



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC MISC. APPLICATION NO. E026 OF 2021

SUNIT SINGH VARMA.....1ST APPLICANT

SUDARSHAN SINGH VARMA & SONAL SURYAKANTI RAVAL

(Suing in their capacity as the executor of the estate of the late

SANTOSH KUMARI VARMA).....2ND APPLICANT

VERSUS

UNIKEN LIMITED.....1ST RESPONDENT

ATHI MINERALS LIMITED.....2ND RESPONDENT

SPARE TECH LIMITED.....3RD RESPONDENT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 5th October 2021, where the Respondents have sought to oppose the Applicant's Notice of Motion dated 20th April 2021 on grounds that;

a. This Honourable Court lacks jurisdiction to hear and determine this suit by virtue of the cause of action being time barred, having been filed after the lapse of the statutory period as set out in Sections 7 and 9 of the Limitation of Actions Act.

b. The Applicant's application is an affront to the mandatory provisions of the well-known legal principle of *sub judice* owing to the pendency before the High Court of Kenya at Machakos in **Misc. 234 of 2021 – Sunit Singh Varma & 3 Others vs Athi Stores Limited** filed by the Applicants herein against the Respondents' 'parent company'- Athi Stores Limited wherein the ownership of the Land Reference 11895/1 is directly and substantially in issue.

c. The Applicants' application is an affront to the mandatory provisions of the well-known legal principle of *sub judice* owing to the pendency before the High Court of Kenya at Machakos in **P & A 1254 of 2017, In the matter of the Estate of Madan – Mohan Singh Varma** relating to the Applicants' stake over Land Reference 11895/1 is directly and substantially in issue.

2. The preliminary objection was canvassed by written submissions. On record are the Respondents' submissions filed on 19th October 2021 and the Applicants' submissions filed on 1st November 2021.

SUBMISSIONS

3. The Respondents' counsel submitted that the applicants admitted that the Respondents' occupation of the land in issue began in 1997 and therefore the time to bring a claim lapsed in the year 2009. Counsel argued that there are cases pending before the High Court at Machakos and Nairobi being Misc. 234 of 2021 *Sunit Singh Varma & 3 Others vs Athi Stores Limited* and P&A 1254 of 2017 *In the matter of the Estate of Madan-Mohan Singh Varma*.

4. Counsel relied on Section 6 of the Civil Procedure Act and Sections 7 and 9 of the Limitation of Actions Act. Counsel referred the court to the case of *Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Ltd [1969] E.A 696* on what constitutes a preliminary objection. Counsel argued that it is clear that the cause of action arose in 1997, and therefore 12 years have already lapsed.

5. It was further contended that the two cited cases filed at Machakos and Nairobi relate to ownership, interest and control of the suit property. Counsel placed reliance on the cases of *Muturi Investments Ltd vs NBK [2006] eKLR*, *Nguruman Limited vs Jan Bonde Nielsen & Another [2017] eKLR*, *Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 Others [2012] eKLR*, *Thiba Min Hydro Co. Ltd vs Josphat Karu Ndwiga [2013] eKLR* and *Cecilio Murango Mwenda & 6 Others vs Isaac Kimathi Ikunga* and contended that although the former suits were not in the ELC, nevertheless, the substance of the suit and the pleadings were the same.

6. On their part, the Applicants submitted that the preliminary objection ought to be dismissed for being fatally defective, as it needs evidence to substantiate it yet a preliminary objection should be based on pure points of law. Counsel argued that the suits referred to, are in respect of different parties and that the determination of the alleged cases offer no remedy to the Applicants, hence this suit is not *sub judice*.

7. Counsel contended that the preliminary objection is based on disputed facts and therefore does not qualify to be a preliminary objection. Counsel relied on the cases of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors [1969] EA 696*, *Oraro vs Mbaja [2005] KLR 141*, *County Government of Migori vs INB Management IT Consulting Limited [2019] eKLR*, *John Musakali vs Speaker County of Bungoma & 4 Others [2015] eKLR* for the proposition that where facts are disputed, then that cannot qualify to be a preliminary objection.

