



REPUBLIC OF KENYA



**Mbara & 2 others v Camp & 4 others (Environment & Land Case
16 of 2021) [2022] KEELC 2355 (KLR) (15 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2021**

MAO ODENY, J

JULY 15, 2022

BETWEEN

MOHAMED SALIM MBARA 1ST APPLICANT

NURU SALIM MBARAK 2ND APPLICANT

**SALMA SALIM MBARAK (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF SALIM MBARAK BAKSHUWEN) 3RD APPLICANT**

AND

MIDA CREEK ECO CAMP 1ST RESPONDENT

CHANGAWA KARI NYANJE 2ND RESPONDENT

DANIEL SAFARI KAHINDI 3RD RESPONDENT

MASHA KITSAO KARISA 4TH RESPONDENT

SAMUEL KAPOMBE 5TH RESPONDENT

RULING

1 This ruling is in respect of a Notice of Motion dated 11th March 2021 by the Plaintiff/Applicants seeking the following orders; -

1. Spent
2. That the Honourable Court be pleased to issue an order that the Plaintiffs/Applicants are the lawful beneficial owners of that piece of land known as portion Number 79 Mida and are entitled to the said piece of land.
3. That this Honourable Court be pleased to issue permanent injunctive orders restraining the defendants/respondents whether by themselves or their servants or agents and/or otherwise



howsoever from continuing with the unlawful trespass and illegal possession over all that piece of land known as Portion Number 79 Mida pending the hearing and determination of this application.

4. That this Honourable Court be pleased to issue an order that the defendants/respondents do hereby provide vacant possession of the suit property.
 5. That this Honourable Court be pleased to issue execution against the defendants/respondents by way of forceful eviction from the suit property.
 6. That the OCS Watamu Police station be ordered to provide security during the eviction process of the defendants/respondents from the suit property.
 7. That the costs of this suit be borne by the defendants/respondents.
- 2 In response to the application, the 2nd Defendant filed a Preliminary Objection dated 4th May 2021 raised on the following grounds; -
1. The value of the suit property is less than the pecuniary jurisdiction of this Honourable Court and thus should have been filed at the Chief Magistrate's Court.
 2. The suit herein is time barred under Section 7 of the *Limitations of Actions Act* Cap 22.
 3. The court therefore lacks jurisdiction to entertain the claim and the same ought to be struck out with costs.

Counsel agreed to canvas the Preliminary Objection vide written submissions which were duly filed.

The 2nd Defendant's submissions

- 3 Counsel for 2nd Defendant submitted that the Plaintiffs have failed to provide reasons as to why they never sought to take possession and/or occupation of the suit property from the time they acquired the letters of administration of the deceased and that they have not shown any proof that the suit property constitutes part of the estate of the deceased.
- 4 It was counsel's submission that the 2nd Defendant has been in occupation of the suit property for over 50 years and that the value of the suit property is less than twenty million thus this suit should have been instituted in a subordinate court of competent pecuniary jurisdiction.
- 5 Mr. Obaga stated that this suit was instituted 25 years from the date of the confirmation of grant thus barred by virtue of Section 7 of the *Limitations of Actions Act* and urged the court to uphold the Preliminary Objection.

Plaintiff's Submissions

- 6 Counsel for the Plaintiffs relied on the Mukisa Biscuits case on Preliminary Objections and submitted that the Applicant has not met the threshold of what constitutes a Preliminary Objection. Counsel further submitted that the issues in this suit are disputed facts which have to be ascertained during the trial and urged the court to dismiss the Preliminary Objection with costs.

Analysis And Determination.

- 7 The issue for determination is whether the Preliminary Objection has merit and whether the application as presented can be granted by the court.



8 It is trite law that a Preliminary Objection can only be sustained if the same is purely on a point of law and not facts as was held in the case *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 where the court held that ; -

----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 a contract giving rise to the suit to refer the dispute to arbitration”.

Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

9 Further in the case of *John Mundia Njoroge and 9 Others –v- Cecilia Muthoni Njoroge and Another* [2016] eKLR, the Court outlined the grounds which could form the basis of a Preliminary Objection;-

- a. Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or a complaint;
- b. Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter;
- c. Insufficient specificity in a pleading;
- d. Legal insufficiency of a pleading (demurrer);
- e. Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action; and
- f. Pendency of a prior action or agreement for alternative dispute resolution.

10 Counsel based the Preliminary Objection on pecuniary jurisdiction that the value of the subject matter falls within the Magistrates’ Court jurisdiction. The issue of pecuniary jurisdiction is a matter of fact which can only be deduced from evidence of a valuation report which can be disputed. There is no evidence of the value of the land in the pleadings and no valuation report has been filed to prove the same.

11 The court has original, territorial and pecuniary jurisdiction to hear and determine the suit unless otherwise proven to the contrary.

12 Section 13(1) of the *Environment and Land Court Act* reads as follows; -

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”



13 The *Environment and Land Court Act* grants jurisdiction to the Environment and Land Court under section 13 (7) to do the following, thus: -

....to make any order and grant any relief as the Court deems fit and just, including—

- (a) interim or permanent preservation orders including injunctions;
- (b) prerogative orders;
- (c) award of damages;
- (d) compensation;
- (e) specific performance;
- (f) restitution;
- (g) declaration; or
- (h) Costs.”

14 Counsel also submitted that the suit is Statute barred as the Plaintiff’s did not register the land after they got grant of letters of administration. The issue as to whether the suit is time barred, the time when right to sue accrued must be established and this can only be done via evidence. This is a factual matter which can be dealt with during the hearing of the main suit and not vide a Preliminary Objection.

15 In the case of *John Chelimo (suing as the administrator of the Estate of Josiah Kandie Chelimo (Deceased) v Africa Inland Church of Kenya Trustees & 2 others* [2016] eKLR the court held that: -

In my view, the first issue is a true preliminary objection but I have doubts as to the second. Although limitation may be raised as a preliminary objection, in my view, it can only be raised as a preliminary objection if there is no factual contention of when time started or stopped running. Where there is a factual contention, then the question of fact has to be determined and the issue will go beyond the parameters of a preliminary objection. For example, if a party sues under contract and the date of contract is not disputed, then it can be argued through a preliminary objection, whether or not the suit is within time. But if there is contention as to when the contract was made, then the date of contract becomes a question of fact which cannot be determined through the preliminary objection”.

16 I have considered the application, the submissions by counsel and find that the Preliminary Objection lacks merit and is therefore dismissed with costs.

17 I have also perused the application dated 18th March 2021 seeking for a declaratory order that the Plaintiffs are the beneficial owners of the suit land, permanent injunctive orders, order of vacant possession and forceful eviction which are the same orders sought in the main plaint as the final prayers. I find that the same cannot be granted at an interlocutory stage and are therefore dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF JULY, 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.

