



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

ELC CASE NO. E12 OF 2020 (OS)

JAMES MWANGI MAINA.....1ST PLAINTIFF
JOHN MUIRU MWANGI.....2ND PLAINTIFF
STANLEY KIMANI MWANGI.....3RD PLAINTIFF
SOLOMON MAINA MWANGI.....4TH PLAINTIFF

VERSUS

THE LAND REGISTRAR OF MBEERE DISTRICT.....1ST DEFENDANT
NJUKI MARANGA, THE ADMINISTRATOR OF
THE ESTATE OF MARINGA KIBISHO.....2ND DEFENDANT

RULING

1. This is a ruling on an amended preliminary objection dated 15.6.2021 and filed on 2. 11. 2021 by the 2nd defendant. The objection targets the suit as filed. It is premised on four (4) grounds as follows:-

- i) The suit offends Section 7 of the Limitations of Actions Act, Laws of Kenya.*
- ii) This Honorable Court lacks the jurisdiction to hear and determine this matter.*
- iii) This suit is misconceived, mischievous, frivolous, vexatious, bad in law and amounts to an abuse of the court process.*
- iv) This suit ought to be dismissed with costs for want of jurisdiction.*

2. The parties in the suit are **JAMES MWANGI MAINA, JOHN MUIRU MWANGI, STANLEY KIMANI MWANGI** and **SOLOMON MAINA MWANGI** as the Plaintiffs, while **THE LAND REGISTRAR OF MBEERE DISTRICT** and **NJUKI MARANGA**, who is on board as **THE ADMINISTRATOR OF THE ESTATE OF MARINGA KIBISHO**, are the Defendants. In the suit, the 1st plaintiff had sought to be registered as owner of 6 acres of land to be excised from land parcel NTHAWA/RIANDU/619. The 1st plaintiff claimed to have purchased the land in 1978 from Maringa Kibisho, the vendor. According to him, he had paid the full purchase price of the land to the vendor, who in turn gave him the original title to carry out subdivision of the land for purposes of excising the 6 acres from it and facilitating the transfer of the land. It is alleged that before the transfer could be effected the vendor died in the year 1986, which death is said to have halted the transfer process.

3. The 1st plaintiff averred that as a result he placed a caution on the land and even notified the vendor's family of the sale through a meeting chaired by the chief in 1993. The family undertook to commence succession proceedings in order to effect the transfer. The 2nd defendant and other representatives are said to have been summoned by the area chief and the DO but ignored such summons. It is the 1st plaintiff's assertion that Succession was never commenced but instead the family had fraudulently caused the publication of a notice vide Kenya gazette on 6.11.2020 seeking replacement of lost title and registration of the 2nd defendant as proprietor of the suit parcel of land.

4. The plaintiffs alleged that the succession cause in favour of the Estate of Maringa Kibisho did not exist and that the defendants had

conspired to defeat his proprietary interest in the land. The plaintiffs stated that they have raised an objection with the 1st defendant against registration of the transmission but the 1st defendant is alleged to have stated intentions to proceed with the registration of the transmission, the objection notwithstanding. According to the plaintiffs the 2nd defendant and his family are hostile to them and have not allowed them to take possession of the suit property.

5. The preliminary objection was canvassed by way of written submissions. The 2nd defendant filed his submissions on 1.7.2021. On whether the suit was filed within statutory time, he submitted that the suit was filed out of time and that it offends the provisions of sections 7, 13, 16, 17 and 38 of the Limitations of Actions Act. Reliance was made on the provisions of the said sections and, according to the 2nd defendant, the combined effect of these sections is that an action for claim of land must be brought within 12 years.

6. It was stated that the plaintiff claims to have purchased land from the deceased father in the year 1978 and the present suit was filed in the year 2020 which is 42 years from the time of purchase. It is contended that as at the time of filing the suit, the deceased had already allocated the suit land to his family in the year 1986. It is further submitted that the 2nd defendant, as administrator of the Estate of his late father, had already started the process of transmission of the suit to the beneficiaries when they realized a restriction had been registered on the suit land.

7. The 2nd defendant reiterated that a claim on recovery of land should be filed within 12 years and it was argued that filing the suit 42 years later was tantamount to an abuse of the court process. In support of the case reliance was made on the cases of **WANYOIKE V KAHIRI [1979] KLR** which cited with authority the case of **WILSON NJOROGE KAMAU VS NGANGA MUCERU KAMAU [2020] EKL** where it was decided that the period of limitation starts to run on the date of payment of the last installment of the purchase. Reliance was also made on the cases of **GATHONI V KENYA COOPERATIVE CREAMERIES LTD [1982] EKL** where the court determined that the essence of limitations of actions was to protect defendants' against unreasonable delay in bringing suits. The 2nd defendant further relied on the cases of **IGA VS MAKERERE UNIVERSITY [1972] E.A 65** which cited with authority the case of **(HARON ONYANCHA V NATIONAL POLICE SERVICE COMMISSION & ANOTHER [2017] EKL) AND THE CASE OF LAW, AG V P.**

8. The court was urged to dismiss the plaintiff's suit with costs by virtue of being filed out of time. It was said to be time-barred.

