



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 3 OF 2021

SAMUEL NYANJUI MBUGUA ALIAS

SAMUEL NYANJUI MURUNGA.....1ST PLAINTIFF/RESPONDENT

-VERSUS-

MARGARET NDUTA NGUGI.....1ST DEFENDANT/OBJECTOR

JOHN NJENGA KARIUKI.....2ND DEFENDANT/OBJECTOR

SAMUEL NGUGI KARIUKI.....3RD DEFENDANT/OBJECTOR

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **4th February 2021**, brought by the Defendants/ Objectors on the grounds that;

- I. This suit is bad in law and an abuse of due process of law.**
- II. This suit is time barred under the statute of Limitation of Actions Act.**
- III. This suit is Res Judicata as a different suit touching on the same issues and the same parties has been determined.**
- IV. This application is unprocedural and fatally defective in the presence of a parallel application filed by the Respondents seeking eviction orders against the applicant on similar facts in Succession Cause No.1213 of 2001.**
- V. This suit is void ab initio for want of compliance with the law on the sought prayers.**

The Notice of Preliminary Objection was canvassed by way of written submissions and the Defendants/Objectors through the **Law Firm of R.W Muhuhu & Company Advocates**, filed their written submissions on **3rd March 2021**, and submitted that a Grant for the estate of the deceased issued to **Wilson Ngugi Karanja**, in the year **2000** was revoked and subsequently issued on **27th November 2002**, with the Plaintiffs/ Respondents full knowledge and on **15th February 2008**, all transactions that had taken place on the Deceased title were revoked and since then the Plaintiffs/ Respondents have not filed any claim either for Specific Performance or endorsement or completion, thus their Claims are barred by **Section 7 of the Limitation of Actions Act**, It was further submitted that as in the instant suit, there was no sale agreement, evidence of payment and as the claims were brought out of time, the suit is a nonstarter and ought to be struck out. They relied on the case of ***Danson Muniu NjeruVs.... William Kiptarbei Korir & 6 others (2014) eKLR.***

It was their further submission that the Plaintiffs/Respondents admitted to having participated in **Succession Cause No. 1213 of 2001**, which was determined in **2008**, and that they admitted that it related to ownership of land that they alleged to have purchased from the Deceased, while the instant suit relates to claim of ownership of the same parcel of land and specific performance. That the Plaintiff/Respondent litigated a similar issue and lost. That the decision cannot be contradicted by a Court of even jurisdiction. Further that the Application is unprocedural and fatally defective on the presence of a parallel Application by the objectors seeking eviction orders against the Plaintiffs/ Respondents on similar facts in **Succession Cause No. 1213 of 2001 (Succession Cause No. 282 of 2006 Nakuru)** and should the Court grant injunctive orders, it would have defeated the pending Application. The Court was therefore urged to struck out the pleadings.

The Plaintiff/Respondent through the Law Firm of Kamata & Company Advocates, filed his submissions on **31st March 2021**, and submitted

that Plaintiff/ Respondent was not a party in Nakuru Succession Cause No. 282 of 2006, though his grievance were heard by the trial Judge . That he was not a party, and the Court recommended that he file the matter in the relevant Court. That the Judgments was delivered on 15th February 2008, and one of the persons sought to be expelled, filed an Appeal No. 60 of 2009, but before the Appeal could be finalized, one of the Administrators passed on, in the year 2014. That by that time, the Claim had not become time barred as the Plaintiff/ Respondent could not file any claim for Specific Performance against the Administrators of the estate of Felix Ngugi, since one of them had passed on and he took too long to be replaced. That he only noticed that he had been replaced when the Plaintiff/Respondent was served with an Application for eviction. That the eviction necessitated the filing of the instant suit and Application.

That the Succession matter had not been finalized and the same cannot be finalized in the absence of people who are to be evicted. The Court was urged to allow the suit to proceed for hearing and be determined on merit.

