



**Kantim (Suing as the Next of Kin and Personal Representative of the Estate of the Late Ntopia Noonkuta Masitoi) v Kiu (Suing as the Next of Kin and Personal Representative of the Estate of the Late Daniel Talengo Kiptunen) (Environment & Land Case 2 of 2021) [2023] KEELC 20172 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20172 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT & LAND CASE 2 OF 2021**

**EM WASHE, J  
SEPTEMBER 18, 2023**

**BETWEEN**

**HELLEN NASHIPAE KANTIM (SUING AS THE NEXT OF KIN AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE NTOPIA NOONKUTA MASITOI) ..... PLAINTIFF**

**AND**

**NASERIAN JOSHPHINE KIU (SUING AS THE NEXT OF KIN AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE DANIEL TALENGO KIPTUNEN) ..... DEFENDANT**

**RULING**

1. The Preliminary Objection dated 18<sup>th</sup> April 2023 (hereinafter referred to as “the P.O”) for determination in this Ruling has been raised by the Defendant (hereinafter referred to as “the Applicant”).
2. The P.O is premised on three main grounds which are outlined as follows:-
  - a. This Honourable Court lacks jurisdiction to hear and determine the instant suit as it offends the express provisions of Section 7 and 26 of the *Limitation of Actions Act* for the reasons that; -
    - i. The Plaintiff’s suit is time barred by law of limitation having been brought outside the statutory limitation of 12 years.
    - ii. The suit is fatally defective, misconceived and mischievous or otherwise an abuse of the court process and therefore is unsustainable in the obtaining circumstances.



3. The Applicant duly served the P.O on the Respondent and thereafter parties filed their written submissions on the same.
4. The Applicant's submission is that the Respondent's present suit has been brought after the expiry of 12 years provided for in the recovery of land and therefore this Honourable Court is devoid of jurisdiction to hear and determine the cause of action raised in this suit.
5. According to the Applicant, the creation of the two adjudication records belonging to the two parcels of land known as LR No Transmara/Ololchani/109 and LR No Transmara/Ololchani/300 (hereinafter referred to as "the suit properties") way back in the year 1987 which is over 35 years ago.
6. Consequently therefore, any claim for recovery of any land registered in the name of the Respondent should have been filed before the lapse of the 12 years period from the year 1987 when Adjudication Records were prepared and finalised.
7. In conclusion, the Applicant submits that the present suit having been filed after the lapse of 12 years from the date of the Adjudication Records, then it is time barred and should not be entertained by this Honourable Court.
8. The Respondent in reply to the Applicant's submissions states that the period of 12 years commenced running from the period when the Title Deeds of the suit properties were issued.
9. According to the Respondent, the unlawful, fraudulent and/or acts of misrepresentation undertaken by the Applicant were concluded by the issuing of the Title Deeds on the 1<sup>st</sup> of November 2010.
10. It is only after the Applicant had been issued with the said Title Deeds that the Respondent would be in a position to institute legal proceedings against such ownership.
11. This suit was instituted on the 12<sup>th</sup> October 2020, when the said period of 12 years had not lapsed and/or expired and the proceedings are well within the prescribed time under Section 7 of the Limitation of Actions Act.
12. The Honourable Court having briefly outlined the opposing submissions by the parties, it is important to look at the guiding principles in determining Preliminary Objections and apply those principles to the P.O before it.
13. In the celebrated case of *Mukbisa Biscuits Manufacturing Co. Limited-versus- Westend Distributors Limited* (1969) EA 696 the Court of Appeal observed as follows; -

“ 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. 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.”
14. The Court further made the following finding; -

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”



15. In another case of *The Attorney General & Another-versus- Anderw Mwaura Gitinji & Another* (2016)eKLR, the Court re-emphasized the principles to be applied in determination of Preliminary Objections as follows;-
  - (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
  - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
  - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
16. Indeed, it has been established that once a party raises an issue of jurisdiction, then any Honourable Court should first establish whether it has proper jurisdiction to proceed with the hearing and determination of the said proceedings.
17. In the celebrated case of "*Owners Of Motor Vessel "Iilian S"-versus- Caltex Oil (kenya) Limited*, 1989 eKLR, the Honourable Court has this to say about jurisdiction; -
 

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.
18. Turning to the P.O before this Honourable Court, it is important to understand that both parties have alluded to a Vendor and Purchaser relationship which commenced way back in 1984.
19. According to the facts contained in the Amended Plaintiff and the Defence, the Agreement For Sale between the Plaintiff/Respondent and the Defendant/Applicant was over piece of land measuring approximately 40 Acres which was under adjudication.
20. According to the Plaintiff/Respondent, the Defendant/Applicant only purchased a portion of 10 acres out of the 40 acres and therefore the two adjudication records ought to have reflected this position.
21. However, for unknown reason and in a fraudulent manner, both Adjudication Records for the 10 acres sold to the Defendant/Applicant and the 30 acres which should have remained with the Plaintiff/Respondent were recorded in the name of the Defendant/Applicant and thereafter issued with title deeds to the exclusion of the Plaintiff/Respondent.
22. The Defendant/Applicant in Paragraph 10 introduces an issue that actually there was an objection proceeding known as Objection No. 369 which upon determination in his favour enabled both the properties known as Plot.109 and Plot.300 to be registered in his name.
23. Clearly therefore, this Honourable Court is of the considered view that the facts as pleaded by the parties are at variance and can not be said to be unchallenged or admitted.
24. In essence therefore, a number of issues arise from the pleadings filed by the parties which require to be proved by way of a trial for the Honourable Court to make the appropriate determination.
25. Secondly, the issue of when time began to run against Plaintiff/Respondent has still not been admitted from the facts in the pleadings.



26. According to the Defendant/Applicant, time for purposes of computing began when the Adjudication Records of Plot.109 and Plot 300 were finalised.
27. On the other hand, the Plaintiff/Respondent is of the view that time for purposes of filing this suit began after the suit properties were issued with Title Deeds on 1<sup>st</sup> November 2010.
28. Again, these conflicting pleadings raise another issue of when does time running for properties under Adjudication.
29. Is it at the time the Adjudication Record is prepared or when the substantive Title Deed is issued?
30. This in the Honourable Court's considered view are facts and issues that should be addressed through a proper trial and not a preliminary objection.
31. If at the end of the trial and submissions of the parties the Honourable Court agrees with the Defendant/Applicant that the suit is time barred, then the appropriate Order will be made and the suit struck out.
32. In essence therefore, the facts as pleaded by the Defendant/Applicant cannot be assumed to be correct and are in fact denied and therefore the point of law raised in this P.O does not meet the threshold of a Preliminary Objection.
33. In conclusion therefore, the Honourable Court hereby makes the following Orders as appertains the Preliminary Objection dated 18<sup>th</sup> April 2023; -
  - A. The Preliminary Objection Dated 18<sup>th</sup> April 2023 Be And Is Hereby Dismissed.
  - B. The Applicant Shall Bear The Costs Of The Preliminary Objection.

**DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 18<sup>TH</sup> OF SEPTEMBER 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

In The Presence Of:

Advocates For The Applicants: Mr. Shira

Advocates For The Respondent: Mr. Kamwaro

Court Assistant: Mr. Ngeno

