



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ENVIRONMENT AND LAND CASE NO. 130 OF 2018

KENNETH KIPKOSGEI KEMBOI.....1ST PLAINTIFF

CAROLINE JEROTICH.....2ND PLAINTIFF

VERSUS

LEAH TUWEI.....1ST DEFENDANT

WILSON KIPRONO TUWEI.....2ND DEFENDANT

CORNELIUS CHERUIYOT.....3RD DEFENDANT

BOAZ SAINA.....4TH DEFENDANT

SOLOMON KIPCHIRCHIR.....5TH DEFENDANT

SHADRACK KIRWA.....6TH DEFENDANT

RULING

This ruling is in respect of a preliminary objection by the defendant dated 5th October, 2020 on the following:

- a) That the suit herein is statutorily time barred and untenable in law as it breached the clear provisions of section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya having brought to recover land after the expiration of 12 years from the date the cause of action accrued and should be struck out with costs to the defendants.
- b) That the suit is frivolous, vexatious, an abuse of the court process, bad and untenable in law and should be struck out with costs to the defendants.

DEFENDANT/APPLICANTS' SUBMISSIONS

The applicants raised the issue that the plaintiff's suit is time barred as per section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya which provides that:

"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."

Counsel submitted that one of the prayers in the Plaintiff's suit is an order for eviction which is clearly an action for recovery of land within the meaning of the above provision. Counsel computed time to establish when time started running by looking at the green card and the entries in Nandi/Baraton/104 as follows:

- a) 27.04.71 — Registration of Kipkemboi Arap Kogo
- b) 05.08.81 — Registration of Clementina Jepkurgat Kogo and title deed issued.

c) 23.06.09 — title closed on subdivision see new Nos. 1593 and 1594.

Counsel further relied on Section 13 (1) of the Limitation of Actions Act which provides a useful guide as to when time starts to run.

"(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land."

Mr. Sambu therefore submitted that the green card which has been relied upon by both parties Clementina Jepkurgat Kogo — deceased was registered by transmission in the register on 5th August 1981 in respect of parcel No. Nandi/Baraton/104, That at the time the 1st Defendant who is claiming the suit land through adverse possession on behalf of the other Defendants was in occupation having entered the suit land in 1972.

It was counsel's submission that the time for recovery of the suit land started running in favor of the 1st Defendant on 5th August 1981 and that 12 years from 5th August 1981 ended on 5th August 1993. Further that the changes that allegedly took place on 23rd June 2009 were inconsequential in view of the extinction of title over the portion occupied by the Defendants.

Counsel relied on the case of **Joseph Kamau Gichuki (suing as the administrator of the estate of Gichuki Chege (deceased) vs James Gatheru Mukora & Anor [2019] Eklr** where the court stated as follows.

"The defendants had contended that since Mukaria died on 14th July, 1960 and no administrator had been appointed in respect of his estate until 1992, the limitation period could not run against him. I am not persuaded by this argument. Under the Limitation of Actions Act, Chapter 22 Laws of Kenya, death of a registered owner of land does not stop time from running for the purposes of adverse possession. Section 16 of the Limitation of Actions Act, Chapter 22 Laws of Kenya provides as follows: - "For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration."

"I am in agreement with the plaintiff that as at the time the defendants obtained grant of letters of administration in respect of the estate of Mukaria and purported to transfer the suit property to themselves by transmission, the suit property was not available for distribution amongst the beneficiaries of the estate of Mukaria since Mukaria's title over the property had been extinguished under section 17 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and the property acquired by the deceased by adverse possession. The registration of the defendants as the owners of the suit property was therefore unlawful."

Counsel further submitted that from the pleadings it is clear that the 1st Defendant and her family took possession of the portion they are claiming in the 1970s or thereabouts, the possession was open, continuous and uninterrupted to date and that the possession was adverse to the interest of the registered owner.

Mr, Sambu cited the case of **John Nioroge Gitau & 2 others v David Mwangi Gitau & 3 others [2020] eKLR** where Oungo J, held as follows:

"The plaintiffs herein have prayed in the plaint for cancellation of the 2nd, 3rd and 4th defendants' titles and re-issuance of titles in their names. They allege that the titles were fraudulently issued to the 2nd, 3rd and 4th defendants. The suit is therefore one for recovery of land which must be filed no later than 12 years from the date when the cause of action accrued. The question then is: when did the cause of action arise in this matter" According to the 3rd and 4th defendants the cause of action herein accrued in 1999 when the last of their titles in respect of the suit properties was issued and when the alleged fraud was discovered. As I noted at the beginning of this ruling, filed alongside the plaint herein was also a list of documents to which was annexed copies of titles issued between 1995 and 1997 as well as a witness statement by the 1st plaintiff in which he stated that the subdivision process that resulted in the suit properties "was finalized in 1995 or thereabouts". That in essence confirms the 3rd and 4th defendants' contention that the cause of action herein had accrued by 1999. It seems that it accrued even earlier, in 1997. This suit ought to have been filed by the end of the year 2009. Having been filed on 20th September 2013, it violates the provisions of Section 7 of the Limitation of Actions Act. The preliminary objection is meritorious. I uphold it. "

Counsel therefore urged the court to uphold the preliminary objection and strike out the suit with costs to the defendants. Dismiss the plaintiff's suit and proceed with the counter claim.

