



REPUBLIC OF KENYA



Mwawani & another v Swaleh & another (Environment & Land Case 179 of 2018) [2022] KEELC 4001 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 4001 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 179 OF 2018**

**MAO ODENY, J
JULY 12, 2022**

BETWEEN

NYEVU LUWALI MWAWANI 1ST PLAINTIFF

**WILLIAM MWAWANI LUWALI [SUING FOR AND ON BEHALF
OF THE ESTATE OF THE LATE BENETI LUWALI MWAWANI -
DECESAED] 2ND PLAINTIFF**

AND

THABIT SWALEH 1ST DEFENDANT

PAOLO DI MARIA 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Preliminary Objection dated November 30, 2021 by the 2nd Defendant on the ground that the suit is time barred by dint of Section 7 of the *Limitation of Actions Act*.
2. Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

2nd Defendant's submissions

3. Counsel gave a brief background to the case and stated that the plaintiff Beneti Luwali Mwawani (now deceased) filed this suit on September 13, 2018 claiming the suit land known as Plot No Chembe/ Kibabamshe/294.
4. That the 2nd Defendant contends that he purchased Plot No Chembe Kibabamshe/294 measuring 10 acres for the sum of Kshs 4,000,000 from the 1st Defendant, Thabit Swaleh (deceased) on June 14, 2007 and that at the time of the purchase the suit land was legally registered in the name of the 1st Defendant with no encumbrances.



5. Further that the 2nd Defendant through a letter dated June 26, 1997, by the plaintiff to his advocate makes it evident that the deceased Plaintiff was aware that the land parcel Chembe/Kibabamshe/294 (suit property) had been transferred to the 1st Defendant. The deceased filed the present suit on September 13, 2018 long after the expiry of the requisite 12 years since the cause of action arose.
6. Counsel relied on the cases of *Sobanlaldurgadass Rajput & another v Divisional Integrated Development Programmes Co Limited* [2021] eKLR and *Gregory Mutiani v Standard Bank Limited* [2021] eKLR and submitted that time started running when the Plaintiff became aware of the fact that would give rise to legal action.
7. It was counsel's submission that the purpose of the Law of Limitation of Actions is to prevent a plaintiff from prosecuting stale claims as was held in the case of *Mehta v Shah* (1965) E.A. 321.
8. Similarly, counsel cited the case of *Gathoni v Kenya Co-operative Creameries Ltd* (1982) KLR 104 where the court held that the Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them and urged the court to allow the preliminary objection and dismiss the plaintiff's suit.

Plaintiff's submissions

9. The Plaintiff's counsel opposed the Preliminary Objection and stated that the original Plaintiff, the late Beneti Luwali Mwawani filed this suit on September 13, 2018 vide his plaint dated September 12, 2018, seeking both declaratory reliefs of ownership and revocation of a title deed of the suit premises, being Plot No Chembe/Kibabamshe/294 which was issued to the Defendants through fraud.
10. Counsel submitted that the preliminary objection does not meet the requirements of what amounts to pure points of law. Further that the plaintiff is not aware of the purported letter written by the deceased and that the Plaintiffs only became aware of the cause of action herein in June 2017, as stated in paragraph 4 of the Plaint.
11. It was counsel's further submission that a preliminary objection, can only succeed if it is based on a pure point of law where no fact is disputed and relied on the cases of *John Mundia and 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR; *Kenya Breweries Limited & another v Keroche Breweries Limited* [2020] eKLR; *Charles Onchari Ogoti v Safaricom Limited & another* [2020] eKLR; *Zipporah Njoki Kangara v Rock and Pure Limited & 3 others* [2021] eKLR; and *Maulid Mohamed Ogoni v Jikomi Said Maro*[2021] eKLR.*
12. Counsel submitted that the defendant has based the preliminary objection on a letter dated June 26, 1997 which is disputed by the plaintiff therefore calls for hearing of the suit to determine the facts that are disputed. Further that a preliminary should not be used as a sword but as a shield and savior of judicial time hence the present Objection as filed does not meet the threshold and urged the court to dismiss the same with costs.

Analysis and determination

13. The issue for determination is whether the preliminary objection as filed meets the threshold for objections and if so whether the suit is time barred.



14. It is trite law that a preliminary objection should be purely on a point of law as was held in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 where the court explained 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... 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.”

15. Further Sir Charles Newbold, JA stated 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 had 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. Further it is also trite law that a preliminary objection must not deal with disputed facts and factual information which must be tested by the normal rules of evidence as was held in the case of *Oraro v Mbaja* (2005) eKLR.

17. The basis of this preliminary objection is a letter dated June 26, 1997 which is disputed by the plaintiff. This is based on factual evidence which has to be proved vide rules of evidence either on its existence or authenticity. This alone throws the preliminary objection off balance as it does not meet the principle that a preliminary objection must be purely on a point of law. The other point is that when a Preliminary Objection is raised, it is assumed that all the facts pleaded by the other side are correct, therefore it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion.

18. The plaintiff has claimed fraud which he discovered in 2017 and section 26(a) of the *Limitation of Actions Act* 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. The time when the plaintiff alleged to have discovered the fraud is a matter of fact which has to be ascertained by evidence during trial.

19. Section 26 of *Limitation of Actions Act* provides as follows; -

Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the Respondent or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the Applicant has discovered the fraud or the mistake or could with reasonable diligence have discovered it: Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which— (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time



of the purchase know or have reason to believe that any fraud had been committed; or (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

20. In the case of *Justus Tureti Obara v Peter Koipeitai Nengisoi* [2014] eKLR the court 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. The defendant’s objection based on time bar also fails.”

21. Further in the case of *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Mubindi* [2019] eKLR, while holding that the defence of limitation of time was a matter for determination at the trial and not to be summarily dealt with as a preliminary objection cited with approval the cases of *Oruta & Another v Nyamato* [1998] KLR 590 and *Divecon Ltd v Shirinkhanu S. Samani* Civil Appeal No 142 Of 1997 as follows:

22. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of *Oruta & Another v Nyamato* [1998] KLR 590, where the court held that limitation of action: -

“... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

23. I have considered the submissions by counsel and the relevant judicial authorities and find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF JULY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