The Court has carefully read and considered the Notice of Preliminary Objection, the written submissions and the Pleadings in general and finds that the issue for determination is *whether the Notice of Preliminary Objection is merited*.

The Court will first have to determine whether the Grounds of Objections raised by the Defendants/Objectors qualify to be a **Preliminary Objection** as was described in the case of **Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696**, where Law J A stated that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings and which objection point may dispose the suit”.

Further the Court stated;

“A preliminary objection raises a pure point to 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 Court has considered the five grounds raised by the Defendants/Objectors. The Objectors have raised various issues amongst them that the suit is **Res Judicata**; the same is bad in law and that the same is fatally defective as there is a parallel Application by them seeking eviction orders. In the case of **Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) ECLR**, the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.

Further in the case of **George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eCLR**, the Court held that:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

It is clear that for the Court to ascertain whether the instant suit is **Res Judicata**, unprocedural or bad in law and an abuse of the Court process, the Court will have to ascertain and probe evidence more so as the parties are disputing various issues. Therefore, this Court finds and holds that grounds **No.1,3,4** and **5** are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence, probing it and the Court ascertaining facts from elsewhere and therefore the same are not properly raised Preliminary Objection. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

See also the case of **United Insurance Co. Ltd...Vs...Scholastica A. Odera, Kisumu HCCA No.6 of 2005**, where the court held that:-

“A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”

On ground **No.2** on jurisdiction and the allegations that the suit has been barred by statute, it is clear that the issue of whether or not the provisions of the law have been complied with before the filing of the suit, goes to the jurisdiction of the Court and does not require the

ascertaining of facts as Jurisdiction is everything and without it, the court has no option but to down its tools.

The Court is required to determine what the law says and whether indeed the suit is barred by **Limitation of Actions Act** and that would not require the probing of evidence. All that the Court would need to do is determine what the law says and this would only mean that the same raises a pure point of law.

From the description of Preliminary Objection in the *Mukisa Biscuits case (supra)* and given that an issue of whether the suit is barred by the Limitations of time, does not involve ascertaining of facts, then the instant *Notice of Preliminary Objection* as raised by the Defendants/ Objectors meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere but from the pleadings. This, Court finds and holds that the **ground 2** of the *Notice of Preliminary Objection*, as filed by the Defendants/ Objectors is a Preliminary Objection as per the *Mukisa Biscuits case (supra)*. **The Court will then determine whether the Preliminary Objection on jurisdiction is merited.**

The Defendants / Objectors have contended that the instant suit is time barred as the Plaintiff's/ Respondent's allegation that though there was no sale agreement, he had paid for the land and took possession in 1999. That a Grant of Estate issued to Wilson Ngugi Karanja was revoked and subsequently re-issued in 2002, with full knowledge of the Plaintiff/ Respondent and that on 15th February 2008, all the transactions that had taken place on the title deed were cancelled.

The objectors anchored their Objection on Section 7 of the Limitations of Actions Act which provides that;

“An action may not be brought by any person to recover land after the end of 12years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person.”

When then did the right of actions accrue? In the case of *Edward Moonge Lengusuranga ...Vs... James Lanaiyara & another [2019] eKLR* the Court held that

“A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the 13th January 2015 and a period of three years ended on 13th January 2018. These proceedings were filed on the 20th August 2018 which period was beyond the 3 years from the date the fraud was discovered.”

Persuaded by the above case, it is not in doubt that a cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Plaintiff /Respondent used to justify its rights to sue?

It is evident that on 15th February 2008, the Court revoked the Grant and in the Plaintiff's/ Respondents own submission, the Court advised him to file the matter in the relevant Court. It is thus the Court finding that the cause of action rose in 2008, as the set of facts being the revocation of the transactions justified the right to sue. From the year 2008, to the year 2021 when the instant suit was filed, there is no doubt that 13 years have since passed.

