



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC SUIT NO. 65 OF 2020

HANNAH WANJIRU MBURU.....PLAINTIFF/RESPONDENT

VERSUS

SIMON NYUTU MARARO.....1ST DEFENDANT/OBJECTOR

JEREMIAH NYUTU MARARO.....2ND DEFENDANT/OBJECTOR

ESTATE OF CYRUS THIGARI MARARO.....3RD DEFENDANT

WANJIKU MARARO.....4TH DEFENDANT

RULING

The 1st and 2nd Defendants/Objectors raised a Preliminary Objection dated 28th August 2020, on the following grounds:-

- a) This suit is Res Judicata and an abuse of the Court process in that Thika ELC No. 254 of 2017, formerly Milimani ELC No. 3 of 2010, involving the same subject matter and the same parties, was competently dealt with by this Honourable Court and dismissed for want of prosecution on 31st October 2017 thus it offends the provisions of Section 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.*
- b) An Application by the Plaintiff dated 4th June 2019, seeking to reinstate the dismissed suit was also dismissed on 9th July 2020 with costs.*
- c) Dismissal of Thika ELC 254 of 2017, for want of prosecution was as good as the final judgment of this Honourable court thus divesting it of jurisdiction to hear the instant suit.*
- d) This suit is statute barred contrary to Section 4 of the Limitations of Actions Act Chapter 22 Laws of Kenya and is filed without leave of court to enlarge time as the Plaintiff pleads that it is founded on a Contract of 23rd July 1985.*
- e) The Plaintiff has instituted this suit in her own name not as the personal representative of the Estate of George Mburu Kabucho thus lacks capacity to sue contrary to Order 4 of the Civil Procedure Rules.*
- (f) That the suit is thus incompetent, frivolous and malafide*

The Preliminary objection was canvassed with by way of written submissions.

The 1st and 2nd Defendants/Objectors filed their written submissions on 21st October 2020, through the Law Firm of **Kipkenda & Company Advocates** and submitted that the suit is *Res Judicata* as there is no dispute that a previous suit to wit **Thika ELC No. 254 of 2017**, involving the same parties and the same subject matter existed and the suit was dismissed for want of prosecution. That an Application seeking to reinstate the suit was also dismissed on 9th July 2020. That the only issue that the Court should determine is whether the dismissal of the suit was as good as the final Judgment, It was thus submitted that the dismissal of a suit is as good as a final Judgment. They relied on the case of **Peter Ngome ...Vs... Plantex Company limited (1983)eKLR**.

It was further submitted that the suit is time barred contrary to **Section 4 of the Limitations of Actions Act** and is filed without leave of Court to enlarge time. They relied on the case of **Mehta ...Vs... Shah(1965)E.A 321** where the Court held that;-

“... The object of any limitation enactment is to prevent a Plaintiff from prosecuting sale claims on the one hand, protect a Defendant after he has lost evidence for his Defence from being disturbed after a long lapse of time. The effect of Limitation is to remove remedies irrespective of the merits of the particular case.”

Further that according to the Plaintiff dated **4th August 2020**, the Plaintiff/Respondent averred that the cause of action is founded on a Contract dated **23rd July 1985**, and the claim in its present form is time barred as the **6 year Limitation period** prescribed under **Section 4(1) of the Limitations of Actions Act** for actions founded on Contracts has lapsed. The Plaintiff/Respondent has neither sought leave nor made an Application for extension of Limitation periods and therefore the claim is incompetent.

The Plaintiff/Respondent through the Law Firm of **Musyoki Mogaka & Company Advocates** vide her written submissions dated **28th October 2020**, submitted that the initial and most essential ingredient of Res Judicata is whether an earlier decision was made on the issue. That the earlier suit was dismissed for want of prosecution, before the Court could address the issues made in claim brought before it and the answer to the essential ingredient cannot be in the affirmative. That the Ruling dismissing the suit was not founded on merit. It was further submitted that **Order 12 Rule 6 of the Civil Procedure Rules** avails an avenue for filing a fresh suit in place of a previously dismissed suit. That the said Rule provides;

“subject to subrule (2) and to any law of limitation of actions where a suit is dismissed under this Order the Plaintiff may bring a fresh suit.”

The Plaintiff/ Respondent further relied on the case of Christopher **Kenyariri ...Vs... Salama Beach (2017)eKLR** where the Court held that;

“to constitute Res Judicata, there must be adjudication which conclusively determines the rights of the parties with regards to all or any of the matter in controversy.”

It was further submitted that the Plaintiff/ Respondent was within her time when she filed her first suit. That the Plaintiff/ Respondent brought her suit in the year **2011**, after the Defendants trespassed upon her deceased husband parcel of land sometime in **2008**, when it was made clear to her that they did not intend on effecting transfer of the suit property. That the Limitation of Actions Act states that no action shall be brought after 6 years when the cause of action accrued. It was further submitted that the cause of action accrued when the Defendant/ Objectors refused to transfer the property from themselves to the estate of the Deceased. That the arguments of **Res Judicata** and **Statute bar** under the Limitations of Actions Act are not available in this case.

