



Keiyo Farm Limited v Cabinet Secretary Ministry Of Lands & Settlement & 3 others (Cause 42 of 2021) [2022] KEELC 3031 (KLR) (15 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3031 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
CAUSE 42 OF 2021
FO NYAGAKA, J
JUNE 15, 2022**

BETWEEN

KEIYO FARM LIMITED PLAINTIFF

AND

**CABINET SECRETARY MINISTRY OF LANDS & SETTLEMENT 1ST
DEFENDANT**

LAND REGISTRAR TRANS-NZOIA COUNTY 2ND DEFENDANT

JONAH CHELAL 3RD DEFENDANT

HON. ATTORNEY-GENERAL 4TH DEFENDANT

RULING

(On a Preliminary Objection on the existence of the suit)

1. On 23/02/2022, the 3rd defendant filed a preliminary objection dated February 21, 2022. In the objection, he sought the striking out of the entire suit on the following grounds, namely:-
 - a. That the entire suit against the 3rd defendant herein is filed in express violation of section 7 of the *Limitation of Actions Act*, chapter 22, Laws of Kenya.
 - b. That the suit is non-starter, raising no reasonable cause of action against the 3rd defendant, defective, abuse of court process and ought to be struck out.
 - c. That this court lacks jurisdiction to entertain this matter.
2. Following service of the objection, on 09/05/2022, the plaintiff filed a replying affidavit sworn on 2/05/2022 by one Moses Sagite. In it he deponed that he had authority to swear the affidavit on his own behalf and that of the plaintiff. The plaintiff was a Limited Liability Company. He deponed further that the applicant (whom this court understood to mean the 3rd defendant who had raised the



preliminary objection) was a former secretary of the plaintiff who acted outside his powers by colluding with and selling part of the suit land to third parties without following the due process.

3. He swore further that the third parties were not members of the plaintiff company and they had applied for the subdivision of the land to the exclusion of bona fide shareholders. He termed the third parties as masqueraders against whom the plaintiff had reported to the relevant authorities and by virtue of the process of subdivision of the suit land, the plaintiff had brought the suit. He deponed at paragraph 9 that the plaintiff needed the court to “ascertain and verify the register of the company shareholders.” He stated further in paragraph 12 that the issue of shareholders was a disputed fact which called for the “verification of the register to ascertain the true and bona fide shareholders.”
4. He then deponed that the pleadings called for evidence to have the allegations therein proven rather than being decided on by way of a preliminary objection. He prayed that the suit be determined on merit. The 1st, 2nd and 4th defendants did not wish to participate in the preliminary objection. They left it for the court to determine it.

Submissions

5. The preliminary objection came up for hearing on 11/05/2022 when, upon the court confirming that the parties had filed their written submissions, the Court fixed it for a Ruling date. By his submissions dated February 28, 2022 and filed on March 1, 2022, and the supplementary ones dated May 16, 2022 filed on May 18, 2022, the 3rd defendant stated that on whether the suit offended Section 7 of the *Limitation of Actions Act*, the court should consider paragraphs 6, 7 and 9 of the plaint. He reproduced the said paragraphs wherein, at paragraph 6, the Plaintiff stated that it was the registered owner of all those parcels of land known as LR 7383, LR 5788 and LR 5529, and at paragraph 7 that in the year 1974 Pokot raiders invaded the land and displaced occupants, burnt down houses, injured, maimed and killed some of the occupant shareholders and displaced some, and at paragraph 9 that masqueraders with assistance of 3rd defendant infiltrated the area list and purported to allocate themselves land on the said parcels. He then linked that to the prayer in the plaint which was for a declaration that parcels of land belonged to the plaintiff.
6. He then submitted that since the plaintiff directors left the suit land in the year 1974 which to the date of filing the suit translated to 47 years or thereabouts, then such a long period of time in which the 3rd defendant and other occupants have enjoyed quiet possession, put the land beyond recovery of the plaintiff from the occupants. He stated that by virtue of section 7 of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya, the suit was statute barred since the cause of action arose in 1974 when time started running. He submitted that the plaintiff was not vigilant enough and equity could not aid it but the vigilant.
7. He submitted that the plaintiff could not run away from its pleadings which bound it. He relied on the case of *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR, where the court stated as follows; -

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”



8. He submitted further that the suit offended section 7 of the *Limitation of Actions Act* which provides that “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”. By the provision, an individual claiming a land is not permitted by law to do after the end of twelve (12) years from the time his right over it accrued. He is only entitled to act within before the end of that period.
9. The 3rd defendant stated that since the suit was instituted in 2021, it was statute barred because it was brought 47 years from the time action accrued. He argued that such a case should not be left maintained in court. He submitted, in what I understood him to mean, that the plaintiff admitted in its pleadings that since 1974, it was not in possession of the suit land. His view was that such a long period of time as 47 years of absence from the land extinguished its claim, whether proprietary or otherwise, to the suit land.
10. He relied on the case of *Sobanlaldurgass and another Versus Divisional Integrated Development Programmes Co Ltd* (2021) eKLR, which cited the case of *Iga v Makerere University* [1979] EA wherein the court stated as follows:-

