



REPUBLIC OF KENYA



KENYA LAW
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**Irene Warue Ndwiga v Nancy Njoki Mwara (Environment & Land Case
E001 of 2022) [2022] KEELC 3709 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3709 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E001 OF 2022**

A KANIARU, J

JUNE 30, 2022

O.S

BETWEEN

IRENE WARUE NDWIGA PLAINTIFF

AND

NANCY NJOKI MWARA DEFENDANT

RULING

1. Before this court for determination is a preliminary objection dated 11.2.2022 and filed on 14.2.2022. The objection targets the suit as filed. It is premised on two (2) points as follows:-
 - i) That the suit herein offends the provisions of Sections 4(a) of the Limitations of Actions Act Chapter 22 Laws of Kenya.
 - ii) That the suit offends the provisions of Section 7 of *Limitation of Actions Act* Chapter 22 Laws of Kenya.
2. The parties in the suit are Irene Warue Ndwiga who is the plaintiff and Nancy Njoki Mwara who is the Defendant. The preliminary objection is filed by the defendant.
3. In the suit instituted by way of Originating Summons, the plaintiff stated to have filed the suit in her own capacity and as the legal administratrix to her late husband's estate. Her claim is for registration as owner of land parcel Kyeni/Mufu/10658 (0.50 Ha) by way of adverse possession. She averred that together with her husband they entered into a sale agreement with the defendant for sale of a portion of 0.20 Ha out of the defendant's entitlement of land parcel Kyeni/Mufu/2991 for Kshs. 110,000/= . That at the time, the land was registered in the defendant's father's name and was subject to Runyejes Succ Cause 34 of 1997. The sale was said to have been necessitated by the fact that the defendant required funds to substitute her late mother in order for her to distribute the estate.



4. It was averred that upon such substitution they paid the agreed purchase price in installments and the surveyor demarcated the 0.20Ha on the ground. They were then granted vacant possession. Her husband is said to have died on 23.12.2019 and in the following year she requested for transfer of the land. She avers to further have paid the requisite amount to facilitate the transfer. It is her case that the land parcel Kyeni/Mufu/2991 was subdivided and the defendant's portion became Kyeni/Mufu/10658. The plaintiff was to get her entitlement from this portion but the defendant refused to cooperate. It is alleged that the defendant had offered to sell the property to third parties. Her claim is that she has occupied the land for over 12 years, hence the defendant had lost claim over the land. In the alternative it was said that the defendant had held the said portion in trust for herself and her husband.
5. The suit was opposed by way of preliminary objection and replying affidavit. The replying affidavit was filed by the defendant on 9.2.2022. The defendant basically denied the allegation of sale of the land to the plaintiff and her husband. According to her, the plaintiff and her husband were licensees and the purported sale agreement was said to be misleading as she did not have land to sell at the time. She denied receiving the purchase price and maintained that the plaintiff's occupation of the land was by virtue of being a licensee. She alleged to have failed to chase the plaintiff from the land she pitied her for being a widow. She had instead asked her to get an alternative place. The plaintiff was categorical that she had no intention of transferring the property to the defendant, who was said to have breached the agreement by frustrating it. The claim on occupation was said to be by way of permission and that the plaintiff had failed to demonstrate how the defendant was holding the land in trust for her.
6. The preliminary objection was canvassed by way of written submissions. The defendant filed his submissions on 19.4.2022. She averred that an action on a contract could not be brought after six years from date on which the cause of action accrued as envisaged in Section 4(a) of the Limitations of Actions Act (Cap 22 Laws of Kenya). The plaintiff's claim was said to be founded on a contract which was entered upon on 6.9.2002 and that the same had become null and void after expiry of six years. The action was said to have been brought 20 years from the said sale agreement.
7. Further the suit was said to equally be an action for recovery of land and such action could not be brought after expiry of twelve years from date on which the right of action accrued as stipulated under Section 7 of the *Limitation of Actions Act* (Cap 22 Laws of Kenya). It was reiterated that the suit had been instituted after 20 years and that recovery of land could not be done after expiry of 12 years. According to the defendant, the plaintiff's claim on adverse possession was an afterthought and had no basis being based on adverse possession. The defendant had relied on the provisions of Section 39 of the Limitations of Actions Act and Order 50 rule 4 of the *Civil Procedure Rules*. Further reliance was made on the case of *Maersk Kenya Limited Vs Murabu Chaka Tsuma*: Civil Appeal No. 209 of 2015 and *Kenya Power & Lighting Company Limited Vs Collins Agumba Aboge* Homabay Civil Appeal No. 57 of 2015.
8. The plaintiff filed her submission on 9.5.2022. She referred to the provisions of Section 4 of the Limitations of Actions Act as relied upon by the defendant and averred that her claim was not founded on contract. She also said she was not seeking to enforce the sale agreement entered into by the parties. She instead averred that her claim was based on registration of land by way of adverse possession.
9. With regard to Section 7 of the *Limitation of Actions Act* which forbids a claim founded on land being brought after 12 years, she averred that the said section applied to the defendant who was barred from recovering the suit parcel of land due to effluxion of time. It was alleged that the plaintiff had paid for the land and had been in open exclusive possession for the past 20 years. The issue of when time started running was said to be a matter of evidence which could only be ascertained upon the parties giving evidence. To support this, she relied on the case of *Wilson Njoroge Kamau V Nganga Muceru*



