



Muthungu v Kituma (Sued in his Own Capacity as Squatter and Personal Representative and Administrator of the Estate of his Father Kituma Nganda Musau) (Environment and Land Case Civil Suit E006 of 2022) [2022] KEELC 13707 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE CIVIL SUIT E006 OF 2022
TW MURIGI, J
OCTOBER 19, 2022**

BETWEEN

JULIUS ALEXIUS PAUL MUTHUNGU PLAINTIFF

AND

MBULUNGÁ KITUMA (SUED IN HIS OWN CAPACITY AS SQUATTER AND PERSONAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF HIS FATHER KITUMA NGANDA MUSAU) DEFENDANT

RULING

1. The Plaintiff instituted this suit against the Defendant and sought for the following orders: -
 1. A Declaration that the Deceased Kituma Nganda Musau had sold to the Plaintiff Land Title No Ukia/Utaati/449 and the Plaintiff is entitled to be registered as owner and proprietor thereof and issuance of title deed in his favour.
 2. Cancellation and revocation of land title deed no Ukia/Utaati/449 in the name of the deceased and for its registration to be rectified and to be in the name of the Plaintiff herein.
 3. The Defendant as administrator of the estate of the deceased Kituma Nganda Musau to avail all the original title deed for the land and execute the necessary conveyance transfer forms in favour of transfer of ownership to the Plaintiff's name failure of which the Deputy Registrar of this court to execute the conveyance transfer forms and the Land Registrar Makueni to cancel the registration and title deed in the name of Kituma Nganda Musau and to effect transfer of the land to the Plaintiff and issue title deed of land title no Ukia/Utaati/449 in the name of the Plaintiff.
 4. Permanent injunction restraining the Defendant from entering, remaining on, trespassing, squatting on and/or carrying out any activity of whatever nature on the land and for orders



for Defendant's eviction from the land together with his relatives, wives, children, animals, servants and removal of anything of whatever nature which is on the land.

5. Mesne profits against the Defendant for unauthorised entry into and use of the land.
 6. Cost of and incidental to the suit.
 7. Any other remedy as the Honourable Court may deem fit and applicable in the circumstances.
2. The Defendant filed his statement of Defence and denied the Plaintiff's claim.
 3. He also filed a Notice of Preliminary Objection dated 9th of May, 2022 on the following grounds: -
 1. The suit is time barred having been brought outside the statutory limitation period of 12 years in view of Section 7 of the *Limitation of Action Act*.
 2. The Plaintiff's suit is incompetent, bad in law, barred in law, an abuse of the Court's process and should be dismissed with costs.
 4. The Preliminary Objection was canvassed by way of written submissions.

The Defendant's Submissions

5. The Defendant's submissions were filed on 29th of August, 2022.
6. Counsel for the Defendant raised the following issues for the Court's determination.
 - i. Whether the Plaintiff's suit is time barred.
 - ii. Whether this Court has jurisdiction to hear and determine this suit.
7. With regards to the issue whether the Plaintiff's suit is time barred Counsel for the Defendant submitted that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of the pleadings. Counsel went on to submit that Section 7 of the *Limitation of Actions Act* provides that the limitation period to recover land is 12 years.
8. Counsel further submitted that from the Plaintiff's list of documents, the Plaintiff sought to enforce the sale agreements dated December 17, 1980, 9/04/1981, August 18, 1981 and September 5, 1980.
9. Counsel contends that the Plaintiff pleaded that he entered into a sale agreement with the Defendant's father which was formalized as a typed agreement on September 5, 1980. Counsel argued that the cause of action arose in 1980 when the Defendant's father sold the land to him. Counsel argued that the Plaintiff could not bring an action for recovery of land since a period of 41 years had lapsed since he executed the sale agreement.
10. Counsel placed reliance on the following authority in support of her submissions.
 - a. [*Sohanlal Durgadass Rajput & Another Vs Divisional Integrated Development Programmes Co. Ltd* \(2021\) eKLR.](#)
11. On the second issue, Counsel submitted that the instant suit is statute barred hence the Court lacks jurisdiction to hear and determine this suit. Counsel placed reliance on the following authorities in support of her submissions on this point: -
 - a. [*Owners of the Motor Vessel "Lillian S" Vs Caltex Oil Ltd* \(1989\) KLR.](#)
 - b. [*Hezron Kimeli Cheruiyot Vs Cheptkemoi Chebochok & 3 Others* \(2021\) eKLR.](#)



12. Counsel maintains that the instant suit offends the provisions of Section 7 of the *Limitation of Actions Act* and hence it should be dismissed with costs to the Defendant.

The Plaintiff's Submissions

13. The Plaintiff's submissions were filed on 19th of September, 2022.
14. Learned Counsel submitted that the Plaintiff was seeking to be registered as the owner of the land under the doctrine of continued registration and not recovery of the same since he is already in occupation of the suit land.
15. Counsel further submitted that the doctrine of adverse possession stipulates that the owner of land cannot recover his land from a person who has occupied it for more than 12 years. Counsel place reliance was place in the case of *Public Trustee Vs Wanduru Ndegwa* (1984) eKLR.

