



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC CASE NO. E043 OF 2021**

**HARRISSON MUTISYA MBITHI**

**aka MUTISYA JOEL.....PLAINTIFF**

**VERSUS**

**NTHAMBI DANIEL KIOKO.....1<sup>ST</sup> DEFENDANT**

**KIVUVA LAI.....2<sup>ND</sup> DEFENDANT**

**KISEVE MACKENZIE.....3<sup>RD</sup> DEFENDANT**

**ISAAC KASEMA.....4<sup>TH</sup> DEFENDANT**

**DOROTHY TUA.....5<sup>TH</sup> DEFENDANT**

**LEAH PHILIP KIOKO.....6<sup>TH</sup> DEFENDANT**

**MUTUA DANIEL MULI.....7<sup>TH</sup> DEFENDANT**

**KILIKO MULI.....8<sup>TH</sup> DEFENDANT**

**AGNES MUEMA.....9<sup>TH</sup> DEFENDANT**

**WANZA HENRY KISILU.....10<sup>TH</sup> DEFENDANT**

**RULING**

1. Vide a Preliminary Objection dated 30<sup>th</sup> July 2021, the Defendants sought to have the Plaintiff's suit struck out with costs on the following grounds;

- a) That the Honourable Court lacks jurisdiction to hear and or determine the dispute as far as partition is sought by the plaintiff.**
- b) The cause of action is time barred as per the Limitation of the Actions Act Cap 22 Laws of Kenya.**
- c) That consequently the suit is ill founded, bad in law and an abuse of the court process and ought to be struck out with costs.**

2. On 13<sup>th</sup> October 2021, this court directed that the Preliminary objection will be canvassed by written submissions. On record are the Defendants' submissions dated 10<sup>th</sup> November 2021. The plaintiff did not file any submissions.

**Submissions**

3. The Defendants submitted that the plaintiff's claim was that the same was owned by several tenants in common. Counsel argued that under section 94 of the Land Registration Act No. 3 of 2012 Laws of Kenya, it is the Land Registrar that has jurisdiction to entertain such a

claim.

4. On the issue of Limitation, counsel submitted that the plaintiff's claim was for recovery of land, which suit cannot be filed 12 years after accrual of the cause of action. Counsel pointed out that the plaintiff stated in the plaint that although he was involved in the purchase of the suit land, since 1970s he does not benefit from the investments in the land though he is registered as one of the common tenants. Reliance was placed on the case of *Muhuri Muchiri v Hanna Nyamuya (Sued as Administrator of the estate of Njenga Muchiri also Known as Samuel Njenga Muchiri (deceased) [2015] eKLR*. Counsel relied on section 7 of the Limitation of Actions Act as well as the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors (1969) E.A 696*.

**Analysis and determination.**

5. I have considered the Preliminary objection together with the Defendants' submissions. The issues before this court are as follows;

- a) **Whether the Preliminary Objection constitute a valid preliminary objection; and**
- b) **Whether the preliminary objection is merited.**

6. A preliminary objection was described in the case of *Mukisa Biscuits Manufacturing Company v West End Distributors (1969) E.A 696*, as follows;

**So far I am aware, 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.**

In the same case, Sir Charles Newbold stated the following;

**The first matter relates to the increasing practice of raising- points, which should be argued in the normal manner, quite improperly be way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.**

7. It therefore follows that a preliminary objection can only be raised on pure points of law, where facts are not in dispute. In this suit, the Defendants have raised an objection on two issues, first, that the plaintiff's claim of partitioning land owned in common tenancy is within the jurisdiction of the Land Registrar as provided for under Section 94 of the Land Registration Act. Secondly, it is their contention that the plaintiff's claim is time barred.

8. I have considered the Plaint and I note that the Plaintiff has stated that land parcel number Machakos Town Block 11/81 (suit land) is owned in common tenancy by himself and Daniel Kioko, Abednego Lai, Roman Mackenzie, Paul Kasema, Titus Tua, Philip Kioko, Daniel Muli, Stephen Muli and Henry Kisulu. The Plaintiff then sought for the following orders;

- a) **An order directing the Chief Land Registrar to invoke the provisions of section 91 (4) (b) of the Land Registration Act and thus register 1 twelfth of the title number MACHAKOS TOWN BLOCK 11/81 in the name of HARRISON MUTISYA MBITHI a.k.a MUTISYA JOEL.**
- b) **In the alternative and without prejudice to prayer (b) above, the title number MACHAKOS TOWN BLOCK 11/81 be partitioned into 12 units and the units be registered in favour of the plaintiff and the respective beneficiaries of the deceased's tenants in common.**
- c) **An account be taken after due inquiry with respect to the amount of rent received by the defendants with respect to the suit title and an equitable distribution be effected to the plaintiff and the respective beneficiaries of the estates of the other tenants in common of the suit title.**
- d) **The costs of this suit be borne by the Defendants.**

9. It is therefore not in dispute that the plaintiff's claim is for partition of the suit property and sharing of received rents in the ratio of ownership of the suit property. This squarely falls within section 94 of the Land Registration Act No. 3 of 2012. Besides, the question of time limitation as raised by the Defendants is a pure point of law as the same is based on section 7 of the Limitation of Actions Act. I therefore find and hold that the preliminary objection is based on pure points of law and therefore properly and well taken.