“A plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief sought.”
11. On whether the suit was non-starter and raised no reasonable cause of action, he submitted that in bringing a suit after 47 years had lapsed, it constituted inordinate and unreasonable delay and was designed to abuse the court process. On whether this court lacked jurisdiction to entertain this matter, he submitted that since the claim was stale this court did not have jurisdiction to entertain it. He relied on the case of the *Owners of the Motor Vessel “Lilian S versus Caltex Oil (Kenya) Ltd* [1989] KLR 1. He asked the court to down its tools.
12. About the contention that the plaintiff only discovered in 2017 that the 3rd defendant and other parties had masqueraded and invaded the suit land, the 3rd defendant submitted that the plaintiff was an absentee landlord which was not vigilant. Lastly, he submitted that the affidavit sworn by Moses Sagite on May 2, 2022, was misplaced since the issue at hand was a preliminary objection on points of law and not facts. He asked the court to strike out the affidavit.
13. The plaintiff submitted that the preliminary objection was misplaced. First, he defined a preliminary objection, using the case of *Mukisa Biscuits Manufacturers Co Ltd vs West End Distributors Ltd* [1969] EA 696. About the jurisdiction of a Court, he took cue from the case of the *Owners on the Motor Vessel “Lillian” vs Caltex Oil (Kenya) Ltd* [1989] KLR. He then submitted that the suit was about a declaration that the suit land belonged to it. Again, it stated that one of the prayers in the suit was for an injunction against the defendants subdividing the suit lands. It defended paragraphs 8 and 9 of its pleadings stated that they formed the basis of the claim that non-shareholders had allocated themselves. He then relied on section 26 of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya. The provision is to the effect that where an action is based on fraud, the period does not run until the plaintiff discovered the fraud or mistake or could with reasonable diligence have discovered it.
14. It then submitted that it had bought the parcel of land with the intention of running it as a block. It only discovered that masqueraders invaded the land and had started subdividing it. It submitted that



the 3rd defendant should not hide under sections 7 and 8 of the *Limitation of Actions Act* to benefit from fraud.

15. It then submitted that the substratum of the dispute herein was about “... the ascertainment & verification of the register of the shareholders & the company’s authority/ sanction to allow subdivision of the subject parcel...” It relied on holding of Justice Ojwang (as he then was) in the case of *Oraro v Mbaja* (2005) 1 KLR 141, in saying that the issues before the court called for evidence and were not properly in the province of a preliminary objection.
16. It also relied on the case of *Arta Singh Bhamra & another v. Oriental Commercial Bank*, HCCC No 53 of 2004 where the court stated that “A preliminary objection must stem or germinate from pleadings filed by parties and must be based on pure points of law no facts to be ascertained.” It then summed it that this court had the requisite jurisdiction to determine the matter.

Issues, Analysis and Determination

17. I have considered the preliminary objection raised before me. I have considered the replying affidavit, the parties’ submissions, the law on the issue and case law relied on. I find only two issues before me for determination. These are:
 - a. Whether the preliminary objection is merited;
 - b. Who bears the costs of the objection, and if it succeeds, of the suit.
18. I analyze the issues sequentially, that is to say, in the order they are stated. The court needs only to look at the law and the pleadings before it. As I do so, I begin by pointing out that if a preliminary objection succeeds, it disposes of a matter or suit. A preliminary objection was defined in the locus classicus case of *Mukisa Biscuits Manufacturing Ltd. vs West End Distributors Ltd* [1969] EA 696. In it they defined what constitutes a preliminary objection as follows:

“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... 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.”
19. In *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* [2017] eKLR that: “We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.” What their Lordships are stating in their decision is that one must state with precision the point of law he or she is raising against another so that both the court and that other party are aware of the matter before him or her.
20. In *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others* [2004] e KLR, the same court stated as follows:

“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them.



We are of the considered view that if a party wishes to raise a preliminary objection and files in court a Notice to that effect and is subsequently served on other parties to the suit, the preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the court to sufficiently prepare to meet the challenge. If it is only at the hearing that the preliminary objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”