Kamau [2020] eKLR which cited with authority the case of *Kwetu v Omuntio*, CA Civil Appeal No. 8 of 1990. The preliminary objection was said not to be competent and further that it did not raise clear points of law which were not contested.

Analysis and determination

10. I have considered the objection as filed, the submissions by the parties and the court record in general. The principles on preliminary objection were well set in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 where Law JA rendered himself thus: “So far as I’m 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. 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. Similarly Sir Charles Newbold in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by 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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper practice of raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”
12. A preliminary objection is therefore one that raises a pure point of law premised on the assumption that all facts are correct and if argued as a preliminary point has the potential of disposing of the suit. I have looked at the two grounds of objection raised by the defendant challenging the suit, to wit; that the suit offends the provisions of Sections 4(a) and Section 7 of Limitation of Actions Act (Chapter 22 Laws of Kenya).
13. On the first limb, it is argued that the suit is anchored on a contract entered in the year 2002 and that the sale agreement could not be enforced after lapse of six years. It is argued that this suit has been filed 20 years later, which is way past the 6 year period stipulated under Section 4(a) of the Limitation of Actions Act. The plaintiff on her part argues that she is not seeking to enforce the sale agreement or a recovery of the purchase price but that her claim is based on adverse possession.
14. The said Section 4 (a) of the Limitation of Actions Act which is said to have been contravened provides as follows; “The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.



15. The second limb of objection raised is that the suit offends the provisions of Section 7 of the Limitations of Actions Act. The defendant has argued that no action to recover land can be brought within 12 years from the time the action accrued. The plaintiff on the other hand has maintained that her suit is not based on recovery of land but on declaration of ownership of land by way of adverse possession. The plaintiff has also argued that the said Section 7 of the Limitations Act applies to the defendant who is barred from recovering the parcel of land in dispute from the plaintiff due to effluxion of time. 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, to that person”.

16. From the readings of the two sections, Section 4(a) of the *Limitation of Actions Act* bars one from bringing an action on contract after expiry of six years while Section 7 of the Limitations of Actions Act bars a person from bringing an action to recover land after expiry of twelve years. I have looked at the pleadings before me. The plaintiff is asking for various prayers, the first being a declaration that she is entitled by way of adverse possession to a portion measuring 0.20 ha out of the suit parcel Kyeni/Mufu/10658, then secondly that in the alternative, a declaration that the defendant is registered as proprietor of the portion in trust for her. Thirdly that the plaintiff is the absolute owner of the suit land and, fourthly that she gets costs of the suit. The suit is anchored on grounds that she purchased the suit land from the defendant and paid consideration for the land. She contends that the defendant failed to transfer the land to her and was offering it for sale to third parties. According to the plaintiff, she was of the view that by virtue of having stayed on the land for over 12 years, then the defendant had lost claim over the portion of land.

17. My reading and understanding of the plaintiff's pleadings and the prayers sought, is that the suit before the court is one in which the plaintiff seeks to be registered as an adverse possessor to the suit land. It is not in dispute that the plaintiff is alleging to have entered into a sale agreement with the defendant for purchase of the land. His claim is not one seeking enforcement of the contract. The defendant has therefore misunderstood what is sought in the suit. It is my finding that the suit does not in any way offend the provisions of Section 4(a) of the Limitations of Actions Act. The suit is based on adverse possession; not contract. Period.

18. As to whether it offends the provisions of Section 7 of the Limitation Act, which, as already stated, bars one from bringing an action for recovery of land after expiry of twelve years, the claim by the plaintiff is not one where she is bringing an action for recovery of land. Instead, it is a claim on adverse possession. As pointed out by the plaintiff, this section would apply to the defendant herself and not the other way round. I will however not comment much on it as the substantive suit before this court will determine the issue of adverse possession. To me, the preliminary objection is clearly misplaced. The defendant is laboring under a serious misapprehension of the applicable law.

The upshot of the foregoing is that the preliminary objection raised lacks merit and is hereby dismissed

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF JUNE, 2022.

In the presence of M/s Njanja for Ombachi for defendant and Kiongo for Rose Njeru for plaintiff.

Court Assistant: Sylvia W.

A.K. KANIARU

JUDGE



30.06.2022

