



REPUBLIC OF KENYA



**Naeku & 2 others v Narok & 2 others (Environment & Land Case
30 of 2018) [2023] KEELC 17778 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17778 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 30 OF 2018**

CG MBOGO, J

JUNE 8, 2023

BETWEEN

HELLEN KEKUNJU NAEKU 1ST PLAINTIFF

LOKISA OLE NEKU 2ND PLAINTIFF

KARURU OLE NAEKU 3RD PLAINTIFF

AND

DISTRICT LAND REGISTRAR, NAROK 1ST DEFENDANT

**MARTHA RERENTE NAEKU (SUED AS THE ADMINISTRATOR OF THE
ESTATE OF JAMES OLE NAEKU) 2ND DEFENDANT**

THE HONOURABLE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Before this court for determination is a notice of preliminary objection dated October 25, 2022 and filed by the 2nd defendant challenging the suit on the following grounds:-
 1. The entire suit by the plaintiff and the entire proceedings herein is time barred by dint of the provisions of Section 4 (1) and Section 7 of the *Limitations of Actions Act*, Cap 22 Laws of Kenya.
 2. By reason of the aforesaid provisions of the law, this suit and the entire proceedings herein are misconceived, incompetent, an abuse of the court process and a complete nullity.
 3. Further, by reason of the aforesaid, this honourable court has no jurisdiction to entertain this suit and the entire proceedings herein, which should therefore be struck out with costs to the 2nd defendant.



2. On the March 28, 2023, this court directed that the preliminary objection be canvassed by way of written submissions. The 2nd defendant filed written submissions dated May 30, 2023.
3. The 2nd defendant submitted that there was an agreement between the parties to rectify the land title and also an executed consent to enable the Land Registrar to rectify the title to reflect the agreement and the said consent for rectification was registered on 2nd of November, 1982. For this reason, the 2nd defendant submitted that this matter falls within the province of Section 4 (1) and 7 of the Limitations of Actions Act as the cause of action arose on November 2, 1982.
4. The 2nd defendant further submitted that the consent for rectification of title was registered on November 2, 1982 and it took the plaintiffs 36 years to institute the suit which is past the 6 years' period that is stipulated under Section 4. As such, the suit is stale and ought to have been filed on or before November 2, 1988. The 2nd defendant relied on the cases of Gathoni v Kenya Cooperative Creameries Limited [1982] KLR 104 and Dennis Koikai Naisho v Eric Tipis & 3 Others [2019] eKLR.
5. The 2nd defendant further submitted that the plaintiffs had recourse in law to institute the suit out of time by seeking the leave of the court which they failed again to do so. Also, that it is not in dispute that the plaintiffs now seek to overturn registration of rectification that was done 36 years ago which makes this suit and the entire proceedings time barred by dint of Section 4 (1) of the Limitations of Actions Act.
6. The 2nd defendant further submitted that rectification of the title having been registered 36 years ago, the entire suit is time barred by virtue of Section 7 of the Act. The 2nd defendant relied on the case of Diana Katumbi Kii v Reuben Musyoki Muli [2018] eKLR and submitted that the plaintiffs slept on their right to recover land and the 12-year period lapsed from the date of the cause of action. The 2nd defendant submitted that the plaintiffs are guilty of laches for failure to take any action to challenge the rectification of the land for over 36 years. Reliance was placed in the cases of Dickson Ngige Ngugi v Consolidated Bank Limited (Formerly Jimba Credit Corporation Limited) & Another [2020] eKLR and Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] eKLR.
7. The plaintiffs did not file written submissions. Be that as it may, I have considered the preliminary objection and the written submissions and authorities cited by the 2nd defendant and the issue for determination is whether the suit is statute barred by the Limitations of Actions Act.
8. The threshold for preliminary objections is now well settled and there would be no reason to reinvent the wheel. Courts have held that a preliminary objection deals with purely points of law and where facts are not disputed. Where the court has to look outside the case for evidence to establish the facts presented, then this falls under a case where a full hearing has to be conducted to disprove certain facts. In Mukisa Biscuit Manufacturing Co Ltd v West End Distributors ltd [1969] EA 696, the court stated as follows: -

“So far as I’m 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.”

This was followed up by the judgment of Sir Charles Newbold in the same case:

“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 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 nothing



but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

9. In the case of *Lemitei Ole Koros & another v Attorney General & 3 others* [2016] eKLR, Munyao J, stated as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”

10. Section 7 of the *Limitation of Actions Act* 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 it first accrued to some person through whom he claims, to that person.”

11. Section 4 (1) of the *Limitations of Actions Act* provides;- “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;...”

12. The purpose of the Law of Limitation was stated in the case of *Mehta v Shab* [1965] EA 321, as follows;

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

13. In the case of *Gatboni v Kenya Co-operative Creameries Ltd* [1982] KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows: -

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

14. Also, the question of limitation is a question that goes to the jurisdiction of this court. It is a clear point of law, which if argued as preliminary point may dispose of the suit. In the case of *Bosire Ongero v Royal Media services* [2015] eKLR, the Court stated that “the question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the Court would lack jurisdiction to entertain it. I therefore find and hold that the Preliminary Objection raised in the instant case is on a point of law, and the same is validly and properly taken.”

15. The plaintiffs in this case filed a plaint dated March 28, 2018. The plaint was later amended, dated December 14, 2020 and filed in court on December 23, 2020. Paragraph 7 of the amended plaint reads as follows:- “The plaintiffs avers that when they went to apply for registration of the grant issued on the 23rd day of November, 2016, they did realise that the acreage had been fraudulently and irregularly altered from 0.8 hectares to 0.405 hectares on the green card at the District Land Registry.”

16. Paragraph 8A further reads: - “It is the plaintiffs’ contention that the alteration of the acreage for all that piece of land known as Cis-Mara/Ilmashariani-Morijo/74 from 0.8 hectares to 0.405 hectares was carried out after passing on of Kekunju Ole Naeku Alias Kekunju Taju Naeku (deceased) by the 1st



defendant action in collusion with James Ole Naeku (deceased), the 2nd defendant herein without the involvement of the beneficiaries of his estate.”

17. There is nowhere in the plaint where the plaintiffs have pleaded or alluded to an agreement. My understanding of the plaint shows that the plaintiffs realised that there was an alteration of the acreage of the suit land which they termed as fraudulent when they went to apply for registration of the grant issued on the November 23, 2016.
18. The 2nd defendant on the hand submitted on facts in paragraphs 5-11 of his written submissions.
19. My analysis of the written submissions points to disputed facts as raised by the 2nd defendant and which do not reflect that which is contained in the plaint. Where there is such a disparity in facts, the court can only refrain from upholding the preliminary objection on such grounds. There is need for parties to present their evidence against the facts to enable this court arrive at a just determination.
20. Arising from the above, the notice of preliminary objection dated October 25, 2022 lacks merit and the same is hereby dismissed. Costs to abide the outcome of the substantive suit. Mention on June 13, 2023 before the Deputy Registrar to confirm compliance with Order 11 of the [Civil Procedure Rules](#) and to take a hearing date. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL this 8TH day of JUNE, 2023.

MBOGO C.G.

JUDGE

8/6/2023

In the presence of:

CA:T.Chuma

