



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELC CASE NO. 11 OF 2021

(FORMERLY KAKAMEGA ELC NO.29 OF 2019)

RICHARD KIDINGA KAMAI (suing as

legal and personal Representative of the Estate

of JOSHUA KAMAI MUNASORE- (Deceased).....PLAINTIFF

VERSUS

BENJAMIN MACHAYO BARUSI

a.k.a BENJAMIN BARUSI.....DEFENDANT

RULING

A. Introduction

1. This Ruling is in respect of the Preliminary Objection raised by the Defendant *vide* Notice of Preliminary Objection dated 7th, June, 2021 and filed herein on the same date. The Defendant seeks to have the suit struck out with costs as it offends the mandatory provisions of Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya.

2. The court record shows that at the close of Plaintiff's case on 24th March 2021, the Defendant indicated to the court that he had a preliminary Objection to raise and sought adjournment to do so. On 23rd June, 2021 the court gave directions that the Preliminary Objection be argued by way of written submissions. Both Parties have filed written submissions in respect of the Preliminary Objection.

B. The Defendant's case

3. The Defendants case is contained in the Notice of Preliminary Objection. He contends that the Plaintiff's suit offends the provisions of Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya which provides that actions 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 first accrued to some person through whom he claims, to that person.

4. The Defendant submits that the Plaintiff never filed an application seeking leave to file the suit out of time as the law dictates. That the Defendant has held the suit land namely MARAGOLI/ MAHANGA/1033 since 7th July, 1970. That the Plaintiff's father and family have all along been aware of the status of the suit property and never took any action for over forty eight years prior to the filing of the suit herein. He further submits that the filing of the suit offends provisions of the above cited law.

5. The Defendant relied on the authority of Richard Oduol Opole Vs Commissioner of Lands and 2 Others (2015) eKLR and seeks that the suit be struck out with costs.

C. The Plaintiff's case

6. The Plaintiff's response to the Preliminary Objection is contained in the written submissions dated 17th October, 2021. The Plaintiff relies on the authority of Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Limited (1969)E.A 696 and submits that a Preliminary Objection may only be raised on a pure question of law. That in this particular case the Court is being called upon to determine if indeed the subject of the suit has been held by the Defendant since 1970 and why. That the Applicant is asking this court to analyze the evidence on record.

7. The Plaintiff submits that the Preliminary Objection is not properly before court and prays that the same be dismissed with costs.

D. Issues for determination

8. From the contents of Notice of the Preliminary Objection and the submissions filed by the parties, the court identifies the following as issues for determination;

a) Whether or not the matters raised in the Notice of Preliminary Objection constitute a Preliminary Objection properly before the court

b) Whether or not the suit offends the provisions of section 7 of the Limitations Act

c) Who pays the costs of the Preliminary Objection?

E. Analysis and determination

9. In analyzing and determining the issues identified herein, the court is guided by the law and existing precedents on raising of Preliminary Objections.

10. The Constitution of Kenya secures the right to fair hearing and the right to equality and freedom from discrimination which are some of the rights and fundamental freedoms of Kenyans. It further directs courts and tribunals in the exercise of judicial authority to be guided by certain principles, *inter alia*, that justice shall be administered without undue regard to procedural technicalities. (see articles 50, 27 and 159)

11. Thus in handling a preliminary Objection a court of law ought to guard against depriving any of the parties in the matter any of the above mentioned rights and against being entangled in the matters of procedural technicality and, instead, fix its focus on deciding the substance of the dispute before it.

12. The **Civil Procedure Rules, Order 2 Rule 9** provides **“Any party may by his pleading raise any point of law.”**

13. In determining whether the matters raised in the notice of preliminary objection herein constitute a preliminary objection, the court is guided by the decision in the case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Limited (1969)E.A 696** where it was 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 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 exercise of judicial discretion.”

The court further stated that;

“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 if argued as a preliminary point may dispose of the suit.”

14. The Objection is a plea of limitation based on the provisions of the Limitations of Actions Act. This ought to be clear from the pleadings filed. The pleadings filed herein are the Plaintiff dated 28th March, 2019 and the Defence dated 15th April 2019.

15. The main prayers in the Plaintiff are transfer of the suit land in favour of the Plaintiff and eviction of the Defendant there from. The basis of the Claim as expressed in paragraphs 5 and 6 is trust. Paragraphs 5 and 6 read:

“5. That on or about the 7th day of July 1970, the Defendant acquired first registration on that parcel of land better known as L.R NO. SOUTH MARAGOLI/MAHANGA/1033 to hold in trust for the late JOSHUA KAMAI MUNARE- Deceased

6. The Plaintiff avers that the Defendant has failed, refused and/or neglected to transfer the said parcel of land better known as L.R NO. SOUTH MARAGOLI/MAHANGA/1033 to the Plaintiff.”

16. The Defence dated 15th April, 2019 raises the issue of statutory limitations of the cause of action. Paragraph 8 of the Defendants statement of defence states

“The Defendant avers that the Plaintiff’s suit if any, is statutorily time barred under the Limitation of Actions Act Cap 22 Laws of Kenya and a Preliminary Objection shall be raised thereto, notice of which is hereby given”.

17. It is true as submitted by the Plaintiff that the Preliminary Objection herein was raised after the close of Plaintiff’s case and that the Defendant stated that it was upon perusal and taking of the Plaintiff’s case that he realized that the same was defective and proceeded to raise Preliminary Objection.

18. However, upon reading the pleadings it is clear that the matters raised in the preliminary objection indeed do germinate from the face of the pleadings and not the facts adduced in the testimony of the Plaintiff and his witnesses. Indeed the Defendant had raised the point of law

preliminarily in his defence. No explanation is however given why the same was not taken at the commencement of the proceedings. A preliminary objection, as a way of asking the court not to entertain the suit because the law prohibits ought to be raised right at the onset of the proceedings.

19. Be that as it may, the court finds on the first issue that what is raised in the notice of the preliminary objection constitutes a preliminary objection.

20. The next issue for determination is the substance of the objection namely; whether or not the suit offends the provisions of Section 7 of the Limitation of Actions Act. Section 7 of the Limitation of Actions Act has been quoted verbatim in the Notice of preliminary objection. It prohibits any party from bringing an action to recover land after the expiry of twelve (12) years from the date the cause of action arose.

21. Although the Plaintiff's claim indeed is recovery of land, the same is based on trust as already stated herein above. Section 20 of the Limitation of Actions Act makes provision on the limitation period for actions based on trust. It reads:

“None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under trust, in which an action-

(a) in respect of a fraud or fraudulent breach of trust which the trustee was party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in possession of the trustee or previously received by the trustee and converted to his use.

22. The court emphasized this in the case of **Stephens and 6 others –vs- Stephen & Another [1987]eKLR** and quoting Section 20 of the Limitation of Actions Act held that the periods of limitation do not apply in an action based on breach of trust.

23. The Court has also read the decision in the case of **Richard Oduol Opole** aforementioned relied on by the Defendant and finds that the limitation period in Section 7 of the Limitation Act does not apply herein. Whether or not the trust was created and exists as claimed in the plaint, is the core issue for the court's determination in the suit after hearing both parties.

24. The result is that the Preliminary Objection fails and is hereby dismissed. Costs of the Preliminary Objection to the Plaintiff.

Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT VIHIGA THIS 21ST DAY OF OCTOBER 2021.

E. ASATI

JUDGE

In the presence of:

For the Defendant

For the Plaintiff

Ajevi

Court Assistant.

E. ASATI

JUDGE