



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 441 OF 2017

(Formerly Machakos ELC Case No. 169 of 2015)

GEORGE CHEGE NDUNGU (Suing as the administrator of the estate

of Charles Ndungu Kinuthia – Deceased).....PLAINTIFF

VERSUS

NAIPONI ENE SEMPEKE alias NAIPONI ENE KAMPEI....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Preliminary Objection dated 1st July, 2020 on the grounds that this court lacks jurisdiction to hear and determine this suit; the entire motion is scandalous, frivolous and vexatious; the suit is time barred having been filed thirty one (31) years after the purported cause of action arose; land parcel number Kajiado/ Ol Choro Onyore/ 2342 the subject matter of the present suit has since been subdivided; the Plaintiff has no right over the suit land and the suit does not disclose any cause of action against the Defendant.

The Plaintiff opposed the Preliminary Objection by filing the Grounds of Opposition dated 12th September, 2020 where he averred that the Preliminary Objection is bad in law, frivolous, vexatious and an abuse of the court process; the subject matter in dispute was originally determined by the Kajiado District Land Dispute Tribunal on 13th May, 2010 where it ruled in favour of the Plaintiff; the Defendant filed a Judicial Review Application vide Machakos Civil Application No. 243 of 2010 which court quashed the Tribunal's findings in Ruling dated the 2nd May, 2013; it was not in dispute that the deceased was the owner of ten (10) acres of the suit land; matter was consequently filed in the right forum seeking for a declaration to compel the Defendant to transfer to the Plaintiff, ten (10) acres to be excised from KJD / Olchoro Onyore/ 2342; time started running from the date of the determination by the Machakos Court in Misc Civil Application No. 243 of 2010; and the Preliminary Objection requires further interrogation and enquiry by the court.

The Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection, Grounds of Opposition and rivalling submissions, the only issue for determination is whether this suit is statute barred and should be dismissed with costs.

The Defendant in her submissions has reiterated her claim and relied on the following decisions: **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696; Kennedy Mureithi & Another V Peterson Karimi Gacewa (2016) eKLR; J P Machira t/a Machira & Company Advocates V Wangethi Mwangi & another (1998) eKLR; Jones M. Musau & Another V Kenya Hospital Association & Another (2017) eKLR; and Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd (1998) eKLR to buttress her averments.**

I note the Plaintiff did not file written submissions to canvass the Preliminary Objection.

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.'**

The provisions are clear in terms of the period within which a party can bring forth a claim to recover land and indicates it is 12 years.

The Plaintiff in his Plaint explained that the deceased had transacted with the Defendant's husband who is also deceased. Further, that they took possession of the suit land and have resided thereon. He claims the Defendant declined to transfer the portion of the land purchased culminating in his lodging a complaint with the Kajiado Land Disputes Tribunal.

In the case of **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696** – the Court of Appeal held that:-

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop,” as per Sir Charles New Bold.’

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows:’ **A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. ‘**

Based on the facts at hand while associating myself with the decision cited above, I note the Defendant has stated in her submissions that her husband died in 1992 which was eight years after the alleged transaction. She has not indicated when she took out Letters of Administration Intestate to represent the estate of her late husband. In accordance with the provisions of the Law of Succession Act, it is trite that time stops running and no party is allowed to deal with a deceased persons estate until an administrator is appointed. I note that the Plaintiff who represents the estate of Charles Ndungu Kinuthia, claims the deceased took possession of the suit land upon purchase. Further, Charles Ndungu Kinuthia also died before the same was transferred to him. Since it is the deceased Plaintiff's estate that was claiming suit land, I opine that the matter could not have proceeded until a representative was appointed to represent it. It has also emerged that the Plaintiff proceeded to the Land Disputes Tribunal vide T C 066/ 02/09 after which a Judicial Review was filed in Machakos vide Miscellaneous Application No. 243 of 2010. It is further trite that time stops running when a matter is filed in court. From these highlights, it is my considered view that the issues raised in the Preliminary Objection requires all the facts to be ascertained. It is my considered view that there are so many gaps in the pleadings that require an explanation before the court can determine this matter.. In the circumstance, I find that the objection that the suit is statute barred premature and direct that this matter should proceed to full hearing instead of being dismissed at this interlocutory stage. Further, based on section 13 of the Environment and Land Court Act and noting that the Prayers sought in the Plaint revolves around claim for land, I find that this court indeed has jurisdiction to handle it.

It is against the foregoing that I proceed to disallow the Defendant's Notice of Preliminary Objection dated 1st July, 2020.

The costs will be in the cause.

Dated signed and delivered virtually at Kajiado this 27th day of May, 2021.

CHRISTINE OCHIENG

JUDGE