



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT

AT MACHAKOS

ELC CASE NO.480 OF 2017

CHRISTOPHER MUSYOKA MUSAU.....PLAINTIFF

-VERSUS-

BENEDICTA NDUNGE MBOLE (Sued in her capacity as the Personal
representative of DANSON PAUL MBOLE-Deceased)..1ST DEFENDANT

KASHMIR SINGH.....2ND DEFENDANT

R U L I N G

What is before Court for determination is the Defendants' Notice of Preliminary Objection filed on 6th March 2019. The Preliminary Objection is premised on grounds that:

- 1. This suit is time barred in view of paragraph 6 of the Plaintiff**
- 2. The High Court has no jurisdiction to grant leave to file suit involving land out of time.**
- 3. The suit was filed without leave of the Environment and Land Court.**

The Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination:

Upon consideration of the rivaling submissions in respect to the instant Preliminary Objection, the only issue for determination is whether this suit should be struck out with costs, for having been filed without leave of court.

The Defendants in their submissions contend that this suit is time barred as no leave was obtained before the same was filed out of time. To support their arguments, they relied on section 7 of the Limitation of Actions Act including the following decisions: **Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (1969) EA 696; Intamba Freights S. A V Kenya Revenue Authority & 3 Others (2018) eKLR; Owners of the Motor Vessel 'Lillian S' V Caltex Oil (Kenya) Ltd (1989) as cited with the approval in the case of Phoenix of EA Assurance Company Limited V S. M. Thiga t/a Newspaper Service (2019) eKLR and Equity Bank Limited V Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR.**

The Plaintiff in his submissions insists the High Court granted him leave to file this suit which leave remains inextricable. Further, since the orders given on 23rd February, 2017 were neither varied nor appealed against, they remain valid. To support his arguments, he has relied on the following decisions: **Telkom Kenya Limited V Kenya Railways Corporation (2018) eKLR; Mukisa Biscuit Manufacturing Co.Ltd v West End Distributors (1969) EA 696; Independent Electoral & Boundaries Commission V Jane Cheperenger & 2 Others (2015) eKLR; Charles Onchari Ogoti V Safaricom Limited & Another (2020) eKLR; Owners of the Motor Vessel ' Lillian S' V Caltex Oil (Kenya) Ltd (1989); In the matter of Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution – Constitutional Application No. 2 of 2011; Priscilla Ndubi and Zipporah Mutiga V Gerishon Gatobu Mbui Meru Succession Cause No. 720 of 2013; Salome Wambui Njau (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) V Caroline Wangui Kiguru (2013) eKLR and Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga V Eliud Timothy Mwamunga & Sagalla Ranchers Limited (2017) eKLR.**

I wish to provide a brief background to the dispute herein. The instant suit was filed by the Plaintiff pursuant to court orders issued in

Machakos High Court Succession Cause No.452 of 2008 wherein the Plaintiff was an objector in the said succession proceedings, claiming the suit property, being MACHAKOS TOWN BLOCK 1/303, did not form part of the deceased's estate, as he had purchased it from the deceased.

Further, he produced a sale agreement and a consent to transfer as evidence of the transaction. The court confirmed the Grant of Probate but directed that the Administrator would hold the suit property in trust until the ownership dispute was resolved. The Learned Judge directed the Plaintiff to file a civil suit for determination of ownership of suit property, which culminated in his filing the instant suit. The Defendants, through their counsel on record, objected to this suit, claiming the same is time barred since the High Court had no jurisdiction to grant leave to the Plaintiff to file a civil suit in an Environment and Land Court. I will proceed to reproduce an excerpt from the Machakos High Court Succession Cause No.452 of 2008 where The Plaintiff was granted leave to file this suit:

'The Objector is hereby given the liberty to institute legal proceedings for the determination of ownership of LR No. Machakos Town Block 1/303 notwithstanding the existence of any legal technicalities including time bar or such issues. The suit shall be against the Petitioner who shall be holding the above property in trust for the person whom the court shall find owns the property.'

Section 7 of the Limitation of Actions Act provides as follows:

"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."

In the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **'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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.**

See also the case of **Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 others [2015] eKLR**.

In so far as I concur with the Defendants that the period of limitation had lapsed to enable the Plaintiff file this suit, however, from the record and perusal of the Ruling from the aforementioned High Court Succession proceedings which was produced herein, I note the High court in recognition of the jurisdiction vested on the Environment and Land Court, recused itself from determining matters on the ownership of the suit property but granted leave to the Plaintiff to institute a Civil Suit to determine the same. Since the High Court is a court of competent jurisdiction and noting that the Defendants never appealed from the decision granting the Plaintiff leave to institute this suit, I hold that the said Leave is valid. It is trite that the High Court and the Environment and Land Court are courts of the same status, hence this court cannot invalidate an order emanating therefrom. I opine that the Defendants seek to rely on technicalities which is a defeated avenue based on Article 159 (2) (d) of the Constitution.

Based on the facts as presented while relying on the legal provisions cited above and associating myself with the decisions of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696** and **Independent Electoral & Boundaries Commission V Jane Cheperenger & 2 Others (2015) eKLR**, I find that the Preliminary Objection is invalid and leave was properly granted by a court of competent jurisdiction to enable the Plaintiff institute this suit.

The upshot of all this is that I find the Preliminary Objection dated 6th March 2019 to be without merit and consequently dismiss it.

Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN MACHAKOS THIS 9TH DAY OF FEBRUARY, 2022

CHRISTINE OCHIENG

JUDGE