



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E1 OF 2020

IN THE MATTER OF FAILING TO COMPLETE TRANSFER OF L.R NO. 12715/12393 (12715/174/6) SYOKIMAU-MAVOKO MUNICIPALITY) AND IN THE MATTER OF SECTION 98 OF THE CIVIL PROCEDURE ACT AND ORDER 37 RULES 1, F & 3 OF THE CIVIL PROCEDURE RULES 2010.

-BETWEEN-

PETER KAYUGIRA AND

SCHOLASTICA NDUKU MUNYAO.....APPLICANTS

-AND-

MESHACK MWAKA MUSYOKI AND CHRISTOPHER MUO MUSYOKI

(in their capacities as administrators to the estate of

HENRY MUSYOKI KILONZI (Deceased).....RESPONDENTS

RULING

1. The Applicants filed an Originating Summons dated 28/9/2020 and filed in court on the same date seeking for the determination of the following questions:

1. Whether the Applicants are entitled to be declared the legal owners of LR NO. 12715/12393 (Original 12715/174/6) (SYOKIMAU-MAVOKO MUNICIPALITY) by an order of this honourable court.
2. Whether the said inclusion of the property known as L.R No. 12715/174 in Succession Cause No. 530 of 2017 NAIROBI estate is lawful when the administrators know well that the said property was subdivided and does not exist.
3. Whether the administrators may be ordered to amend the Petition filed in the said Succession Cause to include the property known as L.R. No. 12715/12393 (Original L.R No. 12715/174/6) which is one of the resultant plots from the subdivision of L.R. No. 12715/174 and note the Applicant's interest on it for purposes of the transmission of the property to their name.
4. Whether in the alternative, pursuant to determination of 1 above, the Respondents may be ordered to transfer the said property to the applicants within 30 days of the said order at their cost, failing which the Deputy Registrar of this Honourable Court may be authorized to execute the transfer and any other necessary documents to effect the transfer.
5. Whether costs of this Originating Summons will be borne by the Respondents.

2. The Respondents entered appearance on 11/11/2020. The 1st Respondent filed his Replying Affidavit sworn on 20th December 2020 and filed in court on 12th February 2021. In the Replying Affidavit, he deponed that this court lacks jurisdiction to entertain this matter, because according to him, this suit was time barred at the time of filing. The Respondents further stated that this court sitting as a land court, lacks jurisdiction to grant prayers 2 and 3 of the orders sought in the Originating Summons as the issues raised can be addressed in the succession proceedings in Nairobi Succession Cause No. 530 of 2017.

3. On 12th February 2021, the Respondents filed a Notice of Preliminary Objection dated 10th February 2021 predicated on the following

grounds;

- a. That the matter is fatally incompetent for being filed out of time.
- b. That this court has therefore no jurisdiction to hear and determine this suit.

4. This ruling is therefore in respect of the Notice of the Preliminary Objection dated 10th February 2021 and filed in court on 12th February 2021. On 17th February 2021, the court directed that the Preliminary Objection be canvassed by written submissions. The Respondents' submissions are not on record. The Applicants filed their submissions on 24th August 2021, citing various authorities in support of their position.

THE RESPONDENTS' CASE.

5. The Respondents have raised objections to this court's jurisdiction to determine this matter both in the Preliminary objection and the 1st Respondent's Replying Affidavit sworn on 20th December 2020 and filed on 12th February 2021. They state that this suit is time barred and that this court lacks jurisdiction to grant the prayers 2 and 3 in the Originating Summons as the matters raised may be addressed in Nairobi Succession Cause No. 530 of 2017.

6. In his Replying Affidavit, the 1st Respondent argues that the application filed by the Applicants on 28/09/2020 is time barred having been filed past the 6-year limitation period for enforcing a contract.

7. The 1st Respondent has stated in his Replying Affidavit that this court sitting as a land court has no jurisdiction to grant prayers 2 and 3 of the orders sought in the Originating Summons as the issues raised can be addressed in the succession proceedings in Nairobi Succession Cause No. 530 of 2017. He further contended that this court has no supervisory powers over another superior court of equal constitutional competence.

