



**Kioko & another (Suing as administrators and representatives of the Estate of the Late Charles Muli Nzozzo) v Kimweli & 11 others (Environment & Land Case E060 of 2021) [2022] KEELC 2963 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2963 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E060 OF 2021**

**CA OCHIENG, J**

**MAY 18, 2022**

**BETWEEN**

**SAMUEL MULI KIOKO ..... 1<sup>ST</sup> PLAINTIFF  
FREDRICK MUINDE MULI ..... 2<sup>ND</sup> PLAINTIFF  
SUING AS ADMINISTRATORS AND REPRESENTATIVES OF THE ESTATE OF  
THE LATE CHARLES MULI NZONZO**

**AND**

**PIUS KITHOME KIMWELI ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH MUTISO KIMWELI ..... 2<sup>ND</sup> DEFENDANT  
TAVITHA KIMWELI ..... 3<sup>RD</sup> DEFENDANT  
DANIEL MUTUKU MBEVI ..... 4<sup>TH</sup> DEFENDANT  
BRYAN KISAINGU MUTINDA ..... 5<sup>TH</sup> DEFENDANT  
BERNARDS MUSA KISAINGU ..... 6<sup>TH</sup> DEFENDANT  
COLLINS KIVILA MUTINDA ..... 7<sup>TH</sup> DEFENDANT  
SYLVIA MUTHONI KAMOTHO ..... 8<sup>TH</sup> DEFENDANT  
KITONGI INVESTMENT LIMITED ..... 9<sup>TH</sup> DEFENDANT  
NGELANI RANCHING UNIT (SUED THROUGH CHAIRMAN, SECRETARY  
AND TREASURER) ..... 10<sup>TH</sup> DEFENDANT  
DISTRICT LAND REGISTRAR, MACHAKOS ..... 11<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 12<sup>TH</sup> DEFENDANT**



## RULING

1. What is before court for determination is the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' notice of preliminary objection dated the October 25, 2021 which is premised on the following grounds:
  1. The notice of motion is incompetent as the main suit upon which the notice of motion arises is itself incompetent for reasons inter alia:-
    - a. In so far as the plaintiffs claim breach of agreement in July 2010, the plaintiffs suit is statute barred and thus unmaintainable.
    - b. The orders prayed for in the plaint may not be lawfully granted in so far as they seek cancellation by the District Land Registrar, Machakos of Land Certificates issued by the Registrar of Titles.
    - c. The prayers in the notice of motion have no basis and are thus without merit.
    - d. The notice of motion dated 3<sup>rd</sup> June 2021 ought to be struck out.

The notice of preliminary objection was canvassed by way of written submissions.

### Analysis and Determination

2. Upon consideration of the notice of preliminary objection dated October 25, 2021 including the rivalling submissions and respective pleadings filed herein, the only issue for determination is whether the plaintiffs' suit and Notice of Motion application dated the June 3, 2021 should be struck out.
3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants in their submissions reiterate their averments as per the instant notice of preliminary objection and contend that the plaintiffs' cause of action as pleaded in the plaint occurred in July, 2010. They insist the claim herein is a tortuous one and should have been brought to court before the end of three years. To buttress their averments, they relied on the following decisions: *Edward Moonge Lengusuranga v James Lanaiyara & another* (2019) eKLR and *Justus Tureti Obara V Peter Koipeitai* (2014) eKLR.
4. The 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 9<sup>th</sup> defendants supported the instant notice of preliminary objection and in their submissions aver that the same is sustainable. They insist that the same is merited and should be upheld. They contend that since the cause of action arose in July 2010, and this being an action in tort, the claim herein is statute barred. Further, that the prayers sought in the Plaint are not within the powers of the Land Registrar hence the same amount to an abuse of the court process. To support their arguments, they have relied on the following decisions: *Edward Moonge Lengusuranga V James Lanaiyara & another* (2019) eKLR; *Justus Tureti Obara V Peter Koipeitai* (2014) eKLR and *Livingstone Mutsune & Another V African Tours and Hotels Limited (in Receivership) & another* (2014) eKLR.
5. The plaintiffs in their submissions insist the preliminary objection raised is not sustainable and does not have merit. Further, that the preliminary objection must stem from pleadings and raise pure points of law while the instant objection requires evidential proof. They explain that the cause of action arose in July 2010 when the 1<sup>st</sup> defendant breached the agreement dated 2<sup>nd</sup> July, 2009 by purporting to dispose by way of sale to the 4<sup>th</sup> defendant, 50 acres of land out of Plot No. 22B which belonged to the estate of Charles Muli Nzonzo. It reiterates that this suit is not time barred as claimed as the limitation can only arise after expiry of 12 years. Further, time only started running after the various titles to land



were registered. To support their averments, they relied on the decision of *John Muthusi Mweke V Mosoi P. Parkut* (2020) eKLR.

6. On perusal of the plaint herein, I note the fulcrum of the dispute herein revolves around claim for land. The plaintiffs in their plaint have provided the background of the dispute herein and contend that their family and the family of the 1<sup>st</sup> to 3<sup>rd</sup> defendants jointly shared plot No. 22 which was later surveyed and divided into plot 22A and 22B. Further, the said plots were interchanged as one party had developed another party's portion but the 1<sup>st</sup> to 3<sup>rd</sup> defendants representing the estate of the owner of one parcel of the said land reneged on the arrangement reduced to an agreement dated the July 2, 2009 and commenced selling the plaintiffs' portion land. The plaintiffs hence sought various orders in the plaint including cancellation of title. Further, contemporaneously with the plaint, they filed a Notice of Motion seeking various injunctive reliefs.
7. On the issue of whether this suit is statute barred, I wish to refer to section 7 of the *Limitation of Actions Act* which provides inter alia:

‘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.’
8. In the case of *Mukbisa 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.’
9. While the Supreme Court addressed its mind on this issue in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 others* [2015] eKLR and stated that: “Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts.” [Emphasis added]
10. Further in the case of *Avtar Singh Bhamra & Another Vs Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, the court held that: - “A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” [Emphasis added]
11. Based on the facts as presented while associating myself with the decisions cited above, I find that the plaintiffs have raised triable issues in the plaint which cannot be determined unless viva voce is adduced. insofar as the defendants only wish to rely on the impugned agreement, to my mind the fulcrum of the dispute herein revolves around claim for land. Further, I find that since the cause of action arose in 2010, this suit was filed within time as envisaged under section 7 of the *Limitation of Actions Act*. I beg to disagree with the defendants contention that the suit should have been filed within three years.
12. I note the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any defence to controvert the plaintiffs averments but instead proceeded to raise the preliminary objection. From the explanation in the plaint which remains uncontroverted by most of the defendants except the 11<sup>th</sup> and 12<sup>th</sup> defendants, it is my considered view that since the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not deny the plaintiffs averments, their preliminary objection is premature as it does not stem from any pleadings and requires facts to be ascertained.



13. I further wish to raise another issue of concern in this matter in respect to a court order which was purportedly issued on April 23, 2021 in Machakos ELC 48 of 2021 Bryan Kisaingu Mutinda, Collins Kivila Utinda, Sylvia Muthoni Kamotho & Bernard Musa Kisaingu Vs All the Squatters Encroached and or Occupying Land Reference Number 8914/254, annexed to both the plaintiffs' and 5<sup>th</sup> defendant's replying affidavits, with some of the parties named therein being defendants herein and have noted that the plaintiffs have disputed this court order while the 5<sup>th</sup> defendant insists it is a valid one. Further, upon perusal of the said court order and undertaking a Search in the Court Registry, this court has taken judicial notice of the fact that on April 23, 2021, there was no Judge in Machakos called Hon. O A Amtoti. I am of the view that this is a very serious issue and will call for investigations to be undertaken so as to establish the authenticity of the said court order.
14. It is against the foregoing that I find the notice of preliminary objection dated the October 25, 2021 unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18<sup>TH</sup> DAY OF MAY, 2022.**

**CHRISTINE OCHIENG**

**JUDGE**