10. On whether this court lacks jurisdiction, the Defendant's counsel has contended that the prayer for partition of the suit property is a matter for the jurisdiction of the Land Registrar in accordance with Section 94 of the Land Registration Act.

11. Section 94 of the land Registration Act provides as follows;

**(1) Any of the tenants in common may with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a subdivision of land and of any covenants or conditions in a certificate of**

title or certificate of lease, the registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.

(2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by-

a) Any one or more of the tenants in common without the consent of all the tenants in common; or

b) Any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.

(3) The Registrar may, after hearing the applicant and any of the other tenants in common, who wish to appear and be heard, make an order for the partition of land having regard to-

a) .....

b) ....

c) ....

d) .....

e) .....

f) .....

g) .....

h) .....

i) .....

j) .....

(4) .....

(5) Any co-tenant aggrieved by the decision of the Registrar may apply to the Court for a review of that decision.

12. It is therefore clear that the jurisdiction to partition land owned under common tenancy is vested in the Registrar appointed under sections 12 and 13 of the Land Registration Act No. 3 of 2012. Subsection 5 of section 94 allows a co-tenant who is aggrieved by the decision of the Registrar to apply to this court for orders of review. It is my understanding of section 94 that the officer with original jurisdiction to order partition of the land owned under joint tenancy is the Registrar and not this court. The residual jurisdiction of this court is the power to review the orders of the Registrar.

13. In the case of *Samuel Uiru v George Mburu [2020] eKLR*, the court held that this court lacks jurisdiction to determine a claim for severing the common tenancy, as the power to do so was vested in the Registrar appointed under sections 12 and 13 of the Land Registration Act.

14. Similarly in the case of *Muhuri Muchiri v Hanna Nyamunya (Sued as the Administrator of the estate of Njenga Muchiri also known as Samuel Njenga Muchiri (deceased) [2015] eKLR*, the court held as follows;

**Section 94 and 96 of the Land Registration Act also now provide for a severance of a common tenancy by way of partition or sale of the land. As regard partition, the procedure is provided for under section 94 as follows....**

**It is therefore the case that as the applicant in this suit is not asking for sale of the suit property, the alternative that is available to him under the law is that of partition, and he is required to follow the procedure laid down in section 94 of the Land Registration Act in this regard. Under the section, the power to partition land held under common tenancy is given to the registrars appointed under section 12 and 13 of the Land Registration Act, and this court therefore finds that it cannot grant the order sought of severing the common tenancy ...as the procedure provided for by law has not been followed.**

15. I do not think that where statute has expressly ousted the jurisdiction of this court and vested it in another person, this court can arrogate itself such jurisdiction. Jurisdiction flows from the Constitution or statute or both. See *Samuel Kamau Macharia & Another v Kenya Commercial Bank and Another [2012] eKLR*. Where the law expressly vests jurisdiction in another body other than this court, this court has no business exercising such jurisdiction.

16. In the case of *Paul Muraya Kaguri v Simon Mbaria Muchunu [2015] eKLR*, the court held as follows;

**It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where**

**a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.**

17. In the premises, it is my finding that the partitioning of the suit property being owned in common tenancy is a matter that the Registrar appointed under sections 12 and 13 of the Land Registration Act has jurisdiction to determine and therefore this court lacks jurisdiction to determine this matter on that basis.

18. On the question as to whether the Plaintiff's suit is time barred, my view is that the purpose of limitation statute is to bar a plaintiff from prosecuting a stale claim, which if not for its staleness, the court would otherwise have had jurisdiction to determine. Having held that this matter touches on partition of property owned in a common tenancy and matters attendant thereto, is a matter whose jurisdiction belongs to the Registrar, it would not be for this court to determine whether the claim is time barred. As I understand the law, once a court holds the view that it has no jurisdiction to determine a matter, it should down its tools. See *Owners of the Motor "Vessel Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*.

19. The upshot is that the preliminary objection is upheld and this suit is struck out for want of jurisdiction with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27<sup>TH</sup> DAY OF APRIL 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Langalanga for the Plaintiff

Mr. Muema for the Defendants

Ms Josephine Misigo – Court Assistant