THE APPLICANTS' CASE

8. In their written submissions, the Applicants argued that the Preliminary Objection does not meet the threshold set out in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors (1969) E.A 696**, which is the locus *classicus* authority on preliminary objections in Kenya. They stated that the facts relied upon by the Respondents are disputed facts and that is why the Respondents filed a Replying Affidavit. They relied on the case of **Mukisa Biscuit** (Supra) in which the Court of Appeal stated that a preliminary objection consists of a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct; and cannot be raised where any fact needs to be ascertained or if what is sought is an exercise of judicial discretion. Reinforcing this position, they also placed reliance on the case of **Republic v Eldoret Water & Sanitation Company Ltd Ex parte Booker Onyango & 2 Others (2007) eKLR**, where it was held that an objector cannot introduce any factual dispute or controversy and must stick to pure points of law.

9. The Applicants further argued that the Respondents cannot be heard to argue on one hand that the suit is premature and on the other hand that the same is time barred. The Applicants therefore stated that this is a matter for the court's discretion, hence not valid for a preliminary objection.

10. They contended that limitation period cannot run until when the plaintiff discovers fraud. They relied on the case of **Justus Tureti Obara v Peter Koipeitai Nengisoi (2014) e KLR**, where it was held that a claim for recovery of land is 12 years as provided for in section 7 of the Limitation of the Actions Act Cap 22 Laws of Kenya and that section 26 (a) of the said 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.

11. The Applicants further submitted that the 1st Respondent held the suit land in trust for the Applicants upon the demise of the deceased, as the Applicants were valid creditors to the estate of the deceased. They also argued that the Respondents' acknowledgment that they were in the process of transferring the suit land to the Applicants amounted to a fresh accrual of their right in the deceased's estate. They referred this court to the case of **Anne Murambi v John Munyao Nyamu & Ano. [2018] e KLR**, where the court held that upon the demise of the vendor, the administrators of her estate held the suit property in trust for the parties to the sale agreement and they cannot therefore raise a legitimate defence of limitation against any of the parties in whose trust they held the suit property.

12. It was also submitted by the Applicants that the 1st Respondent failed to honour their part of the transaction by failing to disclose the Applicant's interest upon the vendor's demise. The Applicants further submitted that the Respondents were part of the laches and should not be allowed to benefit from their illegal actions. The Applicants further stated that acts of fraud on the part of the Respondents included laches and failure to disclose the Applicants' interests to the succession court in Nairobi Succession Cause No. 530 of 2017. They relied on the case of **Attorney General v Law Society of Kenya & Ano. [2017] e KLR**, where the Court of Appeal adopted the words of Lord Mansfield CJ in **Holman v Johnson (1775) 1 Cowp 341**, to the effect that no court will aid a person whose cause of action is anchored on immoral or illegal acts. The Applicants contended that the Respondents deliberately delayed and failed to transfer the suit property to them and therefore they cannot plead lapse of time when they deliberately hindered the finalization of the transfer of the suit property.

13. In addition, the Applicants contended that through various emails, the 1st Respondent assured the Applicants of their commitment to complete the transfer process. They further stated that the allegation that the suit is time barred is misleading, far-fetched and an incorrect interpretation of the law. They stated that the email correspondence by the Respondents amounted to acknowledgements in terms of the provisions of section 23 (3) of the Limitation of Actions Act.

14. The Applicants averred that this court has jurisdiction to issue orders sought in the Originating Summons as they are directed at the Respondents and not the court under reference. On the issue of where a suit should be filed in respect of creditors of a deceased estate, the Applicants relied on **In Re Estate of Stone Kathuli Muinde (deceased) 2016 e KLR**, where it was held that a third party who claims ownership of a property, alleging that it does not form part of the estate of a deceased person and therefore it need not be placed on the probate table, may file such claim in the Environment and Land Court.

15. The Applicants argued that this court has jurisdiction to entertain this suit by also relying on the case of **Florence Makena vs. John Maruri M'ibere & 3 Others [2017] e KLR**, where it was held that where a party has an identifiable legal stake or interest in a suit property that is subject to a succession cause, the succession court may appropriate or set aside the particular share in question to abide the determination of the question in the other proceedings.

16. The Applicants submitted that the Preliminary Objection is a delay tactic calculated to expend the court's valuable time and the same is an abuse of the court process.

ANALYSIS AND DETERMINATION

17. I have carefully considered the Preliminary Objection raised, the written submissions as well as the pleadings filed in this matter. Three key issues emerge for determination;

- a. Whether the Notice of Preliminary Objection dated 10th February 2021 raises a valid preliminary objection;
- b. Whether this suit is time barred; and
- c. Whether this court lacks jurisdiction to determine issues number 2 and 3 in the Originating Summons.