8. Counsel further argued that this matter is not *sub judice* as the suits referred to have different subject matter and the remedies sought are different. Counsel submitted that for a matter to be deemed to be *sub judice*, a suit must exist in which the specific matter was in issue, the parties ought to be the same, and the determination of the pending suit will render the impugned suit *res judicata*. Reliance was placed on the cases of *Kenya National Commission on Human Rights vs Attorney General, Independent Electoral & Boundaries Commission & 16 Others* and *Republic vs Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya [2020] eKLR*.

ANALYSIS AND DETERMINATION

9. I have carefully considered the preliminary objection raised as well as the parties' pleadings and submissions. The issues that arise for determination are;

- a. Whether the preliminary objection dated 5th October 2021 raises a valid preliminary objection.
- b. Whether the preliminary objection is merited.

10. A preliminary objection was described in the case of *Mukisa Biscuits Limited vs West End Distributors [1969] E.A 696* as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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.”

11. In the case of *Oraro vs Mbaja [2005] KLR 141*, the court held as follows;

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

12. Essentially therefore, for a preliminary objection to be deemed to be valid, it must be based on pure points of law and anchored on facts that are not in dispute as presented in the pleadings.

13. In the instant suit, the Respondents have raised two grounds upon which they argue their preliminary objection. First it is the allegation that the suit is time barred by dint of Sections 7 and 9 of the Limitation of Actions Act, and secondly that the suit is *sub judice*.

14. Section 7 of the Limitation of Actions Act provides as follows;

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.

15. Section 9 of the Limitation of Actions provides as follows;

(9) Accrual of right of action in case of present interest in land

1) Where the person bringing an action to recover land or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.

2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

3) Where a person brings an action to recover land, being an estate or interest in possession assured otherwise than

by will, to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land by virtue of the assurance, the right of action accrues on the date when the assurance took effect.

16. Essentially therefore, a claim for recovery of land may not be brought after the lapse of 12 years from the date the cause of action accrued. In my considered view, the question of time limitation is a matter of law and therefore the same can be validly raised as a preliminary objection. I therefore find and hold that the issue of time limitation is a pure point of law which has been validly taken herein as a preliminary objection.

17. To determine whether this suit is time barred, I have considered the pleadings on record. The suit was commenced by Miscellaneous Application Notice of Motion dated 20th April 2021. There is no replying affidavit to the motion. The Respondents have argued that the cause of action accrued to the Applicants in 1997. I have perused the Notice of Motion dated 20th April 2021, as well as the Supporting Affidavit thereto and there is nothing in those pleadings to show or suggest that the cause of action arose in 1997. It is my finding therefore that this suit is not time bared as argued by the Respondents.

18. On the issue of whether this suit is *sub judice*, I note that the Respondents have contended that the issues and parties in this instant suit and those in **Misc. 234 of 2021 Sunit Singh Varma & 3 Others vs Athi Stores Limited** and **P&A 1254 of 2017 In the matter of the Estate of Madan Singh Varma**, are the same.

19. The law governing the doctrine of *sub judice* is provided for in Section 6 of the Civil Procedure Act, as follows;

Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

20. It is therefore clear that for a party to maintain a plea of *sub judice*, they must present evidence to show that the suit relates to the same parties or parties litigating under the same title, and the matter in issue is substantially the same as that in an earlier filed suit. It therefore follows that to prove that a suit is *sub judice*, it will be necessary that pleadings in respect of a previously instituted suit, are exhibited, for the court to determine whether the parties and the issues are the same. As pointed out earlier in this ruling, where evidence is necessary to prove a preliminary objection, then the same cannot be validly raised as a preliminary objection. Indeed, in the instant suit, while the Respondents argue that both the parties and issues in this suit and in the two previous suits filed in Nairobi and Machakos are the same, the Applicants have emphasized that the parties and issues in the previous and current suits are different. It is my finding that the plea of *sub judice* ought not be raised as a preliminary objection, but may be raised by way of a Notice of Motion. I therefore find that the plea of *sub judice* in so far as the facts thereof are in dispute, is not validly raised as a preliminary objection and the same must fail.

21. In the premises, it is my finding that the Notice of Preliminary objection dated 5th October 2021 has no merit and the same is dismissed with costs.

22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Ms Monda holding brief for Mr. Nduati for the Applicants

Ms Dave for the Respondents

Ms Josephine Misigo – Court Assistant