Kanyi (Suing as the Administrator of the Estate of Kennedy Kanyi Chrispo) v Kamau & 7 others (Environment & Land Case 64 of 2021) [2023] KEELC 18540 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18540 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 64 OF 2021

LA OMOLLO, J

JULY 5, 2023

BETWEEN

DAMARIS MARY NJERI KANYI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KENNEDY KANYI CHRISPO) ..... PLAINTIFF

AND

DOUGLAS MACHARIA KAMAU ..... 1ST DEFENDANT

GITEBA NJIHIA ..... 2ND DEFENDANT

NYANDARUA PROGRESSIVE AGENCIES COMPANY LIMITED .... 3RD DEFENDANT

ELIUD SAMUEL WAWERU ..... 4TH DEFENDANT

PETER KINYANJUI NGUGI ..... 5TH DEFENDANT

JESSE KAMERIA NGWIRI ..... 6TH DEFENDANT

JOSEPHAT MUREITHI MURITHI ..... 7TH DEFENDANT

PETER WANJOHI KARANJA ..... 8TH DEFENDANT

RULING

Introduction

1. This ruling is in respect of the 3rd to 8th Defendants Notice of Preliminary Objection dated 25th October, 2022. The objection is on the following ground;

    a. That the amended statement of defence and counter-claim is time barred and offends the mandatory provisions of Sections 4(1)(a) and 7 of the *Limitation of Actions Act*.

Factual Background.

2. This suit was commenced by way of a plaint dated 29th July, 2021 which seeks the following prayers;

   a. A declaration that Plot No's 354 & 355 Nyandarua Progressive Co. Ltd belong to the estate of the late Kennedy Kanyi Chrispoh and the Defendants have no right at all over the same.

   b. Permanent order restraining the Defendants by themselves, servants and/or agents from interfering with the Plaintiff's title, possession and use of the said plots.

   c. Costs of suit.

3. The 1st and 2nd Defendants filed their Statement of Defence and Counterclaim dated 5th February, 2022 which was later amended on 28th July, 2018. They seek the following prayers;

   a. A declaration that the Defendants (now the Plaintiffs) are the lawful proprietor of the parcels plot number Nyandarua Progressive Co. Ltd Plot No. 354 and 355.

   b. A declaration that the Plaintiff (now the 1st Defendant) is trespasser to the parcel Nos. Nyandarua Progressive Co. Ltd Plot No. 354 and 355.

   c. An order of permanent and temporary injunction against the Plaintiff (now the 1st Defendant) and the 2nd to 7th Defendants herein either by themselves, agents and/or servants from trespassing, surveying, resurveying, sub-dividing, putting up beacons, transferring beacons, selling, invading, disposing, reallocating, fencing, demolishing, fences, ploughing, charging or in any manner whatsoever dealing with the Defendants' (now the Plaintiffs) parcels Nyandarua Progressive Co. Ltd Plot No's 354 and 355.

      ca. In the alternative an order that the 2nd to the 7th Defendant do compensate the Plaintiffs herein by payment to them equivalent of the current market price of the land parcels and all the development in the land of Kshs. 2,000,000/= each.

      cb. The said amount to be paid back with interest at the court's rate from the date of judgement until payment in full.

      cc. The 2nd Defendant do compensate the Plaintiff herein, with a similar plot as the one that Plaintiff had purchased.

   d. Costs of this suit with interest till payment in full.

4. The 3rd to 8th Defendants filed a document titled "Defence to 1st and 2nd Plaintiffs Counterclaim" dated 12th July, 2022 which was amended on 20th September, 2022 wherein they denied the contents of the 1st and 2nd Defendants Amended Statement of Defence and Counterclaim.

5. The Plaintiff filed a Reply to Amended Defence & Defence to Counterclaim by the 1st and 2nd on 27th September, 2022. She denies the 1st and 2nd Defendants claim as set out in their Amended Counterclaim.

6. The preliminary objection under consideration came up for hearing on 5th December, 2022 when the court directed that it be heard by way of written submissions.

7. On 13th February, 2023 parties confirmed having filed submissions and the matter was reserved for ruling.

Issues for Determination.

8. The 1st and 2nd Defendants filed their submissions on 2nd February, 2023 while the 3rd to 8th Defendants filed their submissions on 8th February, 2023.

9. The 3rd to 8th Defendants in their submissions identify the following issues for determination;

   a. Whether the Defendants have satisfied the grounds for raising a preliminary objection.

   b. Whether the preliminary objection is merited.

10. On the first issue, the 3rd to 8th Defendants rely on the cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 Others* [2014] eKLR, *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR and submit that their preliminary objection raises a pure point of law as the 1st and 2nd Defendants counterclaim offends Sections 4(1) and 7 of the *Limitation of Actions Act*.

11. The 3rd to 8th Defendants also submit that the agreements for sale relied on by the 1st and 2nd Defendants were entered into in the year 2004.

12. The 3rd to 8th Defendants further submit that Section 4(1) of the *Limitation of Actions Act* states that claims founded on sale agreements which are also claims based on contracts, can only be raised before the expiry of six months.

13. The 3rd to 8th Defendants submit that under Section 7 of the *Limitation of Actions Act*, the 1st and 2nd Defendants can only file for recovery of land before expiry of twelve years.

