



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kituku v Haji (Sued on her behalf and as Administrator of the Estate  
of Marnier Pierre Andre Rogers - Deceased) (Environment & Land  
Case E010 of 2021) [2022] KEELC 14546 (KLR) (1 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 14546 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE E010 OF 2021**

**AE DENA, J**

**JULY 1, 2022**

**BETWEEN**

**PETER MUSAU KITUKU ..... PLAINTIFF**

**AND**

**FATUMA MOHAMED HAJI (SUED ON HER BEHALF AND AS  
ADMINISTRATOR OF THE ESTATE OF MARNIER PIERRE ANDRE ROGERS  
- DECEASED) ..... DEFENDANT**

**RULING**

**Background**

1. The plaintiff has instituted this suit seeking *inter alia* for a declaration that he is the owner of share of plot Galu/Kinondo/592 (herein suit property) measuring 0.425 Ha and for transfer of the same to him. It is pleaded that the plaintiff entered into an agreement with the deceased a foreigner to assist him in processing a work permit, registration of a company in Kenya and removal of Alex Muthami's name from the title herein. That the plaintiff incurred Kshs 2.9 million on behalf of the deceased to undertake the tasks which is equivalent to the portion claimed. The plaintiff alleges that the defendant has fraudulently transferred the entire suit property in her name.
2. In response to the suit the respondent filed a defence on March 4, 2022 and denies existence of the above arrangements. It is further pleaded among others that the defendant is the only wife to the deceased and rightfully transferred the suit property into her name after obtaining a decree from the Kadhi's Court Kwale declaring her the sole beneficiary of the deceased estate including the suit property.
3. The defendant filed a notice of preliminary objection on March 4, 2022 on grounds that the suit ought to be struck out with costs to the defendant pursuant to section 7 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya.



## Submissions of the parties

4. On March 14, 2022 I directed parties to file written submissions on the preliminary objection.

## Defendants submissions

5. The defendant's submissions were filed on March 18, 2022. citing section 7 of the *Limitation of Actions Act*, it was submitted that since the plaintiffs claim is based on an agreement entered between the deceased and the plaintiff on October 15, 2008, this suit having been filed on December 17, 2021 was time barred. That an action to recover land may not be brought before court after the end of 12 years from the date to which the right of action accrued to a party.

Counsel cited authorities where preliminary objections were upheld on this ground Machakos ELC 50 Of 2020 *Soraj Sobanlala & Another Versus Divisional Integrated Development Programs Co Ltd; Gathoni Versus Kenya Cooperative Creameries Ltd* [1982] KLR 104 and *Rawal Versus Rawal* [1990] KLR 275.

## Plaintiff submissions

6. The plaintiff filed written submissions on March 31, 2022. It is submitted that the conclusion of the agreement was incumbent upon certain clauses taking effect. That key among these was the filing of a case for removal of the name of the said Alex Muthami Ndungi. That these proceedings were filed by the plaintiff in Mombasa HCCC No 302 of 2008 Marnier Pierre Andre Roger Versus Alex Muthami Ndungi. That at the time of filing the current suit, HCCC No 302 of 2008 was still pending before court and hence it cannot be said that time had started running. The plaintiff submitted that the preliminary objection did not meet the threshold set in the case *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696 on what constitutes a preliminary objection. It is submitted that certain facts must be ascertained like progress of the Mombasa suit and issues of fraud as raised by the plaintiff. That the court needed to establish facts on when the defendant got registered as owner of the suit property, the validity of the succession and grant issued at the Kadhis Court and whether the deceased professed the Islam faith.

## Analysis and determination

7. Having considered the pleadings and written submissions of the parties herein and case law cited the key issues for determination is whether the preliminary objection is properly raised and whether the instant suit is time barred by dint of section 7 of the *Limitation of Actions Act*.
8. The purpose and character of a preliminary objection was well discussed by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696. The court laid down the principles as to what constitutes a preliminary objection. A preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a preliminary objection would not be sustainable.
9. It has been pleaded in the plaint that there is an agreement between the plaintiff and the deceased which is the foundation of the plaintiffs claim. The agreement is dated on October 15, 2008 and it this date that the defendant relies upon as the date when time started running for purposes of computing the 12-year limitation period within which a claim to recover land must be filed in court. The plaintiff however points that there are certain conditions which had not been fulfilled as at the time this claim was filed which had the effect of freezing the computation of time until they crystalized. Of importance is the Mombasa HCCC No 302 of 2008. The issue as to when time started to run is very pertinent



and I'm not convinced that this court will be able to determine it without delving into the facts, the interpretation of the agreements as well as the intentions of the parties. Clearly this ceases to be a pure point of law. In my view the matter should proceed on merit and for a proper determination on this point.

10. The upshot is that the preliminary objection fails. Costs shall be in the cause.

**DELIVERED AND DATED AT KWALE THIS 1<sup>ST</sup> DAY OF JULY, 2022.**

**A E DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams video conferencing Pplatform in the presence of:

Ms Muthoka holding brief for Mr Mutugi for the plaintiffs

Ms Nyariki for the defendant

Mr Denis Mwakina- Court assistant.

