



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO 25 OF 2020

JOHN OKAYANA SABATIA.....APPELLANT

VERSUS

BARNABAS GITARI MUGAMBI.....1<sup>ST</sup> RESPONDENT

KAARI GITARI MUGAMBI.....2<sup>ND</sup> RESPONDENT

**(Being an appeal from the Ruling and order of Hon B M Ekhubi PM IN CMCC NO 12 OF 2019 THIKA delivered on the 30/4/2020)**

**RULING**

1. The Respondents instituted their suit **Thika Chief Magistrate's Court MCL&E No. 12 of 2019** vide a plaint dated 28/11/2018 against the Appellant for orders *inter alia* that; an order for eviction of the defendant from the suit property known as THIKA MUNICIPALITY/BLOCK 7/149 and a declaration that the suit property is legally owned by the plaintiff. Contemporaneous to filing the Plaint, the Respondents filed a Notice of Motion Application of even date seeking vacant possession of the suit property pending determination of the suit.

2. Naturally, the Appellant was served and fervently opposed the said Application and suit. Further he filed a notice of Preliminary Objection dated 15/8/2019 impugning the trial Court's jurisdiction to hear and determine the suit. The gist of the objection was that the suit was statute barred by dint of Section 7 of the Limitation of Actions Act (LAA).

3. Upon hearing both parties, the Court considered the Preliminary Objection, found it unmerited and dismissed it on 30/4/2020. Dissatisfied with the outcome, the Appellant preferred the instant appeal. He filed his memorandum of appeal dated 5/6/2020 pursuant to leave to file out of time of this Court granted on 4/3/2021 on ground that;

**a. The learned trial Magistrate erred in law and in failing to find that by dint of the provisions of Section 7 of the LAA, he lacked jurisdiction to hear and determine Thika CMELC Case No. 12 of 2019 Barnabas Gitari Mugambi & Anor. Vs John Okayana Sabatia the same having been filed after the lapse of 12 years since the cause of action arose.**

**b. The learned trial Magistrate erred in law in considering factual issues raised in the Appellant's defence which factual issues were not raised in the Appellant's Notice of Preliminary Objection.**

**c. The learned trial Magistrate erred in law in finding that the Appellant was invoking the provisions of Order 1 of the Civil procedure Rules yet the Appellant in his Notice of Preliminary Objection crystal clearly invoked Section 7 of the LAA.**

**d. The learned trial Magistrate erred in law and in fact in failing to award the Appellant the costs of the Notice of Preliminary dated and filed on 15/8/2019.**

4. The appeal was admitted for hearing on 3/11/2021. On the same date, directions were taken to canvass the appeal by way of written submissions.

5. The firm of **Musyoki Mogaka & Company Advocates** filed submissions dated 4/11/2021 on behalf of the Appellant. The Appellant drew two issues for determination; whether the Preliminary Objection dated 15/8/2019 is merited and who should bear costs. He submitted that since the cause of action arose in 2005, the suit was barred by dint of Section 7 of LAA. That the plaint was filed on 16/1/2019, 14 years later and therefore a claim for recovery of land cannot be sustained. He also faulted the trial Court for considering issues of ownership and joinder/misjoinder that are factual in nature as opposed to the pure point of law they raised.

6. On the issue of costs, the Appellant argued that costs follow events. Urging this Court to allow the appeal and uphold the Preliminary Objection, the Appellant prayed for costs in both the appellate and trial Courts. Reliance was placed in the cases of **Gathoni Kenya v Kenya**

**Co-operative Creameries Ltd [1982] eKLR, Wines & spirits Lenya Ltd & Anor. V George Mwachiru Mwango ([2018] eKLR and Nelson Machoka Keraro v Land Registrar Kisii & 3 others [2019] eKLR.**

7. Conversely, the Respondents filed submissions dated 5/12/2021 through the firm of **Rosemary Monyangi & Company Advocates**. The Respondents narrated the background of the trial Court suit and maintained that parties are bound by their pleadings. That Section 7 of the LAA does not bar the suit and cited Article 40 Constitution of Kenya on the right to own and enjoy property. They beseeched the Court to dismiss the appeal with costs on the basis of the persuasive authority of **Rose Kule Ndubi v Harriet Muthoni Kinyinga & 2 others [2021] eKLR**.