The Court has now carefully read and considered the instant Preliminary Objection and the written submissions. The issues for determination is whether the **Notice of Preliminary Objection is merited**.

The grounds upon which the Preliminary Objection is premised on is that the Suit herein is **Res Judicata** and that the suit is **barred** by the provisions of **Section 4 of the Limitations of Actions Act**.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“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.”

Further Sir **Charles Nabbold, 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.”

It is evident that a **Preliminary Objection**, raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

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.”

On whether an issue of **Res Judicata** can be raised as a Preliminary Objection, the Court is persuaded by the case of **Henry Wanyama Khaemba... Vs... Standard Chartered Bank Ltd & Another (2014) eKLR**, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary

Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

Further in the case of George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR, where the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.”

Various issues have been raised by the parties as to whether or not the matter is **Res Judicata** given that as there was a similar suit that was between the same parties over the same subject matter. For the Court to make a determination whether the matter is **Res judicata** or not, it will have to ascertain facts and probe evidence. Therefore, the Court finds and holds that what has been raised by the 1st & 2nd Defendants/Objectors on the issue of **Res Judicata** cannot be raised as a Preliminary Objection and the same is therefore not merited.

It has also been submitted that the suit is **statute barred**. It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertain of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action will not require the probing of evidence. All that the Court will then need to do is determine what the law says and this would only mean that the same raises a pure point of law.

As per the description of Preliminary Objection in the Mukisa Biscuits case (supra), the Court finds that the said ground raised by the 1st & 2nd Defendants/Objectors meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere.

The Court is now left to determine whether the same is merited as provided by the Limitations of Actions Act.

Though the Objectors have averred that the suit is time barred as it is

hinged on a Contract dated 23rd July 1985, the Plaintiff/ Respondent has averred that the cause of action accrued in 2008, when the Objectors trespassed on the suit property and it became clear that they did not intend on transferring the suit property to the Deceased's Estate.

In the case of Edward Moonge Lengusuranga ...Vs... James Lanaiyara & 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 suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the 13th January 2015 and a period of three years ended on 13th January 2018. These proceedings were filed on the 20th August 2018 which period was beyond the 3 years from the date the fraud was discovered.”

Persuaded by the above case, it is clear that a cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Plaintiff / Applicant used to justify its rights to sue?

The Court has carefully perused the Plaint herein and is satisfied that the suit is hinged on the actions of the 1st and 2nd Defendants /Objectors of trespassing onto the suit property in 2008 as per **paragraph 22 of the Plaint** and after being summoned they refused to perform their contractual obligations.**Section 4 (1) of the Limitation of Actions Act** provides:

“4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(a) actions founded on contract;

(b).....

(c).....

(d).....

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

The Court finds and holds that the cause of action having accrued in **2008**, that is when time began to run. As per **section 4 of the Limitations of Actions Act** the causes of action founded on Contract have time limitation of **6 years**, time having begun to run in **2008** naturally it would mean that limitation ended in **2014**.

The Plaintiff/ Respondent has submitted that by the time she was filing her suit, she was well within time. However this is a fresh suit. Without going to the merits of whether or not a fresh suit is or is not **Res judicata**, the provisions of **Order 12 Rule 6(1) & (2)** of the Civil Procedure Rules provide as follows:

6 (1) Subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this order, the plaintiff may bring a fresh suit.

6 (2) when a suit has been dismissed under rule 3, no fresh suit may be brought in respect of the same cause of action.

It would therefore mean that the suit is subject to Limitation of Actions Act. **Section 39** of the said **Limitation of Actions Act** provides as to when a period of Limitation does not run.

39. (1) A period of limitation does not run if—

(a) there is a contract not to plead limitation; or

(b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purposes of subsection (1) of this section, “estopped” includes estopped by equitable or promissory estoppel.”

Further in the case of **Lillian Njeri Muranja & John Muranja Mahinda ...Vs... Virginia Nyambura Ndiba & Kajiado County Government (2014)eklr** the Court held that;

“For two reasons, I would not uphold that contention, firstly it would be stretching the law of limitation for one to argue that once a suit is filed time ceases to run. The only rider to a Plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is the action is still within the limitation period. Certainly if this were not so then the suit filed would mean time begun to run on the filing of the suit. Effectively time would not stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running...”

It is thus evident that the filing of the previous suit did not stop time from running for purposes of limitation of time. For the above reasons the Court finds and holds that since **6 years** ended in **2014**, from the time the cause of action accrued, then the suit is **time barred** by **Section 4** of the **Limitations of Actions Act**.

The upshot of the foregoing is that the Court finds the **Notice of Preliminary Objection** dated **8th August 2020** is merited and the same is upheld in terms of prayers nos. **(d)** and **(f)**. The suit is **Statute barred** and thus struck out entirely.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 18TH DAY OF MARCH 2021

L. GACHERU

JUDGE

18/3/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

L. GACHERU

JUDGE

18/3/2021