18. In **Mukisa Biscuits Manufacturing Company Limited v West end distributors (1969) E.A 696**, the Court of Appeal set out the principle of what constitutes a preliminary objection. For a Preliminary objection to be valid, it must be on a pure point of law and must be premised on facts that are not in dispute. If one or both parties are required to adduce evidence to ascertain the facts to be relied upon for the preliminary objection, then such a preliminary objection cannot be sustained. In **Mukisa Biscuit** (Supra), it was held as follows;

“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 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.”

19. In the instant case, the Respondents have premised their preliminary objection on grounds of time limitation and that this court sitting as a land court lacks jurisdiction to grant prayers 2 and 3 in the Originating Summons as the issues raised therein can be addressed in the succession proceedings in Nairobi Succession cause no 530 of 2017.

20. The questions as to whether the Applicants' suit was filed out of time and whether this court has power to determine issues number 2 and 3 of the Originating Summons are questions that go to the jurisdiction of this court. They are clear points of law, which if argued as preliminary points may dispose of the suit. In the case of **Bosire Ongero v Royal Media services [2015] eKLR**, it was held that the question of limitation touches on the jurisdiction of the court to entertain claims, hence if a matter is statute barred, the court has no jurisdiction to entertain the same. I therefore find that the preliminary objection is on points of law and validly taken.

21. The Respondents contend that the Applicants' claim was filed past the 6-year limitation period for enforcing a contract. In rebuttal, the Applicants have contended in their submissions that the suit was not filed out of time. They have faulted the Respondents' equivocal arguments in respect of limitation, where on one hand they allege that the suit is premature and on the other hand that the suit is time barred. The Applicants have further argued that their claim is based on fraud and therefore time can only start running from the time fraud was discovered as provided for under section 26 of the Limitation of Actions Act. They submitted that the particulars of fraud include laches and failure to disclose to the succession court the Applicants' interests in the deceased's estate in Nairobi Succession Cause No. 530 of 2017.

22. From the Originating Summons and the 1st Respondent's Replying Affidavit, it is not disputed that the suit property was subject of the agreement entered in to on 7th August 2014 between Henry Musyoki Kilonzi (deceased) and the Applicants. The Applicants filed this suit on 28th September 2020. The question therefore is whether this suit was filed out of time.

23. The Respondents have contended that the suit ought to have been filed within 6 years from the date the cause of action arose, as the same is based on a contract. It appears the Respondents have premised their preliminary objection on Section 4 (1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya. That section provides as follows;

1. “The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
 - a. Actions founded on contract;”

24. The Applicants' claim is based on a sale of land agreement dated 7th August 2014 between them and Henry Musyoki Kilonzi (deceased). In their Originating Summons they seek for equitable and legal ownership of L.R NO. 12715/12393 (12715/174/6) (SYOKIMAU MAVOKO MUNICIPALITY). They have sought for, among other prayers, the determination of the questions as to whether they are entitled to be declared as the legal owners of the suit land and whether in the alternative, the Respondents may be ordered to transfer the suit property

to the Applicants, and in default the court's Deputy Registrar to effect the transfer.

25. Section 7 of the Limitation of Actions Act provides as follows;

“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.”

26. In the case of **Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] e KLR**, it was held as follows;

“Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the first defendant having bought the suit land in the year 1999 (as per paragraph 6 of the plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the sale agreement.”

27. Although the Applicants' claim is based on a contract, it is nevertheless a claim for recovery of land and therefore under the purview of section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. As long as an action is for recovery of land whether or not it is anchored on a contract, the limitation period is 12 years. It matters not that the genesis of such action is a contract. In view of the fact that the Applicants' claim in the instant case is for recovery of land, I find that the applicable law is section 7 of the Limitation of Actions Act and therefore the limitation period is 12 years.

28. The Applicants have submitted that their suit is based on fraud. However, I note that in the Originating Summons, fraud is neither pleaded nor any particulars thereof stated. The issue of fraud was raised by the Applicants in their submissions and not in their pleadings. Hence submissions that the Respondents were guilty of laches and that they failed to disclose the Applicants' interest as creditors to the estate, does not in my view constitute pleading of fraud. I therefore find that the suit is not anchored on fraud and hence section 26 of the Limitation of Actions Act is not applicable in the circumstances of this case.

