



Talam (Suing as a Personal Representative to the Estate of the Late Jelagat Tapletgoi) v Kitur & another (Environment and Land Appeal E006 of 2022) [2023] KEELC 18585 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

MN MWANYALE, J

JULY 6, 2023

BETWEEN

JOYCE CHEMELI TALAM (SUING AS A PERSONAL REPRESENTATIVE TO THE ESTATE OF THE LATE JELAGAT TAPLETGOI) APPELLANT

AND

ELLIOT KIPTOO A. KITUR 1ST RESPONDENT

THE LAND REGISTRAR NANDI COUNTY 2ND RESPONDENT

JUDGMENT

1. Vide the memorandum of Appeal dated 26/7/2022, the appellant Joyce Chemeli Talam (suing as a personal representative of the Estate of the late Jelagat tapletgoi (deceased) penned 7 grounds of Appeal against the Ruling of Honourable D. Ocharo (PM) delivered on June 29, 2022, in Kapsabet Chief Magistrate ELC case No. 008 of 2021 between Joyce Chemeli Talam (suing as a personal representative of the Estate of the late Jelagat Tapletgoi (deceased)vs Elliot Kiptoo A. Kitur vs Lands Registrar Nandi.
2. The grounds of Appeal were as follows;-
 - a) The Learned Trial Magistrate erred in law and in fact by allowing the Respondent's preliminary objection dated 25/2/2022 without considering the triable and pertinent issues raised by the appellant in her submissions and without any grounds in law.
 - b) The Learned Trial Magistrate erred in law and in fact by failing to exercising his discretion judiciously in allowing the preliminary objection despite glaring strong evidence that the action was based on fraud of the Respondent or their agents.



- c) The Learned Trial Magistrate erred in and in fact by failing to consider the fact that there was change in ownership of the suit parcel in the year 2019, hence the time started running/the cause of action arose in the year 2019.
 - d) The Learned Trial Magistrate erred in law and in fact by failing to consider the weighty evidence and submissions on record hence arrived at the wrong and unconsidered decision.
 - e) The Learned Trial Magistrate erred and in fact in failing to direct his mind on the totalling of evidence and authorities tendered by the appellant in support of her case and specifically the fact that the fraudulent nature of the Respondents in transacting on the suit parcel would have best be subjected to a full trial and not to a summary procedure employed by the Trial Court.
 - f) The Learned Trial Magistrate erred in law and in fact by failing to act fairly and thereby occasioning miscarriage of justice.
 - g) The Learned Trial Magistrate erred in fact and law in failing to allow the appellant to be heard in a full trial occasioning a miscarriage of justice.
3. On the strength of the above grounds the appellant sought that the Appeal be allowed and the ruling delivered on 29/6/2022 be set aside, and consequent on allowing the appeal, the appellant to be heard in main suit of this matter.
 4. Upon admission of the appeal parties took direction to file written submission on the Appeal.
 5. The appellant filed submissions on February 23, 2023 and the Respondent filed their filed submissions on 23/3/2023. With judgment initially reserved for 26th day of June 2023, but due to a training schedule under the AJS framework and vide Notice issued to the parties, the judgment was differed to today.
 6. Upon review of the Record of Appeal and pleading filed before the Trial court, the Notice of Preliminary objection, and the impugned decisions, as well as the grounds of appeal and the submissions filed by the parties the Court condenses the 7 grounds of Appeal into two main grounds which shall also form the issues for determination;-
 - a. Whether or not the plaint dated January 15, 2021 and the cause of action before the Trial Court was based on fraud?
 - b. Whether or not in determining the Notice of Preliminary Objection dated February 21, 2022, the Learned Magistrate was obligated to look at evidence and triable issues?

Analysis and Determination:

7. It is the appellants position that whereas the notice of preliminary objection giving rise to the impugned decision was based on section 7 of the *Limitation of Actions Act*, which bars an action for recovery of land filed after 12 years on when the from when the date of cause of action pleaded in the plaint was founded on fraud, and that section 26 of the *Limitation of Action Act*, provided that an cause of action based on fraud the period of limitation began after discovery of fraud, and in this case in 2019.
8. In this regard the plaintiff relies on the case of *Justus Tureti Obara v Peter Koitetai* 2014 (eKLR) as well as Kajiado ELC case No 396/2017, *Daniel Mwangi & another vs Leiyen Tamuti* to buttress the point.



9. It is the Respondents submission that the cause of action herein was for the recovery of the property and was thus pegged on section 7 of the Limitation of Action Act, and hence the suit was time barred.
10. Upon perusal of the plaint that was before the Trial Court at paragraphs 8 and 9 of the said plaint, the plaintiff pleaded fraud and illegality, the plaintiff went further to particularise the fraud at paragraphs 9 (a) – (h) on the 1st defendant as well particularised fraud on the 2nd defendant.
11. It follows that the suit before the trial court though an action for recovery of land, the cause of action the foundation of the suit was fraud and under section 26, fraud was an exception to section 7, and the cause of action arose when the same was discovered in 2019, and the suit having been filed in 2021 was not time barred.
12. On this point, the court answers issue number 1 in the affirmative and finds that the Learned Magistrate erred in law.
13. On issue number 2, the appellants in their submissions fault the Learned Magistrate for not looking at the triable issues and totality of evidence but deciding the suit in a summary manner.
14. It is to be noted that the trial court was considering a notice of preliminary objection, and in that consideration, the court is not obligated to look at the evidence and triable issues as submitted by the appellants.
15. In the decision in Omondi vs National Bank of Kenya Limited & 2 others as quoted in the decision of J N and 5 others v Board of Management of St G School the Court of Appeal “ 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.....”
16. it follows that in considering a notice of preliminary objection, a court of law should not ascertain facts and look at the triable issues.

In the matter before court, however the learned trial court in the impugned ruling at the 2nd last paragraph appearing on page 8 of the Record of Appeal stated as follows “I have looked at the copy of the green card filed by the plaintiff and note that the 1st defendant was registered as the proprietor of the suit land on 18/2/1972 and title then issued.”
17. In their submissions, the respondent on page 2 of their submissions, paragraph 3 from the bottom, equally concedes that the Trial Magistrate looked into the documents filed by the plaintiff.
18. As noted in the Omondi decision cited above, once a court ascertains facts, the matter is no longer a pure point of law, which requires not to be decided as a preliminary objection.
19. The notice of Preliminary Objection as filed thus needed ascertainment of facts outside the pleadings and was thus not on pure points of law and ought not to have succeeded.
20. There is thus merit in the Appeal before court, and the same is allowed and the ruling dated June 29, 2022 is hereby set aside, and the matter is remitted before the trial court to proceed to full trial.
21. The Appeal is allowed, costs of the Appeal to abide the outcome of the hearing before the trial court.



DELIVERED AND DATED AT KAPSABET THIS 6TH DAY OF JULY 2023.

HON. M. N. MWANYALE

JUDGE

Delivered in absence of the parties, duly notified.

