



**Komoni v Mbuvi (Environment & Land Case E45 of 2021)
[2023] KEELC 17938 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E45 OF 2021**

TW MURIGI, J

JUNE 7, 2023

BETWEEN

ISAAC MUSYOKI KOMONI APPLICANT

AND

SAMMY KAUMBULU MBUVI RESPONDENT

RULING

1. The Defendant filed the Notice of Preliminary objection dated October 5, 2022 on the grounds that:-
 1. That the plaintiff's claim as contained in the Plaintiff dated December 20, 2021 ought to be struck out with costs to the Defendant for being statutorily barred.
 2. That the plaintiff's claim offends the mandatory provisions of Section 7 and 8 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya.
 3. Other grounds and reasons may be adduced at the hearing hereof.
2. The parties were directed to canvass the Preliminary Objection by way of written submissions. The parties complied and filed their respective submissions.

The Defendant's Submissions

3. The Defendant's submissions were filed on February 16, 2023.
4. Counsel for the Defendant outlined the following issues for the Court's determination:-
 - i. Whether the Preliminary Objection has been raised timeously.
 - ii. Whether the Plaintiff's claim is time barred.



5. On the first issue, Counsel submitted that the grounds raised in the objection are based on paragraph 4, 5 and 6 of the Plaintiff's Plea. Counsel further submitted that the grounds of the preliminary objection are pure points of law as set out in the *Mukisa Biscuits* case.
6. On the second issue, Counsel submitted that the Plaintiff's claim is for specific performance based on contracts allegedly entered between the Plaintiff and the Defendant. Counsel further submitted that the limitation period for recovery of land is 12 years. That with regards to the agreement dated August 29, 1997, the Plaintiff's claim ought to have been filed on August 29, 2009.
7. That as regards the second agreement dated June 15, 1996, the limitation period lapsed on June 15, 2007, while in the third agreement dated August 29, 1997, the limitation period lapsed on August 29, 2008. Counsel contended that the instant suit was filed 20 years after the Plaintiff allegedly purchased the suit property from the Defendant. Counsel contended that the Plaintiff's suit was filed out of time and urged the court strike out the same with costs to the Defendant.

Plaintiff's Submissions

8. The Plaintiff's submissions were filed on March 6, 2023.
9. Counsel for the Plaintiff identified the following issues for the Court's determination:-
 - i. Whether the Defendant's Notice of Preliminary Objection is merited.
 - ii. Who should pay the costs if any.
10. On what constitutes a preliminary Objection Counsel cited the of *Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd* (1969) EA 696 and submitted that it must be grounded on pure points of law. That in the instant matter, Counsel submitted that the objection is not based on pure points of law as enunciated in the Mukisa Biscuits case but is intended to delay the hearing and determination of this suit.
11. Counsel submitted that the facts are hotly contested. He argued that the Plaintiff is suit not seeking specific performance since he has been in occupation of the suit property since 1996. Counsel contended that the Defendant holds the suit property in trust for the Plaintiff.
12. Finally, counsel submitted that the Defendant is trying to water down the case through his argument on limitation of time. He urged the Court to dismiss the objection with costs.

Analysis and Determination

13. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
14. 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.”



15. 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.”

16. 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.”

17. The Defendant based his Preliminary Objection on the grounds that the Plaintiff’s suit is time barred. The issue of 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.

18. The Defendant’s Preliminary Objection is on the grounds that the Plaintiff’s suit was brought after the expiry of the limitation period. The Preliminary Objection is on a point of law and the Court is satisfied that it has been properly and validly taken.

19. 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.

20. 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.

21. 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, if first accrued to some persons through whom he claims to that person.”

22. 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.”

23. The Defendant argued that the Plaintiff is seeking to enforce the sale agreements dated August 29, 1997, June 15, 1996 and August 29, 2008 whose limitation period has already lapsed.



24. It is not in dispute that the Plaintiffs claim is based on the sale agreement entered between him and the Defendant. The issue of when the parties executed the agreements and when the Plaintiff took possession of the suit property are contentious issues of fact as opposed to pure points of law.
25. A preliminary objection should strictly be on pure points of law. For a preliminary objection to be valid it must be on a point of law and must be founded on facts that are not disputed. It should not be proved through facts or evidence or deal with disputed facts.
26. In light of the foregoing I find that the preliminary objection is devoid of merit and the same is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 7TH DAY OF JUNE, 2023.

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Munyasya for the Plaintiff

Mwinzi for the Defendant.

