



REPUBLIC OF KENYA



Njoki v Presbyterian Foundation PCEA Emmanuel Thome & 2 others (Environment & Land Case E051 of 2021) [2022] KEELC 3157 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3157 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E051 OF 2021**

BM EBOSO, J

MAY 18, 2022

BETWEEN

JACINTA NJOKI PLAINTIFF

AND

**PRESBYTERIAN FOUNDATION PCEA EMMANUEL THOME 1ST
DEFENDANT**

LAND REGISTRAR RUIRU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Through a plaint dated 5/5/2021, the plaintiff contends that she is the administrator of the estate of the late Wanjiku Kamau [the deceased]. It is her case that the deceased was a shareholder of Nyakinyua Investments Limited [the company], and by dint of the deceased's shareholding in the company, she balloted for and was allocated land parcel number Ruiru/Ruiru East Block 2/102 [the suit property]. She adds that in 2015, she visited the suit property and discovered that some construction had taken place on the suit property. She reported the matter to the Police, and upon investigations, the Director of Public Prosecutions vide a letter dated January 13, 2020, advised that upon analyzing the evidence in the Police File he had noted, among other things, that Wanjiku Kamau (the deceased) was allocated Plot No 2/102 while Agnes Njeri Ndegwa was allocated Plot No 2/99; at the time when Terry Wangari Kamau was purchasing land from Agnes Njeri Ndegwa, the land she purchased was designated as Plot Number Ruiru/Ruiru East Block 2/99 but the green card showed that the land subsequently registered in her name was Ruiru/Ruiru East Block 2/102.
2. It is alleged in the plaint that Terry Wangari Kamau donated a power of attorney to Evalyne Waithera Kamau and using the power of attorney, the latter sold the suit property to James Kimani Mbui. It is



further contended that it was the view of the Director of Public Prosecutions that there was improper documentation/ record keeping by either Nyakinyua Investments Limited or the Land Registrar.

3. Consequently, the plaintiff seeks the following reliefs against the defendants:
 - a. A declaration that the 1st defendant acquired the title to land parcel Ruiru/Ruiru East Block 2/102 through mistake/misrepresentation thus it should be cancelled by an order of the court and revert to its rightful owner Michael Mugo Njoki who was granted the same vide a confirmed grant dated 25/9/2015.
 - b. An order compelling the 2nd defendant to cancel and revoke title deeds for the land parcel Ruiru/Ruiru East Block 2/102
 - c. A permanent injunction to restrain the defendants, whether by themselves, their agents and their servants from interfering with the ownership, use and possession by the plaintiff or encroaching and trespassing on the suit property.
 - d. An eviction order be issued against the 1st defendant and its agents.
 - e. That the OCS Ruiru be ordered to provide security for the enforcement of the judgement of the Honorable Court.
 - f. Damages for loss of use.
 - g. Costs of the suit and the interest.
4. On or about 9/8/2021, the 1st defendant brought a notice of preliminary objection dated 6/8/2021, objecting to this suit and urging the court to strike out the plaintiff's suit on the following verbatim grounds:
 1. The plaintiff's suit is statute-barred by operation of Sections 7 and 17 of the [Limitation of Actions Act](#), Cap 22 of the Laws of Kenya.
 2. This honourable court has no jurisdiction to hear and determine this suit.
 3. The suit is bad in law and amounts to an abuse of the court process and should be struck out with costs to the 1st defendant.
5. The said preliminary objection is the subject of this ruling. It was canvassed through written submissions dated 20/1/2022, filed by the firm of Njeru Gitonga & Co Advocates. Counsel for the 1st defendant submitted that the plaintiff's suit sought recovery of land. Citing Section 7 of the [Limitation of Actions Act](#), counsel contended that because the parcel register (green card) shows that the suit property was registered on December 12, 1992, that is the date when the cause of action accrued, and that the twelve year limitation period lapsed on December 11, 2004. Counsel contended that the plaintiff brought the present suit seventeen (17) years outside the limitation period. It was the position of counsel for the 1st defendant that the court has no jurisdiction to entertain a suit brought outside the limitation period. Counsel faulted the plaintiff for failing to seek an order extending the limitation period.
6. Counsel for the 1st defendant further contended that this suit is subjudice because there exists Kerugoya ELC Case No. 16 of 2016 involving the same parties and the same cause of action and the same is pending. Counsel urged the court to strike out the suit on the above grounds.
7. The 2nd and 3rd defendants filed written submissions dated 3/2/2021 through Mr Jonathan Mwambonu. The learned Senior State Counsel cited Sections 7 and 26 of the [Limitation of Actions Act](#)



and contended that the applicable limitation period is 12 years. Counsel argued that this suit is statute-barred because it was brought 29 years after the cause of action accrued.

