



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 21 OF 2021

DESTERIO ANDADI OYATSI

KENNETH HAMISH WOOLER KEITH

ELISABETH KLEM (Suing as executors of the estate of the late

KIPYATOR NICHOLAS KIPRONO BIWOTT (deceased)PLAINTIFF/APPLICANTS

VERSUS

STEPHEN CHARO NZAI.....1ST DEFENDANT/RESPONDENT

THE LAND REGISTRAR, KILIFI.....2ND DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT/RESPONDENT

RULING

This ruling is in respect of a Notice of Motion dated 24th March 2021 by the plaintiff/applicants.

a) Spent

b) That this Honourable court be pleased to issue an order of interim injunction pending the hearing and determination of the application herein against the 1st Defendant, his servants, employees, agents, heirs and dependants restraining them from transferring, alienating and/or carrying out any further development of all the property known as Chembe/Kibabamshe/377.

c) That this Honourable court be pleased to issue an order of temporary injunction pending the hearing and determination of the main suit against the 1st Defendant, his servants, employees, agents, heirs and dependants restraining them from transferring, alienating and/or carrying out any further development of all that property known as Chembe/Kibabamshe/377.

d) Cost of this application be provided for.

In response to the Notice of Motion, the 1st and 3rd Defendants filed notices of Preliminary Objection dated 11th June 2021 and 10th May 2021 respectively on the grounds that:

a) The suit property does not form part of the deceased's estate.

b) The suit is statute barred by virtue of section 7 of the Limitation of Actions Act.

c) That the Plaintiff/applicants' are guilty of laches.

Counsel agreed to canvas both the preliminary objection and the Notice of Motion vide written submissions which were duly filed

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st defendant submitted on two issues on the preliminary objection. The first issue was whether the suit property forms part of the estate of the deceased and whether the suit is time barred.

On the issue whether the suit property forms part of the estate of the deceased, counsel relied on the case of **Chengo Katana Koi Vs Protus Evan Masinde [2013] eKLR** where it was held that:

“A title deed is an end product and where there are competing interests over the same land, it is not enough for one to just state that he holds a title deed which is absolute and indefeasible. One has to show the processes that were followed in the acquisition of the title deed so as to entitle him/her to the land to the exclusion of the other claimants”.

Counsel relied on the Law of Evidence and submitted that the plaintiffs must prove the allegation that the deceased was allocated the suit land during adjudication in 1979 as the same was questionable considering the deceased was not a resident of Chembe Kibabamshe,

On the second issue on whether the plaintiffs’ suit is time barred, counsel submitted that the 1st defendant and his s forefathers have been in uninterrupted occupation of the suit land for over 60 years thus would succeed under the doctrine of adverse possession as provided for under sections 7, 13 and 17 of the Limitation of Actions Act.

Mr. Kibunja cited the case of **Benjamin Kamau Murma & other v Gladys Njeri, CA No. 213 of 1996** to buttress the issue of adverse possession. Counsel therefore urged the court to dismiss the plaintiffs’ suit and allow the defendant’s counterclaim with costs.

Counsel filed additional submissions whereby he adopted the submissions by the 2nd and 3rd defendants’ in their entirety.

2ND AND 3RD DEFENDANTS’ SUBMISSIONS

Counsel for the 2nd and 3rd defendants submitted on the issue that the suit is time barred the cause of action having arisen in 2002 as per the plaintiff’s plaint which was filed on 24th March 2021. That the plaintiff took approximately 19 years to bring the suit and is therefore guilty of laches.

Counsel relied on the provisions of section 7 of the Limitation of Actions Act, and that this suit ought to have been instituted before 8th January 2014. Counsel cited the case of **IGA v Makerere University [1972] EA 65** where Mustafa, J. A. held as follows: -

“A Plaint which is barred by limitation is a Plaint “barred by law”. Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court “shall reject” his claim. The appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. 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 sought.”

Law, Ag. V. P. in the same case inter alia stated thus:

“... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaint, the Plaintiff must be rejected.”

Ms Munyony relied on the cases of **Esther Chemutai Keter v David Kipkorir Koech & 3 others [2021] eKLR, South Nyanza Sugar Co. Limited v Manasse Ogaro Otieko [2020] eKLR** to buttress the issue of limitation of actions and urged the court to uphold the preliminary objection and dismiss the case with costs to the defendants.

PLAINTIFFS’ SUBMISSIONS

Counsel gave a brief background to the case and submitted the following issues for determination by the court:

- a) Whether the Court should issue an order of temporary injunction against the 1st Defendant/Respondent**
- b) Whether the suit is statute barred**
- c) Whether the suit property forms part of the estate of the deceased**
- d) Who should bear the cost of this application**

Counsel relied on the supporting affidavit of one Elisabeth Klem sworn on 24th March 2021 whereby she deponed that the suit land known as Chembe/Kibabamshe/377 was allocated to Nicholas Kiprono Biwott (deceased) in 17th January 1979 by way of adjudication and title issued to him.

She deponed further that sometime around 8th January 2002, the 2nd Defendant/respondent issued to the 1st Defendant/respondent a second

title over the suit property. Later around December 2014, the National Land Commission (the Commission) conducted a plot allocation verification process over the plots within Chembe Kibabamshe scheme.