9. The plaintiffs filed their submission on 23.7.2021. On whether the suit offends the provisions of Section 38 of the Limitation of Actions Act, they submitted that their suit was not based on adverse possession. They pleaded that the plaintiff is a bonafide purchaser of 6 acres of land excised from land parcel Nthawa/Riandu/619. The plaintiffs said they filed the suit by way of Originating Summons pursuant to Order 37(3) of the Civil Procedure Rules which, according to them, allowed a purchaser to commence their proceedings by way of Originating Summons.

10. According to the plaintiffs, the 2nd defendant had misconceived their case and that had been the reason why they had moved to amend the preliminary objection. It was argued that the provisions of Section 38 of the Limitation of Actions Act provided for the process of filing a suit based on adverse possession and reliance was placed on the Court of appeal case of **MTANA LEWA VS KAHINDI NGALA MWAGANDI [2015]EKL** which gave a definition for adverse possession.

11. They further submitted that sections 7, 13, 37 and 38 of the Limitations of Actions Act apply to the doctrine of adverse possession, which they contended did not apply to their case. Reliance was made on the case of **BENJAMIN KAMAU MURMA & OTHERS VS GLADYS NJERI, CA NO. 213 OF 996** and the writings in the book **LAND LAW AND CONVEYANCING: PRINCIPLES AND PRACTICES ON PAGE 174 AND 181**. It was reiterated that the suit did not offend the provisions of Section 38 of the Limitations of Actions Act and the preliminary objection was said to be misconceived. The court was urged to dismiss it with costs.

12. On whether the suit offends the provisions of Section 7 of the Limitations of Actions Act, it was argued that the suit did not offend the said provision which provides that an action to recover land has a limitation of 12 years. It was submitted that Section 3 of the said Act gave the court discretion to extend time in cases of disability, acknowledgment, part payment, fraud, mistake and ignorance of material facts. The 1st plaintiff deposed that he had taken steps to ensure he acquired the 6 acres he had purchased from the deceased vendor's estate which included placing a caution on the land, filing a suit against the 2nd defendant, and seeking the intervention of the area chief, all to no avail.

13. According to the plaintiffs, the 2nd defendant had all along avoided instituting succession proceedings in a bid to defeat the 1st plaintiff's right to the purchased land. Instead the 2nd defendant is accused of causing gazettment for lost title to the suit parcel of land under Succession cause no. 20 of 2009 yet the government printers had confirmed by way of letter that they had not published any Succession cause in favour of the Estate of Maringa Kibisho.

14. According to the plaintiffs, Section 26 of the Limitation of Actions Act allows the court to exercise discretion to allow cases of fraud and/or mistake and time starts to run from the date of discovery of the fraud or mistake. To put this point across, they cited Section 26 of the Limitation of Actions Act and the Court of Appeal case of **MTANA LEWA VS KAHINDI NGALA MWAGANDI [2015] EKL** and the case of **ALBA PETROLEUM LIMITED VS TOTAL MARKETING KENYA LIMITED (2019) EKL**. It was submitted that the plaintiffs are not time barred as the fraud and/or mistake was discovered on 6th November 2020 and the case was filed in December 2020.

15. The plaintiffs are of the view that the facts of the case can only be determined when the matter goes to full trial. In support of this they relied on the case of **VICTORY FAITH MINISTRY & ANOTHER VS JOHN ROTE MUSWANYI & 5 OTHERS**. It was also submitted that the plaintiffs' suit was filed within time pursuant to section 26 of the Limitation of Actions Act.

16. On whether the court has jurisdiction to hear and determine the matter, it was submitted that Article 162 of the Constitution, as read with Section 13 of the Environment and Land Court Act, gives the court powers to hear and determine land and environment matters.

17. The plaintiffs further submitted that the suit was not res judicata and has never been heard on merit. They relied on the case of

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION VS MAINA KIAI & 5 OTHERS (2017) EKLR which set out the elements to be met for a case on res judicata. The suit in Meru Civil Application No. 48 of 1993 instituted by the 1st plaintiff against the 2nd defendant was said not to have been determined on merit and that the parties were not litigating on the same title as the suit herein. The plaintiffs reiterated that the suit had been filed within time and that the court had jurisdiction to hear and determine the matter. Ultimately the preliminary objection was said to lack merit and the court was urged to dismiss it with costs to the plaintiffs.