#### **Analysis & Determination**

8. The germane issue for determination is whether this appeal is merited.

9. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in **Selle & another v Associated Motor Boat Co. Ltd. & others (1968) EA 123** in the following terms:

**“I accept counsel for the Respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”**

10. The guiding parameters for this Court are therefore, on first appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first appellate Court must bear in mind and give due allowance to the fact that the trial Court had the advantage of seeing and hearing the witnesses testify before her; and lastly it is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.

11. This is an interlocutory appeal whereby none of the parties had testified. The trial Court's Ruling was based on the pleadings before it. The preliminary objection disputed the Court's jurisdiction on account of statute bar as contained in Section 7 of the LAA that:-

#### **“7. Actions to recover land**

**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.”**

12. The considerations of a valid preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**. At page 700 Law JA stated:

**“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.”**

13. At page 701 **Sir Charles Newbold, P** added:

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”**

14. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

15. In the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR** the Court in determining a Preliminary Objection challenging an application for extension of time to file a notice of appeal, reiterated that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.

16. Applying the above tests, I will now consider the Preliminary Objection as follows;

17. Opposing the Preliminary Objection, the Respondents filed a replying affidavit sworn by Barnabas Gitari Mugambi on 11/9/2019. They

pointed out that Section 7 of LAA applied to claims of ownership under the doctrine of adverse possession. That the Appellant in Paragraph 35 of his Replying Affidavit sworn on 15/8/2019 was clear that he had no claim on the suit property. If this be the case then what would be the basis of an objection of such a nature. Additionally, the Respondents contended that the Appellant had not enjoyed uninterrupted quiet possession of the suit property for the required period of 12 years. Relevantly, at **para. 12** of the Replying Affidavit, the 1<sup>st</sup> Respondent was categorical that he had title over the suit property.

18. The question that arises is whether the Appellant's objection was a pure point of law. **Paragraph h** of the plaint dated 28/11/2018 is explicit that the cause of action arose in 2005 when the Appellant allegedly trespassed on the suit property. A copy of green card attached to the Respondents' List of Documents dated 28/11/2018 shows that indeed a restriction was registered on the suit land in the same year- see page 5 of the Record of Appeal. The Appellant himself at para. 4 of his defence dated 15/8/2019 stated that the suit land is government land – **see page 142 of the Record of Appeal**. Even going by that alone, it is trite that a claim for adverse possession cannot be maintained against government land. See Section 41 of Limitation of Actions Act.

19. The cause of action as adverted by the Respondents is trespass into the suit land by the Appellant. The issue of trespass calls upon the Court to investigate whether the trespass is continuous or not. The fact of investigation ousts the objection from being a pure point of law. Determining a similar appeal that challenged the trial Court decisions to dismiss a Preliminary Objection based on Section 7 of LAA, Learned Judge Oundo in the case of **County Government of Laikipia v James Kimani Mburu & 3 others [2020] eKLR** held as follows;

**“Having found that every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues and that the Limitation of Actions Act does not come into play, I hereby find that Preliminary Objection raised is unsustainable, I uphold the finding of the trial Court and proceed to dismiss this Appeal with costs to the Respondents” [Emphasis added]**

20. The totality of the forgoing is that the Preliminary Objection failed to meet the second test that a Preliminary Objection will suffice assuming that the pleaded facts by the rival party are correct. Even if the claim for adverse possession was merited, the defendants would be required to prove the same by way of evidence. In addition to that, for the Court to determine whether indeed the suit was time barred, it could not shut its eyes to the disputed facts surrounding ownership or otherwise of the suit property as demonstrated in the pleadings. It is the view of the Court that the suit is best left for hearing on its merit by the trial Court. Accordingly, the third test above is similarly unsatisfied.

21. In addition, it is the view of the Court that the objection is not founded on a settled and crisp point of law. In the end, I find that the Appellant has not established his case for this Court to overturn the trial Court's Ruling.

22. The appeal is for dismissal with costs to the Respondents.

**DELIVERED, SIGNED & DATED ON THE 10<sup>TH</sup> DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Mokua for the Appellant

Ms. Monyangi for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

Ms. Phyllis – Court Assistant