It was her evidence that public hearings were consequently conducted between 9th and 17th September 2015 and again between 1st and 4th February 2016 at the Malindi Red Cross Hall whereby the outcome was that the land belonged to the deceased and vide a gazette notice No. 6862 dated 17th July 2017, the suit property was to be regularized to the first allottee, the deceased which decision has never been challenged or quashed.

Counsel submitted on the first issue as to whether the court should issue an interlocutory injunction and relied on Order 40 (1) (a) and (b) of the Civil Procedure Rules, 2010 and the definition thereof as per the Black's Law Dictionary 8th edition. Counsel further submitted on the conditions for granting an injunction as per *Giella v Cassman Brown & Company Limited [1973] EA 358* and in *Robert Mugo wa Karanja v Ecobank (Kenya) Limited & another [2019] eKLR* and submitted that the suit land is in danger of being alienated.

On the issue whether the plaintiffs has established a prima facie case, counsel relied on the case of *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others, (2014) eKLR* and stated that there is a dispute as to who is the rightful owner of the suit land which each party has a duty to explain how they acquired the suit property. Counsel further cited the case of *Shiva Carriers Limited v Imperial Bank Limited & another [2018] eKLR* where the court held thus:

“That need for an explanation is enough for a court to say that let the status quo now prevailing be maintained by way of a temporary injunction pending such explanation at the hearing and determination after the explanation.”

Mr. Odoyo submitted that the plaintiffs are likely to suffer irreparable damage which is not capable of being compensated by way of damages as the 1st defendant is likely transfer or alienate the suit land and if the injunction sought is not granted. Counsel relied on the case of *Banis Africa Ventures Limited v National Land Commission [2021] eKLR* where the court cited *Halsbury's Laws of England*[Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] which stated that :-

“Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

On the issue where the balance of convenience lies counsel relied on the case of *Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR*, where the court dealing with the issue on balance of convenience expressed itself thus: -

“Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies. ”

On the last issue as to whether the suit is statute barred, counsel submitted that the National Land Commission took over the matter in 2014 before the lapse of the required 12 years and made a decision in 2020, to the effect that the deceased is the rightful owner of the suit land.

Counsel submitted that this suit was necessitated by the verdict of the National Land Commission which was issued in 2020 that the suit land belongs to the deceased as it was fraudulently registered in the 1st defendant's name. That time only starts running when the fraud is detected.

Mr. Odoyo relied on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another [2019] eKLR* where the Court cited the case of *Justus Tureti Obara vs Peter Koipeitai [2014] eKLR* wherein J. Okong'o 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.”

Counsel submitted that the suit is not time barred as there is a claim that the suit was registered fraudulently in the name of the first defendant.

On whether the suit property formed part of the deceased's estate, counsel submitted that this question was not a pure point of law and did

not fall within the ambits of what constitutes a preliminary objection defined in **Onchari Ogoti v Safaricom Limited & another [2020] eKLR**. Counsel therefore urged the court to allow the application for injunction and dismiss the preliminary objection with costs to the plaintiffs.

ANALYSIS AND DETERMINATION

The principles governing preliminary objection are well settled that a party can raise an issue touching on purely point of law at any time before the hearing of the suit. Most preliminary objections touch on the jurisdiction of courts to hear and determine matters such as res judicata, where there are other laid down procedures that must be complied with before approaching the court, statutory requirements and limitations sub judice and abuse of court processes just to mention a few.

Where such issues are raised, the court must deal with them first as it might have the effect of terminating the suit by striking out. The issues must be purely on points of law where the court will not go outside the pleadings to look for facts and other extraneous supporting evidence.

The 1st defendant raised an issue which in my view cannot be addressed by way of a preliminary objection. The issue as to whether the suit property forms part of the deceased estate will require evidence from the succession cause and other documents which at this point the court may not deal with. Preliminary objections do not deal with facts and it is trite that the court will only deal with situations where there are undisputed facts. I therefore find that, that limb of the objection therefore fails.

In the case of case of **Avtar Singh Bhamra & Ano. v Oriental Commercial Bank HCC No 53 of 2004**, the Court stated as follows;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

The main issue for determination is whether the suit is time barred. It is on record that this matter was subject from 2014 by the National Land Commission which gave its verdict in 2020. There is an ongoing process of ascertaining the rightful owner of the suit land which there is allegations of fraudulent registration.

It is trite that where there is an allegation of fraud, the time starts running when the plaintiff detected/discovered the fraud. In this case the matter was handled by the National Land Commission from 2014 and the outcome of the public hearings culminated in a verdict which necessitated the filing of this suit for implementation of the said verdict.

I agree with the finding of Okongo J in the case of **Justus Tureti Obara vs Peter Koipeitai [2014] eKLR (supra)** where he held that 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.

I therefore find that the preliminary objection lacks merit and is therefore dismissed with costs to the plaintiff.

On the issue as to whether the plaintiff is entitled to an order of temporary injunction, the plaintiffs admitted that the 1st defendant is in occupation and the he may transfer the suit land to other parties to the detriment of the plaintiffs.

The purpose of interlocutory injunctions is to preserve the substratum of the case which is the suit land from being alienated or wasted by a party. The defendants did not submit on the application for injunction even though the court gave directions that both the preliminary objection and the application be heard together.

I have considered the pleadings, the application and the preliminary objection and find that the order suitable to grant is that the status quo prevailing as the time of filing this suit be maintained and that the preliminary objection is dismissed with costs to the plaintiffs. Parties to comply with order 11 within 30 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF DECEMBER, 2021.

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.