29. It is not in contention that the Applicants purchased L.R NO. 12715/12393 (12715/174/6) from Henry Musyoki Kilonzi (Deceased) on 7th August 2014. I therefore find that the cause of action arose on 7th August 2014.

30. The Applicants annexed to the affidavit in support of the Originating Summons, email correspondence between the 1st Respondent and the 2nd Applicant, which shows that as late as 20th April 2018, the 1st Respondent acknowledged the Applicants' claim to the suit property. Section 23 (1) of the Limitation of actions Act provides that where a person in possession of land acknowledges the title of the person to whom the right of action has accrued, then there is a fresh accrual of the right of action to recover such land. In the instant case, the 1st Respondent by email of 20th April 2018 acknowledged the Applicants' claim by indicating that he intended to conclude the land transaction between him and the Applicants. Hence the cause of action accrued afresh as of that date. I therefore find that the cause of action accrued afresh on 20th April 2018.

31. The purpose of the Law of limitation was set out in the case of **Rawal v Rawal (1990) KLR 275**, where the court stated the following;

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. See also the case of **Melita v Shah (1965) EA 321** cited with approval by Bosire J in the above case....

The Limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief.”

32. Having found that the cause of action arose on 7th August 2014, and subsequently accrued afresh on 20th April 2018, therefore when this suit was filed on 28th September 2020, 12 years had not lapsed. I therefore find that this suit is not time barred.

33. On the second limb of the objection, the Respondents have contended that this court sitting as a land court has no jurisdiction to grant prayers 2 and 3 of the Originating Summons. These prayers are stated in the Originating Summons as follows;

“2. Whether the said inclusion of the property known as L.R. No. 12715/174 in Succession Cause No. 530 of 2017 Nairobi estate of Henry Musyoki Kilonzi Deceased as an undivided property is lawful when the administrators know well that the said property was subdivided and does not exist.

3. Whether the administrators may be ordered to amend the Petition filed in the said succession cause to include the property known as L.R.NO. 12715/12393 (Original L.R. NO. 12715/174/6) which is one of resultant plots from the subdivision of L.R.NO. 12715/174 and note the Applicants' interest on it for purposes of the transmission of the property to their name.”

34. A court's jurisdiction can only be derived from the Constitution, statute or both. In the case of **Samuel Kamau Macharia & Ano. v Kenya Commercial Bank Limited & Others [2012] e KLR**, it was held as follows;

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

35. In issue number 2 of the Originating Summons, the Applicants sought for the determination of the lawfulness of the inclusion of L.R. NO. 12715/174 as part of the estate of Henry Musyoki Kilonzi (deceased) in Nairobi Succession Cause No. 530 of 2017. Therefore, the issue is whether this court has jurisdiction to determine the lawfulness of documents filed in Nairobi Succession Cause No. 530 of 2017. The 1st Respondent has stated in his Replying affidavit that this prayer can be addressed by the Probate court in Nairobi Succession Cause No. 530 of 2017. On the other hand, the Applicant has submitted that this court has jurisdiction to determine that question as the orders sought are directed at the Respondents and not the probate court.

36. The question as to this court's jurisdiction to determine issue number 2 can only be determined upon answering the question as to whether this court can grant the order sought within the confines of its jurisdictional framework provided under Article 162 (2) (b) of the Constitution and section 13 (1) and (2) of the Environment and Land Court Act. The issue of the lawfulness of inclusion of the suit land in the deceased's assets can only be answered after the question of what constitutes the deceased's schedule of assets in Nairobi Succession Cause No 530 of 2017 has been determined. This will involve the collection and preservation of the assets of the deceased. That issue therefore can only be answered on the basis of the provisions of the Law of succession Act together with the Probate and Administration Rules. In **Re Estate of Alice Mumbua Mutua (Deceased) [2017] e KLR**, the court had this to say in regard to the question as to which court should determine the assets of a deceased person;

“... The law of succession Act and the Rules made thereunder, are designed in such a way that they confer jurisdiction to the probate court with respect to determining the assets of the deceased, the survivors of the deceased and the persons with beneficial interest, and finally distribution of the assets among the survivors and the persons beneficially interested. The function of the probate court in the circumstances would be to facilitate collection and preservation of the estate, identification of survivors and beneficiaries and distribution of the assets.”

