



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**ELC CASE NO. 1 OF 2015**

**JERVASIO NYAGA NJAGI.....PLAINTIFF**

**VERSUS**

**PATRICK NGARI NJERU.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, SIAKAGO LAND REGISTRY....2<sup>ND</sup> DEFENDANT**

**RULING**

On 7th January 2015 the plaintiff herein suing as the legal administrator of the Estate of **NJAGI NJERU** Alias **MBUCHI BARAGU** (deceased) filed this suit seeking judgment against the defendants jointly and severally in the following terms:-

- a. An order that the 2nd defendant cancel the title for land parcel No. EMBU/KITHUNTHIRI/1477 in the name of 1st defendant and the said title do revert to the Estate of the deceased.*
- b. An eviction order against the 1st defendant from land parcel No. EMBU/KITHUNTHIRI/1477.*
- c. Costs and interest of this suit.*
- d. Interest on (c) and (d) (sic) above at Court rates.*
- e. Any further relief which the Honourable Court may deem fit and just to grant.*

The basis of the claim is that at all time relevant to this suit, the deceased was the registered owner of the land parcel No. EMBU/KITHUNTHIRI/1477 (the suit land). However, on or about August 2014 after the plaintiff had obtained a grant of letters of administration in respect of the Estate of the deceased and was in the process of distributing the same, he discovered that the 1st defendant had fraudulently acquired the title to the suit land. Particulars of fraud are pleaded in paragraph 7 of the plaint.

The 1st defendant filed a defence in which he pleaded, inter alia, that **NJAGI NJERU** and **MBUCHI BARAGU** are two different persons and **NJAGI NJERU** is not deceased and neither has **MBUCHI BARAGU** ever been the lawful registered owner of the suit land. The 1st defendant pleads further that the title deed to the suit land was issued to him on or about 27th February 2013 and is indefeasible and he is a stranger to the particulars of fraud. The 1st defendant further pleads that this Court lacks jurisdiction and a Preliminary Objection would be raised in limine.

A Notice of Preliminary Objection was filed by the defendant in which he seeks the striking out of this suit on the following grounds:-

**1. That the plaint does not lie by virtue of Articles 25, 50 and 157 of the Constitution and Section 351 and 353 of the Penal Code.**

**2. The plaint herein is time barred and does not lie in law by virtue of Section 7 of the Limitation of Actions Act.**

That Preliminary Objection is the subject of this ruling and submissions have been filed both by the firm of Lee Maina Advocates for the plaintiff and Onyoni Opini and Gacuba Advocates for the 1st defendant. The 2nd defendant has not filed any pleadings or submissions.

I have considered the Preliminary Objection. I have also considered the submissions by counsel.

The starting point must surely be the definition of what amounts to a Preliminary Objection and this was given in the leading case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696** where **Sir CHARLES NEWBOLD** held as follows:-

***“A Preliminary Objection is in the nature of what used to be a demurer. 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”***

In the same case, **LAW J.A** stated that:-

***“A Preliminary Objection consists of a point of law which has been pleaded or which arises from a 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”***

And in **ORARO VS MBAJA 2005 1 K.L.R 141 OJWANG J** (as he then was) described a Preliminary Objection in the following terms:-

***“A Preliminary Objection correctly understood is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed”***

I have considered this Preliminary Objection in light of the above principles. I must confess that I do not see how the provisions of **Articles 25, 50 and 157 of the Constitution** or **Section 351 and 353 of the Penal Code** are relevant in this application. **Article 25 of the Constitution** deals with fundamental rights which shall not be limited. **Article 50 of the Constitution** provides for fair hearing and **Article 157** deals with the office of the Director of Public Prosecution. I do not see the relevance of those Constitutional provisions in this Preliminary Objection. Is the 1st defendant suggesting that his right to a fair hearing has been infringed upon? This case is yet to be heard and determined.

And with regard to the provisions of the **Penal Code** cited which are **Sections 351 and 353**, they provide for the punishment for the offence of forgery and altering a forged document respectively. Again, I do not see the relevance of those provisions. If they have been cited to demonstrate that the 1st defendant has not yet been convicted for the offence of forgery or altering a forged document, all that I can state at this point is that the allegations of fraud levelled against the 1st defendant will be proved at the trial on the required standard and the mere fact that fraud has been alleged does not mean that a finding has been

made on that.

The citing of those Constitutional and legal provisions is clearly out of context.

The second ground is that this suit is time barred by virtue of **Section 7 of the Limitation of Actions Act**. That Section reads:-

***“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 occurred to him or, if it first accrued to some person through whom he claims, to that person”.***

With regard to this ground, counsel for the 1st defendant has submitted that the suit land was gifted to **NJAGI NJERU** in 1972 who became the registered owner and so this suit is statute barred in terms of **Section 7 of the Limitation of Actions Act**. On the other hand, the plaintiff has pleaded that **NJAGI NJERU** and **MBUCHI BARAGU** are one and the same person and that in August 2014, the plaintiff discovered that the suit land had fraudulently been registered in the 1st defendant's names. Whether **NJAGI NJERU** and **MBUCHI BARAGU** are one and the same person or not or whether the suit land was in fact gifted to **NJAGI NJERU** in 1972 are matters for trial. Most importantly, if indeed there was any fraudulent registration of the suit land in the names of the 1st defendant in 2014, then by virtue of the provisions of **Section 26 of the Limitation of Actions Act**, the period of limitation would not begin to run until the plaintiff discovered the fraud or could, with reasonable diligence, have discovered it. The plaintiff, by paragraph 6 of his plaint, alleges that he discovered the fraud in the month of August 2014 when he was in the process of distributing the Estate of the deceased. That is the time, therefore, that the limitation period would begin to run and since this suit was filed in January 2015, it is well within the limitation period. The Preliminary Objection that this plaint is time barred is therefore not well founded.

The 1st defendant has also pleaded in paragraph 26 of his defence that this Court has no jurisdiction. Looking at the pleadings herein, it is not clear in which way this Court's jurisdiction can be questioned. I can only conclude that this was not a serious pleading.

The Preliminary Objection raised by the 1st defendant is clearly without merit. If I may refer again to the words of **Sir NEWBOLD** in the case of **MUKISA BISCUIT** (supra), this is one example where the defendant has resorted to ***“improper raising of Preliminary Objections that do nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”***.

The 1st defendant's Preliminary Objection is hereby dismissed with costs to the plaintiff.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**

Ruling delivered, dated and signed in open Court this 9<sup>th</sup> day of June 2016.

Mr. Andande for Mr. Lee Maina for Plaintiff present

Mr. Gachuba for the 1<sup>st</sup> Defendant absent.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**