8. The plaintiff responded to the preliminary objection through written submissions dated 1/2/2022, filed by the firm of Wakio Mugo & Co Advocates. Counsel for the plaintiff submitted that the plaintiff's suit seeks to remedy a mistake that was made in the land records as per the findings of the Director of Public Prosecutions, contained in the letter dated 13/1/2020. Counsel contended that under Section 27 of the [Limitation of Actions Act](#), time started running when the mistake was discovered. It was the position of counsel that time started running when the report of the Office of Director of Public Prosecution was availed to the plaintiff.
9. Counsel for the plaintiff added that there was no evidence of any trespass to the suit property prior to 2015. Counsel added that the plaintiff had not instructed any law firm to institute a suit in Kerugoya. Counsel urged the court to dismiss the preliminary objection.
10. I have considered the grounds set out in the notice of preliminary objection; the parties' respective submissions; the relevant legal frameworks; and the relevant jurisprudence. I will make brief sequential pronouncements on the three grounds in the order in which they were itemized.
11. The law on what can be raised and canvassed on the platform of a preliminary objection is well-settled. 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 the suit. If a point requires ascertainment through evidence, that point ought not be raised on the platform of a preliminary objection. A party wishing to raise a valid preliminary point that requires demonstration or proof through evidence has the platform of a formal application as the appropriate vehicle to use [See *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
12. The first ground raised in the preliminary objection is that this suit is statute- barred by dint of the provisions of Sections 7 and 17 of the [Limitation of Actions Act](#) [sic]. The 1st defendant contends that the cause of action in the plaintiff's suit accrued on December 12, 1992 because that is when the impugned land register was opened. I have examined the plaint through which this suit was instituted. At paragraph 12, the plaintiff avers that she visited the suit property and discovered that some construction had taken place on the suit property. She reported the matter to the police and an investigation file was opened. Subsequently, through a letter dated January 13, 2020, the Director of Public Prosecutions advised that there was improper documentation/record keeping by either Nyakinyua Investments Limited or the Land Registrar which had resulted in a mistake which had been "visited upon Evalyne Waithera Kamau."
13. It does therefore emerge from the plaint that the plaintiff contends that she learnt about the trespass in 2015. Secondly, the mistake which the plaintiff seeks to rectify was brought to the plaintiff's attention through the Director of Public Prosecution's letter dated 13/1/2020. There is nothing in the plaint to suggest that any of the causes of action pleaded in the plaint accrued prior to 2015.
14. *Black's Law Dictionary, [10th Edition]* defines the word "accrue" to mean "to come into existence as an enforceable claim or right."
15. From the pleadings in this suit, the claims for trespass and for recovery of the suit land accrued in 2015. The limitation period in relation to the said claims is 12 years. The present suit was initiated on 10/5/2021 which was within the limitation period of 12 years. The claim for rectification of the parcel register to correct the mistake pointed out by the Director of Public Prosecutions accrued when the Director of Public Prosecutions brought to the attention of the parties involved that there was no fraud on part of Evalyne Waithera Kamau and that there was improper documentation/record keeping by



either Nyakinyua Investments Limited or the Land Registrar. This was in January 2020. The plea for rectification cannot be said to be statute-barred. The totality of the foregoing is that there is no merit in the first ground of objection.

16. The second ground of objection was canvassed on the premise that the suit was statute-barred hence the court has no jurisdiction to entertain it. Having made a finding to the effect that the plaintiff's suit is properly before this court, the second ground of objection automatically fails.
17. The third ground of objection is that the plaintiff's suit is an abuse of the process of the court. The argument advanced to support the contention that the plaintiff's suit is an abuse of the court process is that there exists another suit at Kerugoya Environment and Land Court involving the same parties and relating to the same subject matter. The above contention is a factual assertion which was not admitted in the plaint. It cannot be raised as a preliminary objection in the circumstances. The 1st defendant was obligated to raise it by way of a formal notice of motion supported with an affidavit exhibiting pleadings relating to the alleged suit. The court would then have the opportunity to look at the pleadings and inform itself appropriately. I will reject the point on the ground that it cannot be raised as a preliminary objection in the circumstances of this suit.
18. The result is that I find no merit in the 1st defendant's preliminary objection dated 6/8/2021. The same is rejected. The 1st defendant shall bear costs of the preliminary objection.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Njeru for the 1st Defendant

Mr Mwambonu for the 2nd and 3rd Defendants

Court Assistant: Ms Lucy Muthoni

