



Kituku & another (Suing as the Personal Representatives of the Estate of the Late William Kituku Ndolo) v Mwangangi & 15 others (Environment & Land Case E101 of 2021) [2024] KEELC 6954 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E101 OF 2021
A NYUKURI, J
OCTOBER 16, 2024**

BETWEEN

**JOHN MUTUA KITUKU 1ST PLAINTIFF
JOSEPH NDOLO KITUKU 2ND PLAINTIFF
SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE
LATE WILLIAM KITUKU NDOLO**

AND

**PAUL NTHENGE MWANGANGI 1ST DEFENDANT
KAINDI MWANGANGI 2ND DEFENDANT
KANINI MWANGANGI 3RD DEFENDANT
MWELU MWANGANGI (SUED AS THE PERSONAL REPRESENTATIVES
AND BENEFICIARIES OF THE ESTATE OF BEATRICE KILUU
MWANGANGI) 4TH DEFENDANT
NDUNGE MUTWIWA 5TH DEFENDANT
MWANGANGI MUTWIWA 6TH DEFENDANT
MUTUA MUTWIWA 7TH DEFENDANT
NYOTA MUTWIWA 8TH DEFENDANT
MATHEKA MUTWIWA 9TH DEFENDANT
BONIFACE M MUIA 10TH DEFENDANT
MUMBUA MUTWIWA (SUED AS THE PERSONAL REPRESENTATIVES AND
BENEFICIARIES OF THE ESTATE OF MARGARET SYOKAU MUTWIWA
ALIAS MARGARET SYOKAU MWANGANGI) 11TH DEFENDANT**



JOHN K MAKUMI	12 TH DEFENDANT
PATRICK M KATIKU	13 TH DEFENDANT
NGUNYA MUTETU	14 TH DEFENDANT
CHRIS WAFULA T/A MUTOCA SURVEY CONSULTANTS ..	15 TH DEFENDANT
REGISTRAR OF TITLES	16 TH DEFENDANT

RULING

Introduction

1. Before court is a notice of preliminary objection dated 26th February 2024, filed by the 15th defendant seeking for the dismissal of the plaintiffs’ suit on the following grounds;
 - a. The plaintiffs’ cause of action being founded on an action to recover land and a present interest in land is barred by effluxion of time by dint of Section 7 and 9 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya.
 - b. This Honourable Court lacks jurisdiction to hear and determine this matter against the 15th defendant by virtue of Section 7 and 9 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya.
2. The objection was canvassed by way of written submissions. On record are submissions filed by the 15th defendant dated 18th March 2024 and the plaintiffs’ submissions dated 12th March 2024.

The submissions of the 15th defendant

3. Counsel argued that this court has no jurisdiction to handle a probate matter as the plaintiffs’ pleadings show that this court is being invited to determine a probate dispute. Counsel relied on the case of *Nashon Onyango Otieno v. George Onyango Otieno* [2021] eKLR to buttress their submissions.
4. Regarding the argument that the suit was in contravention of Sections 7 and 9 of the [Limitation of Actions Act](#), counsel submitted that a claim for land cannot be filed after 12 years of the date when the cause of action arose and that for a deceased person, the cause of action accrues from the date of death, where the deceased had been in possession.
5. Counsel argued that the plaintiff stated that the 15th defendant was the surveyor who conducted survey in regard to the suit property around 2008 in accordance to the orders of the High Court of 1st November 2007 and that the plaintiffs’ father died on 24th November 2003. Counsel contended that the plaintiffs knew that subdivision by the 15th defendant occurred in 2008, but opted to file this suit 16 years later. They cited Section 16 of the Law of Limitation Act and submitted that the suit was filed after 20 years from the demise of the plaintiffs’ father. Reliance was placed on the case of *Kober & 2 Others v. Korkoren (Chairman) & Another* [2021] [2023] KEELC 18168 KLR (15 June 2023) (Ruling) and *Bosire Ongero v. Royal Media Services* [2015] eKLR in support of their argument.

Plaintiffs’ submissions

6. Counsel for the plaintiffs submitted that a preliminary objection may only be raised on a pure question of law, and referred the court to the court’s decision in the case of *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others* [2015] eKLR. Counsel argued that the facts relied upon by the 15th defendant were disputed facts and that the plaintiffs’ position is that the disputed titles were



unlawfully issued on 31st December 2014 while the suit was filed on 8th December 2021 which is before expiry of 12 years.

7. Counsel argued that the 15th defendant could not properly apply Limitation of Actions Act on court judgments to fault the court's jurisdiction. Counsel referred to the case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696 and argued that the preliminary objection cannot be determined without making reference to documentary evidence and that therefore the same is not a proper preliminary objection.

Analysis and determination

8. The court has carefully considered the preliminary objection and submissions filed. In the preliminary objection filed, the 15th defendant raised an objection based on provisions of Sections 7 and 9 of the Limitation of Actions Act essentially faulting the plaintiffs' claim on the basis of having been filed out of time contrary to provisions in the Limitation of Actions Act. However, in their submissions, the 15th defendant began by arguing that this court being an Environment and Land Court had no jurisdiction to determine the dispute herein as the issues raised are probate issues. In addition, the 15th defendant contended that the suit contravenes Section 16 of the Limitation of Actions Act. Since submissions are not a substitute for pleadings but merely constitute persuasive arguments, a party's submissions must not create new issues or matters not raised in their pleading or objection. A party cannot use submissions to go on a frolic of their own, because submissions must be restricted to the issues raised in the pleadings, otherwise, that would result in trial by ambush which is not a fair trial. In the premises, the issues of whether the plaint raises probate matters and whether it contravenes Section 16 of the Limitation of Actions Act did not arise in the preliminary objection, and this court will not address the same.
9. Therefore, two issues arise for determination;
 - a. Whether the preliminary objection raised is a proper preliminary objection raising pure point of law.
 - b. Whether the objection is merited.
10. A proper preliminary objection is an objection based purely on point of law, where facts relied upon are not in dispute. In the case of Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd [1969] EA 696, the court stated as follows;

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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.
11. In this case, the 15th defendant has faulted the plaintiffs' claim based on paragraph 6 of the plaint arguing that the plaintiffs complained that the 15th defendant subdivided the suit property in contravention of Sections 7 and 9 of the Limitation of Actions Act and contrary to the decision of the High Court made on 1st November 2007. The 15th defendant argues that the plaintiffs knew that he subdivided the land in 2008. This allegation is vague, because it is not clear whether 2008 is the year the plaintiff had knowledge or just the year of subdivision.
12. I have considered the plaint and more particularly paragraph 6 thereof, and there is no mention of the allegation that the plaintiff knew of the date or year of the subdivision by the 15th defendant.



Therefore the issue of the plaintiff being aware of the subdivision in 2008 is a matter that is not based on any evidence, leave alone agreed facts. The 15th defendant did not state where he got the evidence or information that the plaintiff knew that he subdivided the land in 2008. Besides, even if that were the position, the plaintiff knowing the date of the subdivision does not necessarily mean that they knew those facts on that date.

13. In the premises, as the objection is based on allegations that are in contention and or not agreed upon, I find and hold that the preliminary objection raised by the 15th defendant is not a pure preliminary objection as the 15th defendant has failed to demonstrate that the same is based on undisputed facts.
14. The upshot is that I find no merit in the preliminary objection which I dismiss with costs to the plaintiff.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 16TH DAY OF OCTOBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Orandi for 15th defendant

No appearance for other parties

Court assistant – Josephine