37. Section 13 (1) and (2) of the Environment and Land Court Act sets out the jurisdiction of this court. Clearly a determination of the legality of documents filed in the probate court, does not fall within the jurisdiction of this court. It is understandable that what happens in the probate court shall eventually affect the Applicants' interests in the suit property. However, asking this court to declare the lawfulness or otherwise of the schedule of assets of the deceased's estate filed in Nairobi Succession Cause No. 530 of 2017 is a shortcut unknown in law. The power to determine the lawfulness or otherwise of inclusion of the suit property in documents filed in Nairobi Succession Cause No. 530 of 2017 court, lies only with the probate court.

38. While the Applicants are legally entitled, as they have done, to move this court for the determination of the question of ownership of the suit property as against the estate of the deceased, as contained in issues number 1 and 4 of their Originating Summons, they cannot invoke the jurisdiction of this court to determine the lawfulness of the schedule of assets filed in respect of the estate of the late Henry Musyoki Kilonzi in Nairobi Succession Cause No. 530 of 2017. Since they allege to have a claim as creditors to the estate, they need first to establish their ownership claim in this court and should a decree issue in their favour, they may move the probate court in Nairobi Succession Cause No. 530 of 2017 to make provision for them in terms of such decree. In the case of **Re Estate of Stone Kathuli Muinde (Deceased) [2016] e KLR**, the court stated as follows;

“Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit properly brought before a civil court in accordance with the provisions of the Civil Procedure Act and the Civil Procedure Rules. This could mean filing suit at the magistrates' court, or at the civil or commercial divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit, in favour of the claimant, then such decree should be presented to the probate court in the succession cause so that that court can give effect to it.”

39. Therefore, though the Applicants have relied on the case of **In Re Estate of Stone Kathuli** (Supra) to argue that this court has jurisdiction to determine issue number 2 in the Originating Summons, this authority applies to this case only in so far as the Applicants' claim for ownership of the suit property is concerned. It does not in any way support the argument that this court can determine the legality of documents filed in a probate court.

40. In **Beatrice Atieno Ongadi v National Land Commission & 5 Others [2021] eKLR**, it was held as follows;

“Section 13 (2) of the Environment and Land Court Act ...sets out in detail the jurisdiction of this court. Disputes arising from the legality of Succession proceedings of the estate of a deceased person do not fall within the realm of this court.”

41. Therefore, I find that this court lacks jurisdiction to determine issue number 2 of the Originating Summons.

42. As regards this court's jurisdiction to determine issue number 3 of the Originating Summons, the Applicants have sought for an order that the administrators be ordered to amend the Petition filed in Nairobi Succession Cause No. 530 of 2017 to include the property known as L.R.NO. 12715/12393 (Original L.R.NO. 12715/174/6) which is one of the resultant plots from the subdivision of L.R NO. 12715/174 and note the Applicants' interest on it for purposes of the transmission of the property to their name. In short, the Applicants pray for an order for amendment of the petition filed in Nairobi Succession Cause No. 530 of 2017 to include their interests in the deceased's estate. Essentially, they are seeking for this court to determine matters that are between administrators and beneficiaries of the estate of a deceased person.

43. Issue number 3 is closely related to issue number 2 in that it seeks for the court to make orders in respect of what should be included in documents filed before the probate court. As discussed above, the Applicants may inform the probate court of the pendency of this suit, in view of their interest in the suit property, but they cannot validly ask this court to order an amendment of the petition filed in the probate court. The petition in the probate court is filed pursuant to the provisions of the Law of succession Act as well as the Probate and Administration Rules and therefore its amendment can only be done within the provisions of the same legal framework. Asking this court to determine issue number 3 is asking this court to exercise powers under the Law of Succession Act. This court has no jurisdiction to make such determination.

44. I therefore find that this court neither has jurisdiction to declare the documents filed in Nairobi Succession Cause No. 530 of 2017 as unlawful nor to order for the amendment of the Petition in the said Succession Cause.

45. Consequently, I find that this court lacks jurisdiction to determine issues number 2 and 3 in the Originating Summons and the same are struck out.

46. In the end, I make the following orders;

a. This suit is not time barred.

b. Issues number 2 and 3 in the Originating Summons are struck out for want of jurisdiction.

c. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 12TH OCTOBER 2021

A. NYUKURI

JUDGE