14. They rely on the case of *John Omollo Nyakongo t/a H. R Ganijee & Sons v Kenya Power & lighting Co. Ltd* [2022] eKLR and submit that a preliminary objection challenging a suit for being time barred has been held to be an objection that goes to the jurisdiction of the court and thus a pure point of law.

15. On the second issue, the 3rd to 8th Defendants submit that its clear from the 1st and 2nd Defendants counterclaim that they allege that they acquired the suit properties in the year 2004.

16. They also submit that the 1st and 2nd Defendants are seeking to be registered as the owners of the suit properties which offends the provisions of Section 7 of the Limitation of Actions Act that provides that a party can only sue for title to land within 12 years.

17. They further submit that the 1st and 2nd Defendants had until the year 2016 to file a claim for ownership of land.

18. The 3rd to 8th Defendants rely on the cases of *Sohanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co. Ltd* [2021] eKLR, *Chirchir Arap Kuto v Nancy Cherotich Koech & another* [2022] eKLR in support of their arguments.

19. The 3rd to 8th Defendants also submit that the 1st and 2nd Defendants have raised a claim of fraud that allegedly arose in the year 2003. They then go into the merits of the 1st and 2nd Defendants claim and submit that they are guilty of laches.

20. The 3rd to 8th Defendants rely on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] and submit that the court should dispose off this suit on the grounds that it is barred by statute.

21. The 1st and 2nd Defendants in their submissions identify only one issue for determination which is;

    Whether the preliminary objection is meritorious.

22. The 1st and 2nd Defendants rely on the cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, *Oraro v Mbaja* [2005] 1KLR 141 and submit that a preliminary objection must raise a pure point of law.

23. The 1st and 2nd Defendants also submit that even though the 3rd to 8th Defendants have hinged their Preliminary Objection on Section 4(1) and 7 of the *Limitation of Actions Act* which raises a pure point of law, its determination will be blurred with factual details which are liable to be contested especially as to when the cause of action arose.

24. The 1st and 2nd Defendants further submit that from the pleadings filed by both the Plaintiff and the Defendants, no date has been expressly indicated as to when the cause of action arose which makes it an issue to be determined at the trial by way of viva voce evidence.

25. The 1st and 2nd Defendants submit that it is also not clear when the parties discovered fraud which makes it an issue to be determined at the trial. In support of their arguments they rely on Section 26 of the *Limitation of Actions Act*.

26. The 1st and 2nd Defendants conclude their submissions by submitting that the preliminary objection does not meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.

Analysis and Determination.

27. After considering the 3rd to 8th Defendants Preliminary Objection and submissions, the only issue that arises for determination is whether the 1st and 2nd Defendants Amended Statement of Defence and Counterclaim is time barred and offends the provisions of Sections 4(1)(a) and 7 of the *Limitation of Actions Act*.

28. The case of *Mukhisa Biscuit Manufacturing Co. Ltd. v West End Distributors Limited*, 91969) EA 696, defined a preliminary objection as follows;

    > ""...a "Preliminary Objection" correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a Preliminary Objection, yet it bears 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. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."

29. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.

30. The 3rd to 8th Defendants preliminary Objection is on the ground that the 1st and 2nd Defendants Amended Statement of Defence and Counterclaim is time barred and offends the mandatory provisions of Section 4(1)(a) and Section 7 of the *Limitation of Actions Act*.

31. The 1st and 2nd Defendants in response argue that even though the 3rd to 8th Defendants Preliminary Objection seems to raise a pure point of law, its determination will be marred by factual details which are liable to be contested.

32. Section 4(1)(a) of the *Limitation of Actions Act* provides as follows;

> " (1) 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..

33. 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."

34. The 1st and 2nd Defendants allege in their Amended Statement of Defence and Counterclaim that they have been in occupation of the suit properties from the year 2004 and they are now seeking to be declared as the legal owners.

35. The Plaintiff on the other hand alleges in her Reply to the Amended Defence and Defence to Counterclaim that the 1st and 2nd Defendants trespassed onto the suit properties in the year 2021.

36. Upon perusal of the pleadings in this matter, I am unable to state with exactitude when the course of action arose.

37. The Judicial decision of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] eKLR offers useful insights. It was held as follows;

> "13. The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. (Emphasis is mine).
>
> On this see the case of *Oruta & Another v Nyamato* [1998] KLR 590, where the court held that limitation of action: -
>
> > "...could only be queried at the trial but not by...a preliminary objection...The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial"14. See also the case of *Divecon Ltd v Shirinkhanu S. Samani* Civil Appeal No. 142 0f 1997, where the court quoted with approval the words of Gachuhi, JA, the leading judge in the Oruta case (ibid) that:
> >
> > > "It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the

plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*…" (Emphasis is mine).

Determination.

38. For the reasons stated in the foregoing paragraphs, I find that the Preliminary Objection lacks merit and is hereby dismissed with costs.

39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF JULY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Chepkulul for the Plaintiffs.

Amunyunzu for the 2nd – 7th Defendants.

Miss Kimure for the 3rd- 8th Defendant

Court Assistant; Ms. Monica Wanjohi.