21. See also the holding in *Susan Wairimu Ndiangui -vs- Pauline W Thuo & another* [2005] eKLR where Musinga J as he then was held that “a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”
22. Having brought out the meaning of a preliminary objection, I now turn to the consideration of the objection and apply the law. In so doing, I will have to look at the pleadings. Matters of fact or those that require long drawn-out search for clarity as to what it is would make the purported objection not based on law. Thus, the affidavit sworn by one Moses Sagite, on May 2, 2022, in response to the preliminary objection herein should not have been sworn and filed against it in the first place. No preliminary objection should be answered to by way of an affidavit. Affidavits should ordinarily be confined to depositions on matters of fact. A party is by the law of procedure permitted automatically to respond to issues of law raised by way of preliminary objection, through submissions or comments on the same.
23. In the instant suit, the plaintiff pleaded at paragraph 9 of the plaint, dated 5/08/2021 and filed the same date, that masqueraders had, with the assistance of the 3rd defendant, infiltrated the area list and purported to allocate themselves parcels Nos LR 7383, LR 5788 and LR 5529. Then, upon being faced with the instant objection, they submitted that the suit was about the ascertainment and verification of the register of the shareholders and the company’s authority to subdivide land.
24. If the above averment and submissions are to be taken as they are, compared with the jurisdiction of this court, then clearly the instant suit is not in any way related to land and environment, and by virtue of section 13 of the Environment and *Land Act*, Act No 19 of 2011, this court lacks jurisdiction to entertain the suit. Issues to do with the ascertainment and verification of the Register of the shareholders and the Company’s authority to carry out its business are matters which only the High Court as ordained by and in the *Companies Act*, No 17 of 2015 is empowered to handle. As much as this Court of equal status as the High Court, its jurisdiction is specifically limited to handling disputes that relate to land and environment. Therefore, to the extent that the Plaintiff’s ultimate intent by the pleadings was to determine the issues of shareholders in the defendant company, I would dismiss the suit on account that this court lacks jurisdiction to hear and determine it.
25. Courts have had occasion to pronounce themselves on the aspect of jurisdiction. They have been clear, and the law is, that jurisdiction of a Court flows from a statute. A court cannot arrogate or assign itself jurisdiction where it does not have it. Thus, in the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi JA of the Court of Appeal stated as follows:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



26. In *Samuel Kamau Macharia & another Vs Kenya Commercial Bank & 2 others*, Application No. 2 of 2011 (2012) eKLR Paragraph (68)A, Supreme Court expressed itself on jurisdiction as follows:

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

27. Therefore, once the plaintiff’s placed themselves in the path of those who seek verification of shareholders and membership in a company, they automatically removed themselves from the jurisdiction of this court. However, the issue of jurisdiction was not the one raised by the 3rd Defendant. He raised the issue of the suit being incompetent for reason of being in violation of section 7 of the *Limitation of Actions Act*. The provision is to the effect that, “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.”
28. A plain reading of the provision is that once the proprietor of a parcel of land loses possession of land, by other means other than by his consent, he or she has to bring a suit for recovery thereof before twelve years elapse. If he waits until the period lapses, then his right to the parcel of land is lost. When one reads the provision in relation to section 17 of the Act, it becomes clear that the proprietor’s title gets extinguished at the end of the prescribed period. The Section provides that, “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.” Thus, the proprietor is not only “estopped” from bringing an action for recovery of the land but his title to the land ceases to be in existence. It therefore means that the person who dispossesses the proprietor is entitled to claim both retention of possession and ownership.
29. In the instant case, the plaintiffs pleaded that in 1974 Pokot raiders invaded the land and displaced occupants, burnt down houses, injured, maimed and killed some of the occupant shareholders and displaced them. The plaintiffs do not aver further that they ever returned to the parcels of land or have ever claimed it by whatever lawful means, until the institution of the present suit. Since the time of displacement to date is a period of over 47 years. If the plaintiff’s position is that it owned the titles as at the time of the alleged invasion and displacement or dispossession, then it is clear that the twelve (12) year period prescribed by law lapsed 32 years ago. It means further that the Plaintiff cannot, by law, sue for the recovery of the parcel of the land.



30. In so finding, I am guided by the holding in the case of *Gathoni v Kenya Cooperative Creameries Ltd* (1982) KLR 104 the court observed that:-

“The law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest.”

31. In *Bosire Ogero v Royal Media Services* [2015] eKLR, RE ABURILI J stated that: “The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them”.

32. The learned judge stated further that;

“.....The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See the case of Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998”.

33. I would do no more than agree with the holdings by my brother and sister judges on this issue. Having so found in paragraph 29 above, the question that remains for this court to determine is, what then happens to the case against the 1st, 2nd and 4th defendants? To answer the question, one had to look at the claim herein in totality. The plaintiff’s claim as clearly pleaded in paragraph 8 of the Plaintiff is that the defendants actions are in consonance as one. Actually, it is not clear what the cause of action by the plaintiff against the other defendants is except that “they are in the process of issuing title to 3rd parties...”. The plaintiffs then prayed for an injunction against the 1st, 2nd and 3rd defendants from subdividing (the suit lands) and issuing title until “the register of ownership is verified and the company sanctions the subdivision of its property.” First, issuing such an order would be in vain since this court has not been moved to do so. Even so, I have stated above that this court does not have jurisdiction to handle such a claim. Second, and of importance, is that, it is clear from the pleadings that the Plaintiff’s claim is totally dependent on the cause of action against the 3rd defendant. Since the court has found in the previous paragraph that the plaintiffs are by law barred from raising a claim of recovery of the land, contrary to sections 7 and 17 of the *Limitation of Actions Act*, then the entire claim against the defendants fails.

34. The upshot is that the preliminary objection succeeds. The suit is hereby dismissed in its entirety with costs to the defendants.

Orders according.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 15TH DAY OF JUNE, 2022.

DR. IUR FRED NYAGAKA

JUDGE, ELC, KITALE.

