



REPUBLIC OF KENYA



KENYA LAW
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**Kiriko v Magari (Environmental and Land Originating Summons
10 of 2019) [2022] KEELC 14480 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2019**

JG KEMEI, J

OCTOBER 31, 2022

BETWEEN

JOHN MWAURA KIRIKO PLAINTIFF

AND

JOSEPH MBUI MAGARI DEFENDANT

RULING

1. What is before this court is the notice of preliminary objection dated the January 19, 2022 and filed on the January 27, 2022 on the grounds as follows;
 - a. The counterclaim is barred by statutes of limitation.
 - b. The counterclaim is presented as an affidavit and not as a pleading and is therefore incurably defective
 - c. The counterclaim is partially based on inadmissible evidence and the same ought to be struck out.
2. The objection was canvassed by way of written submissions which I have read and considered.
3. The law firm of Kiarie Njuguna & Co filed submissions on behalf of the applicant while that of Kithinji Marete filed on behalf of the respondent.
4. It was submitted by the applicant that the gist of the applicant's suit is a declaration that he has become entitled to the suit land *vide* his originating summons dated the December 20, 2018. The respondent on the other hand has denied the plaintiff's claim and contended that the applicant's possession and occupation of the suit land was with his consent and further that he was a rent paying tenant paying Kshs 50,000/- a month an amount that is been outstanding for a long time.



5. The applicant relied on section 8 of the *Limitation of Actions Act* that provides that;

“An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due.”
6. Counsel stated that by the respondent seeking to recover rent arrears that fell due in 2011, the same is not recoverable by dint of section 8 of the *Limitation of Actions Act*. He contended that there is no existence of a landlord/tenant relationship between the parties in this suit to sustain the payment of rent.
7. Turning on section 7 of the *Limitation of Actions Act*, the applicant contended that an action to recover the suit land by the defendant is irretrievably time barred and further added that the respondent has never occupied the suit land and the right to recover possession accrued to him in 2001. That even if the agreements of sale of 2004 were to be considered, the agreement became void on account of want of Land Control Board consent as well as effluxion of time in which case the respondents right to recover the land started 6 months from April 2007 and by September 2016 it had run the full length hence statute barred.
8. Counsel also submitted and took issue with the respondent’s counterclaim and averred that the same being anchored on inadmissible correspondences between a client and his advocate which communication is privileged. That Mr Kimani Kairu acted for both parties in the transaction and he has objected to the said Advocate coming to court to testify on behalf of the respondent as in his view the evidence would not only be improper but be in breach of the advocate client confidentiality. He accused the said counsel of releasing to the respondent the correspondences exchanged between him which the respondent has used to support the counterclaim. He contends that the letters are in breach of advocate client confidentiality and on that ground should not be admissible.
9. See the case of *Uhuru Highway Development Ltd & 3 others -Vs- Central Bank of Kenya & 4 others* (2003) eKLR where the court held as follows;

“We have no doubt whatsoever in our minds that in particular circumstances of this case mainly due to the role played by the counsel in bringing about the 1st and 2nd plaintiffs to agree to sign the charge he may consciously or unconsciously or even inadvertently use the confidential information acquired during the preparation of the charge. There would be prejudice.”
10. The respondent submitted that the objection does not meet the threshold set out in the case of *Mukhisa Biscuit* which stated as follows;

“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.”
11. Further counsel submitted that the objection is premised on facts which are disputed by the applicant before the court and hence cannot be said to be a pure point of law.
12. On the point that the correspondence presented by the respondent are inadmissible on account of suspected breach of advocate client confidentiality the respondent submitted that the invocation of advocate -client privilege is without merit on the basis that the annexures being referred to were drafted by their mutual Advocate and copied to the applicant who has had them in possession. That the



respondent cannot be barred from producing the documents that were copied to him and which are in support of his case. Further counsel submitted that there was no privilege confidential relationship between the applicant and the respondent in the first place to warrant the invocation of advocate - client relationship.

13. In further submission counsel stated that to the contrary the decision in the *Uhuru Highway* case was not applicable to the existing facts of this case and therefore is distinguishable. He urged the court to dismiss the objection.

14. The key issue is whether the objection is a pure point of law.

15. The court will first have to determine whether the objection raised by the 1st respondent qualifies to be a preliminary objection as described in the case of *Mukisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd* (1969) EA 696, where Law JA stated that;

“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 the pleadings and which objection point may dispose the suit”.

16. Further the court stated;

“A preliminary objection raises a pure point to 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.”

17. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.

18. The applicant’s objection is premised on the time bar and inadmissibility of documents filed by the respondent to support his counterclaim and that the counterclaim as drafted is a defective pleading.

19. When the objection is found to be a pure point of law it should be capable of disposing of the suit in finality. In the case of *Quick Enterprises Ltd vs Kenya Railways Corporation*, Kisumu High Court Civil Case No 22 of 1999, the court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone.”

20. The gist of the claimant’s suit is a claim of title by way of adverse possession. In denying the claim of the applicant the respondent has filed a counterclaim on the grounds that the applicant’s claim is not sustainable for his occupation was with his consent and further that the applicant was a rent paying tenant in the premises. In response the applicant’s argument in the objection is that the rent demanded by the applicant is statute barred. For the court to properly determine the objection, it will be called upon to inquire as to the contractual relationship between the parties, the tenancy if any, the rent payable and the period due and the attendant defaults if any. All these require the court to call for evidence to be able to determine if indeed the demand for rent falls outside the 6 years set out in section 8 of the *Limitation of Actions Act* stated above. The act of making inquiries therefore ousts the objection from being a pure point of law.



21. In the Supreme Court case of *Independent Electoral & Boundaries Commission –vs- Jane Cheperenger & 2 others* Civil Application No 36 of 2014 [2015] eKLR the court in determining a preliminary objection challenging an application for extension of time to file a notice of appeal reiterated that;
- “A preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
22. In pari material, I am guided by case of *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga vs Eliud Timothy Mwangunga & Sagalla Ranchers Ltd* [2017] eKLR, where the court held that:-
- “Upholding the said preliminary objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said notice of motion application.
- Indeed, the question of whether they have a cause of action against the defendant and if they can sustain the same against him ought to be considered during the hearing of their notice of motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. the said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.
23. Courts have pronounced times without number that an objection on time bar ought to be raised by way of an ordinary motion so that the applicant can annex affidavit evidence which guide the court as to whether or not the action is time barred or not.
24. The upshot of the foregoing is that the applicant’s preliminary objection is not merited and the same is dismissed entirely with costs being in the cause.
25. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 31ST DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Njuguna for Plaintiff

Defendant – Absent but served via email on record.

Court Assistant – Dominic