RESPONDENT/PLAINTIFF'S SUBMISSIONS

Counsel opposed the preliminary objection on the grounds that it does not meet the threshold in **Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) E.A. 696.**"

Counsel also relied on the case of **George Oraro -vs- Barak Eston Mbaja (2005) eKLR** where the court held: -

"Anything that purports to be a preliminary objection must not derive its foundation from factual information which stands to be tested by rules of evidence"

Mr Kibii submitted that the preliminary point of objection herein does not raise any point of law capable of disposing this suit as the defendant has raised are factual rather than legal issues. That the factual issue need evidence to prove their existence.

That the plaintiffs' claim that they are the indefeasible owners of the suit property having acquired registration in 2017 and seek for the eviction of the defendants herein who on the other hand in their amended statement of defence and counter-claim challenge the plaintiff's registration on grounds of fraud whose particulars are itemized at paragraph 31 of the said statement of defence and counter-claim. The original statement of defence on the other hand at paragraphs 4, 9, 37 & 33 have made general allegations of fraud. The defendants in the counter-claim seek for declaration that the plaintiff's registration is in trust. Counsel therefore submitted that these are issues which the court has to make an inquiry by conducting a full hearing in order to determine the lawful owner of the suit property.

Counsel cited the case in **Embu ELC No. 322 of 2015** where the court held that :

14. The court is thus of the opinion that the same facts have to be established in relation to when the plaintiffs' cause of action accrued. For instance, the plaintiff has pleaded that he discovered the alleged fraud in 2000. This is a question of fact to be established at the trial the question of whether or not the plaintiff could, with due diligence, have discovered the fraud earlier is also a question of fact to be established at the trial. The question of whether or not the 1st defendant's father was bonafide purchaser for value is also a question of fact which is best established at the trial

15. In the circumstances the court is not satisfied that the issue of limitation can be determined as a preliminary objection in the instant suit. It is an issue which can e determined at the trial upon evidence being taken"

Further in the case of **Silvester K. Kaitany -vs Nyayo Tea Zones Development Cooperation Anor -vs- National Land Commission Anor (2020) eKLR** where this court held that:

"From the statement of defence it is clear that there are contested facts which must be adjudicated upon to ascertain whether the defendant is right by stating that the plaintiff acquired the title irregularly. If there was any fraud as alleged by the 1st defendant, then the limitation of actions starts running when the fraud was discovered. The 1st defendant makes general allegations that the plaintiff obtained the title to the suit land by fraud and does not state when they discovered the fraud if any."

Mr Kibii also relied on Section 26 of the Limitation of Actions Act which provides that time does not start running until the date of discovery of the fraud. The fact that the defendant has alleged fraud in its defence, such allegation should not be taken lightly by the court as issues of land fraud have bedeviled the country which should be stemmed.

Counsel cited the case of **Justus Tureti Obara vs Peter Koipeitai [2014] eKLR** wherein J. Okong'o held that "*I am in agreement with the Plaintiff's submission that the Plaintiff's claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff's case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial. "*

Counsel submitted that this is a case where parties should be heard and the issues at stake ventilated and substantially settled.

In the case of **Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] eKLR**: - the court held that:

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end be/ore it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations. "

In the case of **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta Patrick Mbinga ...Vs... Eliud Timothy Mwamunga Sagalla Ranchers Limited [2017] eKLR**, where the Court held that: -

"Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.

Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application".

Mr Kibii therefore urged the court to find that there are contested facts hence the preliminary objection does not meet the threshold as the court would be obliged to look for facts outside the objection. Counsel urged the court to dismiss the preliminary with costs to the plaintiffs.

ANALYSIS AND DETERMINATION

The issues for determination in this preliminary objection is whether the plaintiffs' claim is time barred and whether the preliminary objection meets the threshold as per *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696*, where it was held that:

“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... 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.”

It is trite law that for a preliminary objection to succeed it must be based purely on a point of law and not on facts. The main point of law is that the suit is time barred and is based on section 7 of the limitation of actions Act which provides:

“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”.

The plaintiff's claim is one for a permanent injunction and an eviction order against the applicants herein from the suit land. The land from which the suit land was subdivided was transferred to their mother by way of transmission in 1981. The plaintiffs claim to have acquired registration of the suit land on 28th February 2017. A perusal of the green card shows that indeed they were registered as owners of the suit land on 28th February 2017.

In this case there are issues of fact which have to be proved by tendering evidence, the other issue is the claim of fraud by the defendant. Fraud is not a matter that can be dealt with vide a preliminary objection, Fraud must be specifically pleaded and specifically proved by evidence. You cannot stand somewhere, claim fraud and expect the court to give an instant verdict that it has “seen” or detected fraud. This is not possible without evidence.

The defendant has narrated some facts on the history of the ownership of the suit land, by transmission and later the suit land changing ownership on various dates. This is one of the reasons that necessitates the full hearing of this matter to ascertain the ownership, when time started running for purposes of adverse possession and whether there was fraud in the acquisition of the title to the suit land.

As much as the law allows the application of Section 7 of the Limitations of Actions Act, it has to be applied in the circumstances that are appropriate. In a situation where a preliminary objection is raised purely on a point of law, the court would gladly uphold the same. However, in circumstances where there are facts to be proved or contested issues then the court would be under an obligation to hear the matter by allowing the parties to tender evidence.

I therefore find that the preliminary objection has no merit and is dismissed with costs to the plaintiffs'

DATED and DELIVERED at ELDORET this 15TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE