



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

PETITION NO. 47 OF 2019

GREGORY MUTHIANI.....PETITIONER

VERSUS

THE STANDARD BANK LIMITED alias STANDARD CHARTERED

BANK KENYA LIMITED.....RESPONDENT

RULING

1. Before me for determination is the notice of preliminary objection dated 3rd August 2020 by the Respondent that the petition is res judicata and an affront to Section 7 of the Civil Procedure Act in so far as the Petitioner purports to re-litigate issues already determined by courts of competent jurisdiction and the petition is time barred pursuant to Section 4 of the Limitation of Actions Act as the same is being brought about 38 years from the time the alleged cause of action arose.
2. The Respondent submitted that the Petitioner having pleaded in paragraphs 2, 3, 4, 5 and 6 of the petition that there were previous proceedings over the subject matter herein and heard on merits, the petition is res judicata because the Petitioner purports to re-litigate issues already determined by courts of competent jurisdiction. The Respondent cited Section 7 of the Civil Procedure Act and relied on the case of Christopher Orina **Kenyariri –v- Salama Beach Hotel Limited & 3 Others (2017)eKLR**. It is submitted that from the Petition filed, it is clear that on or about 29th May 1981 the Respondent commenced proceedings before a court of competent jurisdiction against the Petitioner; that the claim in that suit was with respect to all that property known as LR. No. 4118/286 and LR No. 4118/287 situated in Taveta; that the Petitioner was aware of such proceedings and had instructed a firm of advocates to represent his alleged interests therein; that judgment was delivered resulting to the public auction sometimes in the year 1983 and the property was auctioned to third parties.
3. The Respondent submitted that the Petitioner ought to have placed any objections and/or pleas in the long decided suit and where aggrieved, preferred an appeal against such decisions. That the Petitioner failed to do so and cannot purport to re-litigate the suit vide the present Petition. That the Petitioner is estopped by his conduct from seeking remedies regarding the subject matter as failure to appeal is considered a satisfaction as to the judgment of the court and any consequential orders of actions are binding upon all parties therein. The Respondent relied on the case of **Sita Steel Rolling Mills Ltd –v- Jubilee Insurance Company Limited (2007)eKLR**. That in light of the foregoing, the present Petition is a clear abuse of the court process going against the clear provisions of Sections 1A, 1B and 3A of the Civil Procedure Act in so far as the same is seeking to waste previous judicial time and at the same time occasioning a great injustice to the Respondent thirty eight (38) years after such dispute was brought before a court of competent jurisdiction, heard and determined.
4. The Respondent further submitted that the Petition herein is time barred pursuant to Section 4 of the Limitation of Actions Act as the petition is being brought about 38 years from the time the alleged cause of action arose as the Petitioner is seeking a declaration that the alleged auction arising from such cause of action be declared illegal and further declaration that the Petitioner is the legal owner. That the prayers sought vide the present petition making its substance are time barred for all intents and purposes. It is submitted that delay defeats equity. The Respondent relied on the case of **Haron Onyancha –v- National Police Service Commission & Another (2017)eKLR**. It is submitted that it cannot be reasonably expected for the Respondent to possess the evidence and/or particulars arising herein including but not limited to records and statements which retention period has also long lapsed. The Respondent asked the court to take judicial notice that the Respondent is long restructured and no longer operates as Standard Bank. That time herein started running in the year 1979 when the cause of action arose thereby lapsing in the year 1985. The Respondent's submission therefore is that the petition herein is incompetent for all purposes first by running afoul of the doctrine of *res judicata* and further for being not only time barred, but to the greatest imaginable extent of time. That this is clearly an afterthought aimed at frustrating the Respondent and abusing the right to institute such proceedings. That not even the provisions of Article 159 of the Constitution of Kenya, 2010 can allow the same to stand. That the same goes against the very principles as to the administration of justice and the rule of law. The Respondent urged the court to dismiss the petition herein with costs to the Respondent.
5. The Petitioner opposed the preliminary objection and submitted that a preliminary objection is raised on a pure point of law and cannot be raised if any fact had to be ascertained or what is sought is the exercise of judicial discretion. The Petitioner relied on the case of **Charles**

Onchari Ogoti –v- Safaricom Limited & Another (2020) eKLR quoting with approval the ruling in **Mukisa Biscuit Manufacturing CO. Ltd-v- West End Distributors Ltd (1969) EA 696** and submitted that from mere allegations by the Respondent herein there is no evidence before court of the existence of a previous suit between the parties herein nor are there proceedings and a judgment to confirm that the alleged suit was heard and determined. That the issue of whether there was a previous suit is an issue that has to be ascertained and that automatically disqualifies it as a pure point of law and therefore the preliminary objection must fail. Further, that the issue of whether the petition is time barred is a matter of judicial discretion. That there is no law that sets timelines for filing constitutional petitions. The Petitioner cited the provisions of Articles 22, 23 and 159 (2) of the Constitution and submitted that what is before court is a constitutional petition filed under the provisions of the Constitution of Kenya 2010 and not the provisions of the Civil Procedure Rules. That Section 4 of the Limitation of Actions Act does not apply to constitutional petitions. The Petitioner submitted that there is no constitutional or stated provision providing timelines within which a constitutional petition can be filed and that the Petitioner is within his rights to file this petition. That it is not in dispute that a constitutional right has been violated and that this court, by dint of Articles 22, 23, 46, 50, 159 and 165 of the Constitution of Kenya has jurisdiction to hear and determine the Petition herein and issue remedies as per Article 23 (3). The Petitioner submitted that the issue of limitation of time is not a pure point of law and submitted that the preliminary objection is not merited and the same should be dismissed with costs to the Petitioner.

