



**Tabulo v Altocoff Limited & 2 others (Environment & Land Case E030 of 2024) [2024] KEELC 13562 (KLR) (3 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13562 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E030 OF 2024**

**AE DENA, J  
DECEMBER 3, 2024**

**BETWEEN**

**BARAZA ALEX TABULO ..... PLAINTIFF**

**AND**

**ALTOCOFF LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**TANJO DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY LAND REGISTRAR, KWALE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1 Accompanying the plaint instituting this suit is a Notice of Motion dated 30/5/2024. The same was filed under Certificate of Urgency and placed before this court on 23/7/2024. The court in its perusal of the file made a finding that a preliminary objection had been filed in opposing the suit and application. The PO is dated 30/5/2024 and is subject of this ruling.

**Preliminary Objection**

2 The preliminary objection has been raised by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as follows; -

1. That this suit is time barred having been filed in court over 16 years since the defendants were registered as proprietors of the suit property in contravention of the [Limitation of Actions Act](#) Chapter 22 laws of Kenya and the same should be struck out.

3 The preliminary objection was dispensed off by way of written submissions.



## Submissions

- 4 The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's submissions state that the Plaintiffs suit has been filed 17 years since the plaintiff ceased to be the registered owner of the suit property. The said Defendants state that the suit is therefore time barred by virtue of section 7 of the *Limitation of Actions Act*. The Defendants state that the cause of action against the 1<sup>st</sup> Defendant accrued on 6/9/2006 and 6/11/2007 against the 2<sup>nd</sup> defendant. The court is urged to strike out the suit.
- 5 The Plaintiff's submissions were filed electronically before court. It is submitted that the present suit is premised on fraud that was discovered sometime in November 2023 and hence the suit is yet to be time barred. The Plaintiff refers the court to the provisions of Section 26 of the *Limitation of Actions Act* on extension of limitation period in cases of fraud or mistake. The Plaintiff gives a brief narration on the history of his ownership of the suit property and states that he purchased the suit property from one Anderson Macharia Muriuki and was issued with a title deed on 18/8/1995. That he became aware of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's occupation of the property sometime in the year 2023 and requested for a copy of the green card to the property. He discovered that the companies had been illegally registered as owners of the property in 2006 and 2007. According to the Plaintiff, the fraud was discovered in November 2023 and the suit herein instituted in May 2024 and hence 3 years have not lapsed since the discovery was made. The Plaintiff contends that time when the Plaintiff discovered the fraud is a question of fact hence the preliminary objection should be dismissed. He relies on the decision in *Justus Tureti Obara v Peter Koipeitai KSI ELC No. 126 of 2021[2014] eKLR*.
- 6 It is further submitted that a number of facts need to be ascertained as regards the ownership of the suit property and which includes fraud which has been pleaded. The court is urged to proceed with hearing of the matter on merit and the preliminary objection be struck out with costs to the Plaintiff.

## Distinguishing Authorities

- 7 The Defendant has placed reliance in the case of *Edward Moonge Lengusuranga V James Lanaiyara & Another [2019] eKLR*. In the said case, this court notes that the same was based on a sale agreement executed in the year 1999 and a title deed issued in 2004. In a brief summary of the facts, the Plaintiff had sold the Defendant land which was paid in instalments, by the time the 1<sup>st</sup> Defendant therein finished paying the purchase price the Plaintiff had rescinded the agreement but found out that the 1<sup>st</sup> Defendant had already proceeded and registered the land in his name. The Plaintiff in the said suit filed the same in August 2018 which was 14 years after the cause of action arose. The preliminary objection raised therein was to the fact that the suit had been brought 12 years from the date on which the right of action accrued against them. The court in its findings noted that the alleged fraud by the 1<sup>st</sup> Defendant in the suit had been committed on 13/1/2004 when the said party was registered as proprietor of the suit property. That was when the cause of action against the said party arose, the proceedings were initiated on 20/8/2018 which was beyond the 3-year limitation period. The preliminary objection raised succeeded and the suit was struck out.
- 8 In juxtaposing the above findings to the present suit, the suit property herein was purchased by the Plaintiff in the year 1995. He was then issued with a title deed which he has held to date. Sometime in the year 2023, the Plaintiff states that he had the intention of developing the suit property but found out that the same was occupied by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff has attached copies of the official search of the suit property conducted on 7/11/2023 and a certified true copy of the green card issued on 14/11/2023. According to the plaintiff, fraud was discovered in 2023 November when he discovered the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's occupation. The Defendants on the other hand are adamant that the cause of action arose when they were registered as the owners of the suit property. Unlike in the



former suit, the suit herein is not based on a contract for sale of land but rather fraudulent acquisition and registration of property. There is a clear difference in the two causes of action.

## Discussions

9 Now, back to determination of what is before court. I will first embark on establishing whether the preliminary objection is merited. The starting point is to define what a preliminary objection is. According to the Black Law Dictionary a Preliminary Objection is defined as:

In case before the tribunal, an objection that if upheld, would render further proceedings before the tribunal impossible or unnecessary.....”

10 The case of *Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696* held as follows:

A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as 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 ...

Justice Newbold in the said suit argues 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”

11 The 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendants have based the Preliminary Objection on the allegation that the suit herein is statute barred under section 7 of the *Limitation of Actions Act* based on the fact that the Defendants have been in occupation of the suit property over the past 16 years. The Plaintiff contends that the time when the Plaintiff discovered the fraud is a question of fact hence the preliminary of objection should be dismissed. The Plaintiff maintains that he discovered the fraud in 2023 while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants state that time started running when they were registered as the proprietors of the suit property 16 years ago.

12 The purpose of the time limits set under the *Limitation of Actions Act* was aptly put in the Court of Appeal in the case of *Gathoni V Kenya Co-Operative Creameries Ltd [1982] eKLR* correctly pronounced itself as follows:

The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done”.

13 It is clear that the issue of when the fraud was discovered resulting to when the cause of action arose is in contention. The court cannot from the face of the preliminary objection conclude when that fraud was discovered. There is need to consider factual evidence where the court will exercise its judicial discretion on the same by hearing both parties. The Preliminary objection, automatically ceases to be a point of law and cannot be sustained.

14 Consequently, this court finds that: -

The Notice of Preliminary Objection dated 30/5/2024 is not merited. The same is hereby dismissed with costs to the Plaintiff.



Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 3<sup>RD</sup> DAY OF DECEMBER 2024.**

.....

**A E DENA**

**JUDGE**

No appearance for the Plaintiff

Mr. Kiarie Kariuki for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Ms. Opio for 3<sup>rd</sup> Defendant

Mr. Daniel Disii – Court Assistant

