She averred that her mother owned the two parcels of land and had them registered in the name of the 1<sup>st</sup> Defendant to hold them in trust for himself and the Plaintiff. Further, that the 1<sup>st</sup> Defendant maliciously and without her consent transferred parcel No. West Pokot/Kanyarkwat ‘B’/96 in favour of the 2<sup>nd</sup> Defendant.
2. She prayed for, among others, the relief that the Court finds that the 1<sup>st</sup> Defendant was registered as owner of land parcel No. West Pokot/Kanyarkwat ‘B’/130 in trust for himself and her in equal shares while the transfer of land parcel No. West Pokot/Kanyarkwat ‘B’/96 was illegal and void and that the title be cancelled and the land reverts to the 1<sup>st</sup> Defendant to be in trust for himself and her and thereafter the 1<sup>st</sup> Defendant transfers half thereof to her.



3. The Defendants denied all the allegations and put the Plaintiff to strict proof thereof. The 1<sup>st</sup> Defendant pleaded that their mother acquired a parcel of land in Kalenger in 1965 and subdivided it into two, giving one part to the Plaintiff and another to the 1<sup>st</sup> Defendant. Further, that the Plaintiff sold her parcel to one Koringinyiro Rwatachir (deceased). Further, that for him the portion of land given to him which he retained was registered in his name in 1984 when adjudication was conducted and concluded. It became registered as parcel No. West Pokot/Kanyarkwat 'B'/130.
4. He averred that with regard to parcel No. West Pokot/Kanyarkwat 'B'/96 he purchased it from one Mr. Arap Boit and Pselkech at an agreed price of Kshs. 3,000/= and three (3) cows, and that due to insecurity in the Kanyarkwat area he exchanged it with the 2<sup>nd</sup> Defendant's prime land in Lelan. They raised the Counterclaim of Adverse Possession against the Plaintiff, having been on the land from 1965 and 1984 to date.
5. The Plaintiff filed a Reply to Defence and Defence to Counterclaim. In the Pleading, she stated that the averments by the Defendants in paragraphs 5, 6, 7 and 8 of the Defence were pure semantics and for that she reiterated paragraphs 6, 7 and 8 of the Plaintiff.
6. It was in respect of the Plaintiff's claim that the Defendants raised a Preliminary Objection dated 13/07/2023. They raised five grounds. These were that (a) the suit offended the provisions of Section 7 of the Limitation of Actions Act, (b) the suit was filed after the end of 12 years from the date the alleged action accrued, (c) the 1<sup>st</sup> Defendant had enjoyed quiet possession of parcel No. West Pokot/Kanyarkwat/ 'B'/130 for 58 years since 1965 and he obtained title thereto in 1984, (d) the 2<sup>nd</sup> Defendant had had enjoyed quiet possession of parcel No. West Pokot/Kanyarkwat/ 'B'/130 for 39 years since 1984 and he obtained title thereto in 2004, and (e) the suit was bad in law and an abuse of the process of the court.
7. The Court called upon the parties to address it on the Preliminary Objection by way of submissions so that the Court would decide on it before anything else. This is because the hearing of a preliminary objection takes precedence over any other step: it is a jurisdictional issue to any court of law.
8. The Defendants began their submissions by summarizing the claim and Defence. They then argued that the cause of action in respect of parcel No. 'B'/96 arose in 1996 when the Plaintiff's mother died. Also, that the 2<sup>nd</sup> Defendant had been in quiet possession thereof since 15/12/2004. They submitted that the Plaintiff should have sued the Defendant(s) by 2008 and not later. They relied on Section 7 of the Limitation of Actions Act and also Section 20(2) of the Act in regard to a claim for a breach of trust in regard to the parcel of land.
9. Regarding parcel No. 'B'/130, they submitted that since the parcel was registered in 1984 in favour of the 1<sup>st</sup> Defendant both Sections of the law bar her from bringing such a claim.
10. On her part the Plaintiff having summarized the pleadings submitted that the position as contended by the Defendants about being in occupation of the land for the periods they averred is not opposed by her. Rather that Section 7 of the Limitation of Actions Act is not to be read in isolation but it should be read in conjunction with Section 20(1) of the Act. She submitted that the matter before the Court was one of breach of a trust as between three parties.
11. She relied on the decision of *Mae Properties Limited B. Joseph Kibe and Another* [2012] eKLR in which, she submitted, the Court dismissed a Preliminary Objection raised in relation to Section 7 of the Limitation of Actions Act as the claim was for a breach of trust. She also relied on paragraphs 833 and 834 of the Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 28 which explain the exclusion from protection in certain cases and Trustee's fraud respectively.



12. She cited the definition of fraud in *Blacks' Law Dictionary*, 9<sup>th</sup> Edition. She finally relied on the case of *Pan African Insurance Holdings Limited & Another V. Dickson Ngatia Gachuche* [2021] eKLR.
13. I have considered the Preliminary objection. In my view the first four limbs can be condensed into only one: does the suit offend the provisions of Section 7 of the *Limitation of Actions Act*?
14. With regard to the last limb of the Preliminary Objection about whether the suit is bad in law and an abuse of the process of the Court, I am of the view that the ground cannot pass for a preliminary objection because in order for one to determine whether or not the process of the Court has been abused, he/she has to consider a number of factual issues. This is not in line with determining a preliminary objection. For a preliminary objection to be one properly so called it has to fall within the definition of the *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 case. It has to be only on a pure point of law, and should only be discernible from only the pleadings.
15. In the *Mukisa case* (supra) the Court held:-
 

“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... 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.”
16. Without going deeper into citing more authorities that define a preliminary objection since the above definition is precise, I now turn to the issue before me. All I need to consider is the pleadings of the parties and compared them with the provisions of the law said to have been offended. The relevant parts of the Plaintiff, Defence and the Reply to Defence are paragraphs 6, 7 and 8 of the Plaintiff, paragraphs 4, 5, 6 and 7 of the Defence and Counterclaim and the 2 of the Reply to Defence and Defence to Counterclaim.
17. The Plaintiff pleaded that she is the elder sibling of the 1<sup>st</sup> Defendant, through the same mother. She alleged that their mother owned the two suit parcels of land and the 1<sup>st</sup> Defendant registered himself as owner thereof before transferring parcel No. West Pokot/Kanyarkwat 'B'/96 to the 2<sup>nd</sup> Defendant.
18. On the other hand, the 1<sup>st</sup> Defendant herein pleaded that his mother owned a larger parcel of land of which she divided into two and shared it between the Plaintiff and himself. That the Plaintiff sold her parcel while the 1<sup>st</sup> Defendant retained his which was registered in his name in 1984 and parcel No. West Pokot/Kanyarkwat 'B'/130 while he bought parcel No. 'B'/96.
19. Upon the Defendant pleading that the mother (his and the Plaintiff's) bought the land which was divided and given to the two siblings in 1965 and that the Plaintiff sold her portion while the 1<sup>st</sup> Defendant retained his portion which he later got registered in his name as parcel No. West Pokot/Kanyarkwat 'B'/130, the Plaintiff replied that his averment was only “purely semantics”. Thereafter she repeated paragraphs 6 of the plaintiff which was that their mother acquired two pieces, paragraph 7 that the suit properties were registered in the Plaintiff's name as trustee for the two, and paragraph 8 that the 1<sup>st</sup> Defendant transferred parcel No. 'B'/96 to the 2<sup>nd</sup> Defendant secretly and maliciously.
20. In my humble considered opinion, from the pleadings, the Plaintiff does not deny the averments by the 1<sup>st</sup> Defendant about the averment that upon the mother acquiring the land she divided it into two, gave



the Plaintiff and 1<sup>st</sup> Defendant, and that the 1<sup>st</sup> Defendant sold her portion to the individual alleged and that the remaining portion which became No. 'B'/130 was his specific portion upon that subdivision which was apparently done during the mother's life time. The Plaintiff also does not specifically deny the averment that parcel No. 'B'/96 was bought by the Plaintiff before it was sold to the 2<sup>nd</sup> Defendant. All she pleaded was that it was 'semantics'. I see no semantics in the Defendants' pleadings about the manner the suit land parcel No. 'B'/130 moved from the mother to the children or the acquisition of the other. In the circumstances I find difficulty in agreeing with the Plaintiff that the registration of the two parcels of land in favour of the 1<sup>st</sup> Defendant was in trust for himself and the Plaintiff. In any event there are no particulars of trust or breach thereof that the Plaintiff pleaded. I am afraid I cannot agree with her.

21. In line with my findings, I noted that both the Plaintiff and the 1<sup>st</sup> Defendant have written statements in which they allude to the fact that their late mother acquired the original parcel which gave rise to parcel No. 'B'/130 when the Plaintiff was already married. Regarding parcel No. 'B'/96 while they do not agree as to who bought or acquired it, it is agreed between them that it too came into the alleged ownership of either the mother or the 1<sup>st</sup> Defendant respectively way after the Plaintiff was married. In the circumstances, even assuming it was the mother who bought it, then Plaintiff's averment that the mother gave it to the 1<sup>st</sup> Defendant points to the same conclusion as for parcel No. 'B'/130 - it happened in the life time of the mother. It means further that if both parcels were given to the 1<sup>st</sup> Defendant during the mother's lifetime, there was a presumption of advancement. No trust would arise.
22. In the circumstances, her claim of part of the Defendants' parcels of land, being West Pokot/Kanyarkwat 'B'/130 and 96 respectively, in so far as it is in relation to parcels of land which were duly registered in the 1<sup>st</sup> Defendant's name and later the latter transferred to the 2<sup>nd</sup> Defendant's name, in 1984 and 2004 offends Sections 7 and 17 of the Limitation of Actions Act. It is being made against the owners after the expiry of a period of 12 years from the time the cause of action, if any, accrued. In terms of those provisions, no claim as such may be brought after the expiry of 12 years.
23. I am alive to the fact that the Plaintiff claims that the 1<sup>st</sup> Defendant, whether in the current registration of parcel No. 'B'/130 in his name or parcel No. 'B'/96 in his name and then subsequently in the name of the 2<sup>nd</sup> Defendant was due to a trust. I have indicated above that the particulars of trust and breach thereof were not pleaded. Even then, it is clear to me that from the pleadings the mother "gifted" or gave the ownership of the parcel of land No. 'B'/130 to the 1<sup>st</sup> Defendant by way of presumption of advancement. Since the transaction was done and completed in the lifetime of the mother, and there was no indication whatsoever that it was a trust being created in favour of the 1<sup>st</sup> Defendant and the Plaintiff, the presumption of advancement takes precedence. Therefore, the Plaintiff cannot be held to be properly claiming by way of a trust property which became the Plaintiff's in the lifetime of the mother (now deceased).
24. In the circumstances, the Preliminary Objection succeeds. The Plaintiff's suit is herein dismissed with costs to the Defendants. The matter shall be mentioned on 23/01/2024 for further directions.
25. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 19<sup>TH</sup> DAY OF DECEMBER, 2023.**

**HON. DR. JUR NYAGAKA**

**JUDGE, ELC KITALE**