6. I have considered the submissions made. The Preliminary Objection by the Respondent is on the grounds that the suit is res judicata and time barred. In the case of **Mukisa Biscuit Manufacturing Co. Ltd (supra)**, it was 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 objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. From the above decision, it is clear that a plea of limitation can rightly be raised by a preliminary objection contrary to the submission by the Petitioner. In order to determine whether or not the suit is time barred, one has to look at the pleadings. The subject of this litigation is the Petitioner’s claim as contained in the petition dated 12th November, 2019 and filed on 14th November, 2019. In the background to the Petition, the Petitioner has stated as follows:

1. The Petitioner was the sole registered owner of all THAT land registered as LR NO. 4118/286 and LR.NO 4118/287 situated in TAVETA TOWNSHIP.

2. The Respondent herein sued the Petitioner in the year 1981 vide a plaint dated 29/5/1981 and filed on the same day praying for judgment against the Petitioner for; Kshs.213,281/40 and interests thereon at the rate of 11% from date of filing suit.

3. The sum claimed by the Respondent in the aforementioned suit was alleged overdraft facilities and advances THAT the Respondent alleged to have granted to the Petitioner sometimes in August, 1979.

4. The Petitioner has never requested for an overdraft facility from the Respondent and was taken aback when he was served with pleadings which alleged THAT he was indebted to the Respondent for overdraft and advances which he had not asked for.

5. The Petitioner instructed the firm of J. C. Gatonye Esq. Advocate to defend him in the said suit at Mombasa.

6. The matter proceeded without the knowledge of the Petitioner herein and only came to learn later THAT LR. NO.4118/286 and LR NO.4118/287 situated in TAVETA TOWNSHIP had been sold by public auction sometimes in the year 1983.

7. The Petitioner avers THAT the sale by public auction of LR. NO. 4118/286 and LR. No. 4118/287 situated in TAVETA TOWNSHIP which was fully developed sometimes in 1983 was done illegally and fraudulently.

8. The Petitioner has given the alleged particulars of fraud as auctioning the Petitioner’s property without notice, auctioning the property at a low price compared to the current market price, and failure to advertise the date, time and place of auction. The Petitioner seeks the following prayers:

a. A declaration the auction down (sic) by the Respondent was illegal and fraudulent and thus null and void.

b. A declaration that the Petitioner is the legal owner of LR. N. 4118/286 and LR. No. 4118/287 situated in Taveta Township.

c. Any further relief or orders that this Honourable Court shall deem fit to grant.

9. Section 4 of the Limitation of Action Act provides as follows:

“The following actions may not be brought after the end of six year from the date on which the cause of action accrued –

a) Actions founded on contract;

b) Actions to enforce a recognizance

c) Actions to enforce an award;

d) Actions to recover a sum by way of penalty or forfeiture or sum by way of penalty or forfeiture;

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.

2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued; provided that an action for libel or slander may not be brought after the end of twelve months from such date.

3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due... ”

10. Section 7 of the Limitation of Actions Act also 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.” Section 26 of the same Act stipulates thus:

“Where, in the case of an action for which a period of limitation is prescribed, either-

a) The action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

b) The right of action is concealed by the fraud of any such person as aforesaid; or from the consequences of a mistake,

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.....”

11. In this case, the Petitioner has stated that he was sued by the Respondent in the year 1981 and that he instructed counsel to defend him in the said suit. The Petitioner further stated that the matter proceeded without his knowledge and only came to learn later that LR. NO. 4118/286 and LR. NO.4118/287 had been sold by public auction sometime in 1983. The Petitioner therefore was aware of the former suit way back in 1981 and learnt of the sale of the suit properties in 1983. In this regard, I do agree with the Respondent’s submission that the Petition herein has been brought to the court after the lapse of 38 years since the cause of action arose. It is my finding and I so hold that the prayers sought vide the petition herein is time barred for all intents and purposes. The Petitioner admits that he was aware of the judgment of the case filed in 1981 and the sale by public auction carried out in or about 1983. He failed to prefer an appeal and further failed to take action to set aside the sale of the properties by public auction to third parties. Even without considering the other ground of objection raised, which is on the doctrine of res judicata, applying the law of limitation, it is clear to me that this suit is statute barred.

12. The upshot is that this petition is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE