



Raphael & another (Suing as administrators of the Estate of Raphael Chacha Marwa) v Maroa (Environment and Land Appeal E001 of 2022) [2023] KEELC 21136 (KLR) (13 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL E001 OF 2022
MN KULLOW, J
OCTOBER 13, 2023**

BETWEEN

MARWA CHACHA RAPHAEL 1ST APPELLANT

MWITA JOSEPH RAPHAEL 2ND APPELLANT

SUING AS ADMINISTRATORS OF THE ESTATE OF RAPHAEL CHACHA MARWA

AND

NELSON BABERE MAROA RESPONDENT

JUDGMENT

1. This Appeal emanates from the Ruling of D. Onyango in Migori Chief Magistrate’s Court ELC No. 42 of 2021 dated 15th December 2021, in which the Preliminary Objection dated 23/09/2021 was allowed and whose effect was to strike out the Plaintiff’s suit with costs to the defendant. The grounds in the Memorandum of Appeal dated 6th January, 2022 are that: -
 - i. The learned Magistrate erred in law and fact when he sustained the Preliminary Objection that the Plaintiff’s suit was time barred without considering the nature of the Appellant’s pleadings.
 - ii. The learned Magistrate erred in law when he held the limitation could apply to a claim of land based on license and permission.
 - iii. The learned Magistrate erred in law and fact in interpretation of Paragraph 4 of the Appellant’s Plaint; and particularly when he failed to find that their claim was based on a license and permission by the deceased to whose estate they were administrators.
 - iv. The learned Magistrate erred in law and fact when he failed to find that this case required evidence to prove the rival cases of the parties.



2. Consequently, the Appellant sought the following orders against the Respondent before this Court: -
 - a. The appeal be allowed and the ruling of the lower court set aside.
 - b. The Case be remitted to the lower Court to a Magistrate other than Chief Magistrate D. Onyango for hearing and determination.
 - c. Cost of this appeal and the costs in the lower court.
3. A brief background to bring this appeal into perspective; vide a Plaintiff/Appellant instituted a suit against the Defendant/Respondent; seeking an order of Eviction, Permanent Injunction together with costs of the suit.
4. It was the Appellant's contention that his deceased father, who was the registered owner of Bwirege/Bukihenche/1209 measuring 6.6 Ha, gave the Defendant license and permission to settle on a portion measuring 0.4 Ha (1Acre) of the original land since 1990. It is his claim that there was a mutual understanding between the two that defendant would vacate the said portion when asked to. However, upon the Appellant's father's death; the Defendant refused to vacate the land which culminated to the filing of this suit.
5. The Defendant/Respondent filed a Statement of Defense dated 16.08.2021; wherein he denied the allegations of the licensed occupancy and ownership of the said portion. He maintained that he was the owner and proprietor of the subject land vide a sale between him and the Appellant's deceased father. That pursuant to the said sale, he built on the suit land in 1988 and has been in occupation since then, which period is more than 30 years.
6. The Defendant/Respondent also filed a Notice of Preliminary Objection dated 23/09/2021, wherein he averred that the suit was time barred pursuant to the provisions of sections 4 and 7 of the Limitation of Actions Act, given that 30 years had lapsed since the cause of action arose. He thus maintained that the trial court lacked the requisite jurisdiction to determine the suit as filed and urged the court to strike out the same with costs.
7. The said Preliminary Objection was heard and determined vide the Ruling issued on 15/12/2021 whose effect was to allow the Preliminary Objection and strike out the Plaintiffs' suit with costs hence the instant Appeal.
8. The Appeal was canvassed by way of written submissions, both parties filed their rival submissions together with authorities which I have read and taken into consideration in arriving at my decision hereunder;

Appellant's Submissions

9. The Appellant submitted that the Preliminary Objection can only be raised on a pure point of law not where there are any facts to be ascertained. He reiterated that the Respondent had been licensed to use the suit land and that the same was not sold as alleged by the Respondent. It was his claim that the Court had a duty to examine the evidence to prove whose allegations would stand, by giving all parties an opportunity to call witnesses and be subjected to cross-examination.
10. Further, it was his submission that limitation of action could not be sustained on a claim of land based on a licence or permission. He added that a Court could not grant orders of Adverse Possession against an owner who consented to the stay of the individual claiming title. He relied on *Benjamin Kamau Murima & Others v Gladys Njeri* Ca No. 213 of 1996 and *Mzee Wanje & Others v Saikwa* Ca No. 72 of 1982 1 KAR 462.



11. The Appellants' counsel submitted that the Appellants have a right to be heard and that the dismissal of the suit based on the Preliminary Objection did not allow adjudication of the real issues in dispute; whether the same was with regard to a license or a sale agreement and maintained that the suit ought to have been heard on merit. He finally submitted that the appeal should be allowed and matter remitted for hearing in the lower court before a Magistrate with jurisdiction.

Respondent's Submissions

12. The Respondent, I note, maintained his submissions as at trial stage and he submitted on 2 main issues; whether the suit was time barred and whether the court had jurisdiction to determine the suit. He maintained that the cause of action arose in the year 1990 and at the time of filing the suit in 2021, a period of approx. 31 years had since lapsed. He thus opined that pursuant to section 4 of the *Limitation of Actions Act*, any claim founded on a contract would lie stale after 6 years. He contended that the dispute before the trial court arose out of a contract of 31 years.
13. Counsel further submitted that section 7 of the *Limitation of Actions Act* declared any claim of land statutorily barred after 12 years from when cause of action arose. He dismissed the argument by the Appellant that an action based on a license or agreement cannot be statute barred and maintained that rights over land are not absolute and may be limited by statute as per *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR.
14. On the second issue; he submitted that the time limitation rendered the Court's jurisdiction to adjudicate over any issue null. He relied on the cases of *Bosire Ongero v Royal Media Services* [2015] eKLR, *Edward Lesunguranya v James Lamaiyara & Another* [2019] eKLR and *Owner of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) LTD* [1989] KLR 1.
15. Counsel cited several case laws on which basis he prayed the Court to find that time limitation was a proper determinant of Jurisdiction for Courts.

Analysis and Determination

16. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This however does not entail taking on board matters which were never brought to the trial court's attention or were not subject of the said court's consideration. In *Selle v Associated Motor Boat Co.* [1968] EA 123) the Court of Appeal held as follows:

“this court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard the witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

17. I will now proceed to re-evaluate each of the party's claim from the trial court record, the evidence adduced and the trial court findings in determining whether the Appellant is entitled to the reliefs sought in the Memorandum of Appeal dated 6th January, 2022.



18. Having considered and reviewed grounds in the Memorandum of Appeal, the Record of Appeal, the rival submissions as well as the authorities cited in totality; I find that the issues arising for determination are as follows: -

- i. Whether the Preliminary objection was merited
- ii. Whether the Appellant is entitled to the relief sought

19. The law of Preliminary Objections is notorious and well settled and I do not seek to reinvent the wheels. A preliminary objection must be on a point of law. The Court of Appeal in the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 Law JA (as he then was) had this to say:

“... 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.”

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

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.... (emphasis mine)

20. The Respondent filed the Notice of Preliminary Objection challenging the jurisdiction of the Court, on the ground that the suit was time barred pursuant to the provisions of section 7 of the [Limitation of Actions Act](#). Section 7 of the [Limitation of Actions Act](#) 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.”

21. At the heart of this Appeal is the application of section 7 of the [Limitation of Actions Act](#). In considering this question, it is important to determine when the cause of action arose and the same can be answered at paragraph 4 of the Appellant’s Plaintiff as stated above. In the case of *Avtar Singh Bhamra & Ano. v Oriental Commercial Bank* HCC No 53 of 2004, the Court stated as follows;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

22. To this end, I find that the said Preliminary Objection indeed met the criteria of what amounts to a preliminary objection; the same was premised on pure points of law and it germinated from the Appellant’s pleadings.

23. It is now well settled that a question of limitation is a question that goes to the jurisdiction of the Court to entertain the suit. Nyarangi JA in [Owners of the Motor Vessel “Lillian S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue



right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

24. Further, the court in *Bosire Ongero v Royal Media services* [2015] eKLR, held 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”.

25. I have looked at the Complaint dated 23/07/2021 and contained at page 8 of the Record of Appeal. At paragraph 4 of the Complaint; it is the Appellant’s admission that the Respondent entered the suit land and put up a home on a portion of the suit land measuring 1acre sometimes in the 1990s.

26. A plain reading of paragraph 4 clearly shows that the cause of action arose sometimes in the year 1990, when the Respondent entered the suit land; whether the said entry and subsequent continued occupation was by license, permission or vide a sale between the Respondent and their deceased father, was not an issue for determination in the preliminary objection and the same does not also negate the fact that the cause of action arose in the year 1990. This in my considered view, perfectly fits the circumstances contemplated under section 7 of the Limitation of Actions Act and its effect was to oust the jurisdiction of the trial court to determine the suit as filed.

27. A. Nyukuri J. in *Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Ltd* [2021] eKLR cited with approval the case of *Iga v Makerere University* [1972] EA, where while discussing the law of limitation stated as follows: -

“A Complaint which is barred by limitation is a Complaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The *Limitations Act* does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

28. It is the Appellant’s argument that the statute of limitation is not applicable where the cause of action is as a result of a license of permission. This in my view is a misapprehension of the law. I have also noted that the Appellants’ submissions is majorly on the issue of adverse possession which was not pleaded in the trial court.

29. The totality of the foregoing is that the Trial Magistrate exercised his discretion correctly and judiciously in finding that the Preliminary was merited. I find no need to interfere with the said finding. Consequently, I find that the Appellant is not entitled to the reliefs sought in his Memorandum of Appeal.

Conclusion

30. In conclusion, I accordingly find that the Appeal is not merited, and the Memorandum of Appeal dated 6th January, 2022 is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI THIS 13TH DAY OF OCTOBER, 2023.

MOHAMED N. KULLOW



JUDGE

In presence of; -

..... for the Appellant

..... for the Respondent

Court Assistant- Tom Maurice/ Victor

