



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Abdulrahman & 2 others v Seif & 2 others (Environment & Land Case
E062 of 2021) [2022] KEELC 2929 (KLR) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2929 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E062 OF 2021**

**MAO ODENY, J
JUNE 24, 2022**

BETWEEN

**MOHAMED ALI ABDULRAHMAN 1ST PLAINTIFF
OMAR ALI ABDULRAHMAN 2ND PLAINTIFF
ABDALLA ALI ABDULRAHMAN 3RD PLAINTIFF**

AND

**SHARIFA SEIF 1ST DEFENDANT
AZZA SEIF 2ND DEFENDANT
ZIANA SEIF 3RD DEFENDANT**

RULING

1. This ruling is in respect of a notice of preliminary objection dated November 11, 2021 by the defendant seeking the following orders: -
 1. The entire suit is barred by *Limitation of Actions* (Cap 22 Laws of Kenya) sections 4 (4) and 7 as it is premised on title acquired in 1985 vide a vesting order issued in Civil Suit No. 169 of 1980.
 2. The entire suit is fatally defective, incurable and cannot stand in law as no specific dates (particulars) are given as to when the cause of action accrued or arose.
 3. The plaint violates mandatory provisions of the law as to the jurisdiction of the court to issue the prayers sought for reason that this Honourable court lacks the legal capacity to enforce, set aside, vary, hear and determine in an appellate manner the issues arising from Civil Suit No. 169 of 1980.



4. In light of the foregoing, it is clear that the entire suit is wholly incompetent, scandalous, frivolous, vexatious, gross abuse of the court process and in any case has been filed without jurisdiction and should be dismissed with costs to the defendants.
2. Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

Defendants/Applicants' Submissions

3. Counsel for the defendant submitted that the plaintiff's suit is time barred by virtue of the fact the plaintiff averred that he acquired the suit property through a public auction vide a court order in Civil Suit No. 169 of 1980 which he supported by a vesting order dated 22nd July 1985.
4. Counsel relied on section 4(4) and 7 of the provisions of Limitations of Actions (cap 22 Laws of Kenya) and submitted that the section provides that an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) That in this case the decree was issued in Civil Suit No. 169 of 1980 and a vesting order on 22nd 1985.
5. Counsel further submitted that the plaintiff has brought the suit over 36 years after the vesting order was issued and no explanation has been given for the delay in filing the suit and there was no application for extension of time within which to file this claim.
6. Mr. Odundo relied on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] eKLR where the court made reference to *Bosire Ongero vs Royal Media Services* [2015] eKLR and held that where the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court does not have jurisdiction to entertain the same.
7. Counsel also cite the case of *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another* [2020] eKLR on Limitation of Actions. Further counsel submitted that the plaint as drafted does not disclose a cause of action against the defendants as it does not state when the alleged tort of trespass accrued and relied on order 2 rule 15 of the *Civil Procedure Rules* 2010.
8. Mr. Odundo cited the case of *Misiko Remy Sirengo (Suing as the Legal Representative of the Estate of Alfred Juma Sirengo (Deceased) v John Kabaa Watene & another* [2020] eKLR where the court emphasized that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it was plain and obvious that a plaint disclosed no reasonable cause of action or defence in law.
9. Counsel finally submitted that the court does not have jurisdiction to enforce, set aside, vary, hear and determine in an appellate manner the issues arising from Civil Suit No. 169 of 1980. Further that it is unclear from the pleadings which court gave the vesting orders that led to the issuance of the title to the Plaintiffs. That be that it may, the claim is in respect of execution of the orders that were issued in Civil Suit No 169 of 1980 hence it should be done in the same file that issued the orders sought to be executed.
10. Counsel relied on section 34 of the *Civil Procedure Act* that provides that:
 34.
 - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.



11. That the plaint as presented shows that the cause of action was brought about by Civil suit No. 169 of 1980 and therefore any proceedings to enforce by execution, discharge or satisfaction of orders issued therein ought to be in that cause and not filed in a fresh suit and relied on the case of *Nandlal Jivraj Shah & 2 others v Kingfisher Agencies* [2018] eKLR to support the position. Counsel urged the court to strike out the suit with costs.

Plaintiff's Submissions

12. Counsel opposed the preliminary objection and submitted that for a preliminary objection to succeed it should purely on a point of law and all facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained.
13. Mr. Muli submitted that it is evident from the pleadings that both parties thereon aver that they are the duly registered owners of the suit property and are in possession of original title documents and referred to defendants' statement of defence filed on August 6, 2021 at paragraph 3, 5, and 7 (quoted)

....3. the 2nd and 3rd defendant deny the contents of paragraph 3 of the plaint and aver that if the plaintiff holds any title to Plot Number 1623 situated in Shella Area Malindi town, then the same was obtained by fraud, deceit, illegally and forgery and/or through corrupt schemes as defendants are in possession of the original title of the parcel of land that belongs to their father and his brothers.

 5. The existence of any orders issued in Civil Suit No. 169 of 1980 and auction by Shariff Alwai Ahmed on an unspecified date and place is denied by the 2nd and 3rd defendants and plaintiffs will be put to strict proof of the same.
 7. In response to paragraph 6 of the plaint the defendants aver that the original title deed which they have in theirs.
14. Counsel also cited the cases of *Oraro v Mbaja* (2005) eKLR and *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* (2017) eKLR where the Court of Appeal set aside a ruling where a preliminary objection was upheld yet it did not raise a clear point of law as there were issues that were contested.
15. Counsel also cited the cases of *Silvester K Kaitany v Nyayo Tea Zones Development Corporation & another, National Land Commission & Another (interested Parties)* (2020) eKLR and *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga...vs...Eliud Timothy Mwamunga & Sagalla Ranchers Limited* (2017) eKLR, and urged the court to dismiss the preliminary objection with costs.

Analysis and Determination

16. The issue for determination is whether the preliminary objection meets the definition of preliminary objection as per the case of *Mukisa Biscuits Manufacturing Co. Lt Vs West End Distributors Ltd* (1969) EA 696 which states:

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 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.”



17. Further Sir Charles Nebbold, JA stated 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 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

18. For a preliminary objection to succeed, the issues raised must be purely on points of law and not facts that need to be ascertained outside the pleadings and the case. The points of law must be clear that any judicial officer or Judge upon looking at the pleadings would have no difficulty in upholding the Preliminary Objection.

19. The defendants has raised two issues one on *Limitation of Actions Act* and that the plaint discloses no cause of action against the defendants but looking at the plaint, it states that the plaintiff is a bona fide purchaser of the suit land and has pleaded that the defendants are illegally on the suit land. This shows that the plaintiff has a cause of action as an alleged bona fide purchased who has a title to the suit land.

20. The plaintiff has further exhibited official search in his name and rates demand and payment receipts of the suit land.

21. Similarly, the defendants filed a defence and accused the Plaintiff at paragraph 3 of the plaint that he had obtained the title fraudulently as the defendants are in possession of the original title. In a situation where fraud is pleaded and a party pleads that a title has been acquired fraudulently, a party should be interested to find out who has the genuine title. Both the plaintiff and defendant claim to hold a title to the suit land. A parcel land cannot have two title deeds. It follows that one of them may be fake or both which the court must determine on the issue of genuineness. These are issues that cannot be terminated vide preliminary objections as they are contested. It would be also in the defendant’s interest that the issue of who has the genuine title to be adjudicated upon.

22. In the case of *Oraro Vs Mbaja* (2005) 1KLR 141, the Court held that: -

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.”

23. On the issue of the vesting order raised by the defendant, this is an explanation as to how the plaintiff acquired the suit property and not that it is an execution process. This is a claim for trespass to the suit property and not the implementation of the vesting order. The vesting order had already been acted upon by registration and issuance of title.

24. I find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