Analysis and Determination

16. Having considered the pleadings, the Preliminary Objection and the rival submissions, I find that the following issues arise for determination: -
 - i. Whether the present suit is time barred.
 - ii. Whether the Court has jurisdiction to hear and determine this suit.
17. The law on Preliminary Objection is settled. A Preliminary Objection must be on a pure point of law.
18. In *Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd* (1969) EA 696, Law JA stated as follows;

“So far as I’m aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
19. Further on Sir Charles Newbold JA stated;

“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 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”
20. In *Oraro Vs Mbaja* 2005 eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual



aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

21. The Defendant based his Preliminary Objection on the grounds that the suit is time barred and as such, the Court has no jurisdiction to hear and determine the same. The issue of jurisdiction and whether a suit is time barred is a pure point of law which can determine the matter without having to consider the merits of the case.
22. The Defendant’s Preliminary Objection is on the ground that the Plaintiff’s cause of action is time barred since the suit was filed after the expiry of the period of limitation. The Preliminary Objection is on a point of law and the Court is satisfied that it has been properly and validly taken.
23. The question whether or not the Plaintiff’s suit is time barred by statute on account of limitation goes to the jurisdiction to entertain this suit. If the suit is statute barred on account of limitation then the Court lacks jurisdiction to entertain the same.
24. Section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of actions.
25. The limitation period in regard to an action to recover land under Section 7 of the *Limitation of Actions Act* is 12 years. It 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, it first accrued to some persons through whom he claims to that person.”
26. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.
27. The Plaintiff instituted this suit against the Defendants on 25th of March, 2022.
28. The Defendant argued that the Plaintiff sought to enforce the sale agreements dated December 17, 1980, April 9, 1981, August 18, 1981 and September 5, 1980 after the lapse of 41 years. The Defendant further stated that the Plaintiffs cause of action arose in 1980 when the Kituma Nganda Musau (deceased) sold to him the land.
29. In the case of *Edward Moonge Lengusuranga Vs James Laniyara & Another* (2019) eKLR the Court held that;

“A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings a suit.”
30. I have carefully perused the Court record. The plaintiff instituted the present case on 25th of March, 2022. It is not in dispute that the Plaintiff’s claim is based on the sale agreements entered between him and the Kituma Nganda Musau (deceased) in 1980 and 1981. The agreements were formalized by a typed agreement on September 5, 1980. Learned Counsel for the Plaintiff argued that the Plaintiff was seeking to be registered as the owner of the suit land and not recovery of same since he is already in possession of the land. The plaintiff has not offered any explanation as to why it took him all that time to initiate the recovery action.
31. In this case it is clear that the cause of action arose when the Plaintiff formalized the agreement and executed the sale agreement on 5th of September, 1980.



32. The object of the law of limitation was stated in the case of *Gathoni Vs Kenya Co-operative Creameries Ltd* (1982) KLR 104 where the Court of Appeal held that;
- “.....The law on limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them.”
33. Similarly, in the case of *Rawal Vs Rawal* (1990) KLR 2 the Court held that;
- “The object of any limitation is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is to extinguish claims.”
34. Further in the case of *Iga Vs Makerere University* (1972) EA the court held that;
- “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 when a suit is time barred the court cannot grant the remedy or relief sought.”
35. The Plaintiff’s suit having been filed on 25th of March, 2022 was filed out of time. On the basis of the facts and evidence presented before the Court, I find that this suit is statute barred.
36. Counsel for the Plaintiff invoked the doctrine of adverse possession and submitted that an owner of land cannot claim land from a person who has been in possession of land for more than 12 years. It is trite law that parties are bound by their pleadings. The Plaintiff filed this suit seeking for several orders against the Defendant. It is clear from the Plaint that the Plaintiff has not pleaded that he is the owner of the suit land by virtue of adverse possession. The Plaintiff cannot therefore claim ownership of the suit property by virtue of adverse possession.
37. The next issue for determination is whether this Court has jurisdiction to hear and determine this suit. Jurisdiction is everything. A Court cannot take any step without jurisdiction.
38. The question of limitation is a question that goes to the jurisdiction of this Court. The Supreme Court *In The Matter Of The Interim Independent Electoral Commission* (2011) eKLR held as follows;
- “Assumption of jurisdiction is a subject regulated by *the Constitution*, by statute law and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel Lillian (S) Vs Caltex Oil (Kenya) Ltd* 1989 KLR 1.”
39. Learned Counsel for the Defendant submitted that the Court lacks jurisdiction to hear and determine this suit on account that it is time barred.
40. Having found that this suit is statute barred on account of limitation, I find that this Court has no jurisdiction to hear and determine this suit.
41. In the end, the Preliminary objection is upheld. Accordingly, the Plaintiff’s suit against the Defendant is struck out on account of being statute barred. Each party to bear its own costs.
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HON. T. MURIGI

JUDGE_

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

IN THE PRESENCE OF: -

Court assistant – Mr. Kwemboi

Julius Muthungu the Plaintiff.

Moses Odawa for the Plaintiff.

Mutava holding brief for M/s Munyao for the Defendant.