18. The 2nd defendant in reply to the plaintiff's submissions filed supplementary submissions on 15.11.2021. He relied on his earlier submissions and reiterated that the suit ought to have been commenced within the time prescribed under Section 7 of the Limitation of Actions Act, failure to which any cause of action arising from the transaction stood time barred.

19. With regard to Section 26 of the Limitation of Actions Act which the plaintiffs had relied on, it was argued that the plaintiffs had not pleaded fraud and the matter before the court was therefore not one where fraud was pleaded. To put this point across the 2nd Defendant relied on the case of **DICKSON NGIGE NGUGI VS CONSOLIDATED BANK LTD (FORMERLY JIMBA CREDIT CORPORATION LIMITED & ANOTHER [2020])**. It was further argued that there was no particularization of fraud against the 2nd defendant so as to merit extension of time from filing of the suit outside the 12 year prescribed period. In support of this, the 2nd defendant relied on the case of **VIJAY MORJATIA VS NANSINGH MADHUSINGH DARBAR & ANOTHER [2000] EKL**R and eventually submitted that the court lacks jurisdiction to entertain the suit at hand.

20. It was submitted that the 1st plaintiff had been aware that the 2nd defendant and his family were in possession of the land but filed the suit without seeking leave for extension of time. The 2nd defendant relied on the case of Beatrice Wambui Kiarie Vs Beatrice Wambui Kiarie & 9 others [2018] Eklr and the case of Nation Media Group Limited & 2 Others Vs Margaret Kamene Wambua [2021] Eklr. In both matters the court is said to have dismissed the suits for failure to seek extension of time to file the suits outside the twelve year period.

21. Further reliance was made on the case of Bosire Ongero Vs Royal Media Services [2015] Eklr where it was held that if a matter is statute barred, then the court has no jurisdiction to entertain it. The 2nd defendant reiterated that the suit is time barred under the Limitations of Action Act and prayed for the court to dismiss it with costs to the 2nd defendant.

22. I have considered the objection as raised, the submissions by the parties and the suit as filed. *What constitutes a Preliminary Objection is set out in the case of MUKISA BISCUIT MANUFACTURING CO. LTD –VS- WEST END DISTRIBUTORS LTD (1969) EA 696*, where it was held that:

“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.”

23. The 2nd defendant has raised four grounds of objections. The Mukhisa case mandates that for a ground to suffice as a preliminary objection, the said ground should raise a pure point of law. I have looked at the four grounds and to me, grounds 1, 2 and 4 are grounds of law. Ground 3 on the other hand urges the court to make a finding that the suit is misconceived, mischievous, frivolous, vexatious, bad in law and amounts to an abuse of the court process. For a court to make such a determination, it needs to carefully analyse the pleadings and call evidence to establish whether the suit is indeed vexatious or frivolous.

24. In the case of **WINNIE NJERI KARIUKI V CONSOLATA WANGECHI MURIUKI & 4 OTHERS [2015] EKL**R the court was called upon to determine a preliminary objection on grounds that a suit was frivolous and vexatious. The court stated as follows;

“Similarly, the Court ought to consider the pleadings and evidence before a determination that the Plaintiff as drawn against the 5th Defendant is frivolous, vexatious and scandalous can be made. The preliminary objection dated 4th November 2014 does not raise pure points of law and requires the court to make a determination on facts which are in dispute. This can only be done after hearing the parties at the trial when the witness give evidence and are cross-examined”.

I share in the same reasoning as in the above decided case and guided by the Mukhisa case I find that ground 3 is not one that suits to be a ground for a preliminary objection.

25. The remaining grounds raised for objection, are that the suit offends Section 7 of the Limitations of Actions Act, hence the Court lacks the jurisdiction to hear and determine the matter and finally that the suit ought to be dismissed with costs for want of jurisdiction. Grounds 2 and 4 of the preliminary objection, though raised as different grounds, focus on the court's jurisdiction to hear the matter. I shall therefore determine them as one.

26. Before I determine the grounds of objection alluded to above, my attention is drawn to the plaintiff's submissions in which he extensively submitted, among other things, that the suit did not offend the provisions of Section 38 of the Limitation of Actions Act and that the suit was not res judicata Meru Civil Application No. 48 of 1993.

27. I have perused the grounds of objection raised and noted that the objection regarding the suit contravening the provisions of Section 38 of the Limitations of Actions Act had been raised in the initially filed preliminary objection. It is worth pointing out that the 2nd defendant made an application for amendment of the objection which the court allowed for removal of that ground and the said ground therefore ceased being a ground for consideration. Also on the issue of res judicata, the same was not raised in the preliminary objection. I will therefore not

consider the said grounds but will restrict myself to the grounds raised in the preliminary objection and not otherwise.