The Plaintiff/Respondent has further submitted that one of the parties preferred an appeal and therefore at that time, time was not running. Further that one of the Administrator was Deceased and had not been replaced and therefore time could not run. **Section 39 of the Limitations of Actions Act** provides for periods when the Limitations of Actions does not run and states

(1) A period of limitation does not run if—

(a) there is a contract not to plead limitation; or

(b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purposes of subsection (1) of this section, “estopped” includes estopped by equitable or promissory estoppel.

Equitable estoppel is generally words or conduct which cause another person to believe a certain state of things exists and to consequently change his or her position in an adverse way. The Plaintiff's/ Respondent's contention is that there was an Appeal by another person and or that one of the Administrators had not been replaced in the Court. In the case of *William Gatuhi MuratheVs... Gakuru Gathimbi [1998] eKLR* the Court held that;

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor.

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has

made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.’

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. And on this particular point I will go with the potter JA . The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed.

In my judgement, therefore, time stopped to run against the appellant when he filed the Kiambu case in 1984. That case was not withdrawn or discontinued but was transferred to the High Court in Nairobi and consolidated with the O.S. taken out by the respondent. On the respondent’s own testimony before the learned Judge, he went into possession in 1974 and since the appellant filed his possession suit in 1984, time ceased to run against him because by taking that step the appellant, as owner, asserted his right. So therefore when the respondent took out his O.S. in July 1988, he had not been in continuous and uninterrupted possession for 12 years for the purposes of section 38 of the Act, and he was not therefore entitled to judgement.”

Even if as we have said, that the respondent’s adverse possession against Ayub Nguyai “B” began in 1972, which was before the appellant was registered as the proprietor of the suit land, then the uninterrupted adverse possession that would enable the respondent to claim to be entitled to the suit land, would end in 1985. A fortiori, by the time when the appellant filed his counterclaim in 1979, and which effectively interrupted the respondent’s adverse possession of the suit land, the respondent had not achieved twelve years of uninterrupted adverse possession of the suit land as against the appellant.

It is clear that the learned judge had not bothered to consider all the relevant issues which if he had done, could not have come to the conclusion that the respondent had been in uninterrupted adverse possession for more than twelve years as against the appellant by the time he heard the appellant’s counterclaim.

It is evident that time stops to run when a person asserts their right. In this instant, there is no evidence that the Plaintiff/Respondent sought to assert his right. The Court therefore finds and holds that time did not stop running for his purposes. Further on the contention that one of the Administrators of the estate of the Deceased passed on and therefore nothing could be done, the Court finds that the same cannot hold water as the Estate had other Administrators who were capable of carrying on the duties of the Deceased Administrator.

See section 81 of the Law of Succession Act, which provides for vesting of the powers and duties of Personal Representatives in the survivor or survivors of a dead Personal Representative. The provision provides as follows –

‘Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.’

On whether the Objection is merited, the Court has gone through the Plaint dated **15th January 2021** and notes that the Plaintiff/ Respondent has sought for injunctive orders; orders of Adverse Possession and orders of Specific Performance, It is the Court’s considered view that while the prayers for Specific Performance is barred by Limitation of time, the prayer for Adverse Possession and injunction in the circumstances are not barred by the Limitations of Actions Act as **Adverse Possession** is anchored on the time having passed. Consequently the Court upholds the Preliminary Objection in so far as it relates to the prayer for Specific Performance.

However, on the other prayers, the said **Notice of Preliminary objection** is dismissed and costs to be in the cause.

Let the suit proceed for hearing and be determined on merit on the other prayers save for prayers on Specific Performance.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 6TH DAY OF MAY 2021

L. GACHERU

JUDGE

6/5/2021

Court Assistant – Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kamata for the Plaintiff/Respondent

M/s Muhuhu for the 1st, 2nd and 3rd Defendants/Objectors

L. GACHERU

JUDGE

6/5/2021