28. I think it is useful for me to begin by capturing a crucial bit of the reasoning in Mukhisa's case (Supra). That crucial bit is as follows:

"... 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 can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In several latter cases, this important observation has been reiterated in same words. This, for instance, is to be seen in the case of MUIRURI Vs KIMEMIA (2002) 2 KLR 677 and also in SIRMA Vs KIPRONO [2005] 1 KLR 197.

29. From all this, it seems to me clear that a preliminary objection should, first and foremost, be based on a pure point of law. Secondly, the facts on which it is premised should not be contested. It requires to be based either on admitted facts or at least on aspects of pleadings that are not contentious. Finally, even assuming that the first two requirements are met, it still improper to raise a preliminary objection if what the plaintiff is seeking is the exercise of court's discretion.

30. It is important to appreciate in this regard what a demurrer is:

Blacks Law Dictionary, 9th Edition at page 498 defines it as follows:

"A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer ..."

And in Concise Oxford English Dictionary, 12th Edition at page 382, the same word is defined as follows:

"an objection granting the factual basis of an opponent's point but dismissing it as irrelevant or invalid ..."

31. From the definition above, it is clear that a demurrer assumes the truth of the material facts alleged in the plaintiff's suit. It can not be based on denied facts because such facts obviously require proof at the trial of the action.

32. A question then arises as to whether this is the situation that obtains in the case at hand. The suit herein was filed by way of originating summons and it is clear that the plaintiffs claim is based on ownership of land through purchase. The 2nd defendant would have us believe that the suit is based on adverse position but its clear that this is something he has created and proceeded to base his preliminary objection on. The plaintiff's suit does not make reference to adverse possession at all.

33. I have looked at the 2nd defendant's response to the originating summons. This came via a 32-paragraph replying affidavit dated 22/2/2021 filed on the same date. At paragraphs 7, 8, and 21 of that replying affidavit, the 2nd defendant is un-equivocally denying the alleged purchase of the land by the plaintiff. It follows then that he can not also base a preliminary objection on this as he has denied the alleged purchase.

34. But may be an argument could be raised that the 2nd defendant objection is based on the running of time. Even on this score, the 2nd defendant would be wrong. He sets his own starting point concerning the running of time and proceeds to argue that the plaintiff's suit is caught up by the statute of limitations. The plaintiff however has a different view. He is not in agreement with the 2nd defendant as to when time began to run. This issue too is therefore a point of contention and the 2nd defendant therefore can not base a preliminary objection on it. It is an issue that the court needs to determine at the end of trial.

35. The point I am making is that there is no proper preliminary objection before me and the 2nd defendant is wrong to bring a preliminary objection that does not qualify to be one in law. He has completely misapprehended what a preliminary objection is, or should be.

36. I may add, as an aside, that the 2nd defendant appeared uncertain on the issue of the objection that he set out to raise. As pointed out earlier, he brought an objection based on Section 38 of the Limitation of Actions Act (cap 22, Laws of Kenya). That section is essentially about adverse possession and as I have already pointed-out, the suit before this court is not premised on adverse possession. The plaintiff himself has already pointed this out in his submissions.

37. Later on however, the 2nd defendant changed tact and filed an amended preliminary objection, this time based on Section 7 of the Limitation of Actions Act. But the confusion on the part of the 2nd defendant is more manifest in the submissions filed in support of the objection. Quite apart from the fact that the amended notice of objection served on the plaintiffs mentioned only Section 7 of Limitations of Actions Act, the submissions mentioned more sections – notably Sections 13, 16, and 17 – also allegedly violated alongside Section 7. Question is: Why were these Sections not brought to the attention of the plaintiffs in the amended notice of preliminary objection? But that is not all: The 2nd defendant also submitted extensively on the issue of adverse possession, in the process quoting various case law on the issue. It bears repeating: The suit herein is not based on adverse possession. It is clear that the entire preliminary objection is based on a false premise namely: The premise of adverse possession.

38. I think I have said enough now to show that the objection before me now does not qualify to be one and even if one were to assume that it is one, then it is based on a false premise. The upshot is that the preliminary herein is one for dismissal and I hereby dismiss it with costs to the plaintiffs.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **15TH DAY** of **FEBRUARY, 2022**.

In the presence of M/s Osieno for plaintiffs; Ms. Njenga (AG's office) for 1st defendant, Nzioka (absent) for 2nd defendant and in the absence of the rest of the parties.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

15.02.2022