



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KWALE**

**ELC CASE NO 54 OF 2021**

**FORMERLY MOMBASA ELC 30 OF 2021**

**MWANARUSI SALIM MATATA ..... PLAINTIFF**

**VERSUS**

**ROMAN NZIOKA ITATU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ROMAN ALPHONCE ITATU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**EMMANUEL ALEXANDER SCHOOL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MATHIAS LAHRMANN.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**SUSAN GRANDORE LAHRMANN.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**HELA FRIEDA LUISE LAHRMANN.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**MEKAELA ACADEMIES LIMITED.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**DISTRICT LAND AND SETTLEMENT OFFICER KWALE...8<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING.**

**Introduction**

1.1 This ruling is on the Preliminary Objection (PO) by the 3<sup>rd</sup> and 7<sup>th</sup> Defendants/Respondents dated 13/4/2021 raised under order 2 Rule 9 of the Civil Procedure Rules. On the courts directions, the PO was heard by way of written submissions. The Defendants submissions are dated 5<sup>th</sup> August 2021.

**3<sup>rd</sup> and 7<sup>th</sup> Defendant/Respondent Submissions**

1.2 It is the Defendants case that the Plaintiffs suit is statute barred by dint of Section 7 of the Limitation of Actions Act. The PO is raised based on ownership of Plot No 200 Kwale/Diani Settlement Scheme (herein suit property) which was registered in the name of the 4<sup>th</sup>,5<sup>th</sup> and 6<sup>th</sup> Defendants on 14/10/2008. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants thereafter leased the suit property to the 3<sup>rd</sup> Defendant on 6/11/2013 for a term of Twenty-Five (25) years. It is submitted that the 4<sup>th</sup>,5<sup>th</sup> and 6<sup>th</sup> Defendants having bought the suit property in the year 2008 the Plaintiff can only seek to recover if from 4<sup>th</sup>,5<sup>th</sup> and 6<sup>th</sup> Defendants within twelve [12] years after registration of the title. That the period of limitation started to run on the date of registration, that is 14/10/2008. Whereas the present suit was filed on 7/3/2021, the cause of action lapsed on 13/10/2020.

1.3 In addition to the said section 7 the case of **Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd [1969] EA 696** is relied upon where the court stated that -

*‘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’.*

In the same case Sir Charles Sir *Charles Newbold Nebbold, JA* added 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”.*

1.4 It is also submitted that even though the period of limitation runs afresh whenever there is change in title, a lease issued is not a change in title. The lease did not give an absolute and indefeasible title to the 3<sup>rd</sup> and 7<sup>th</sup> defendants. Sections 24 and 26 of the Land Registration Act to the effect that registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land. The case of **Iga V Makerere University** as was mentioned in **Haron Onyancha V National Police Service** where the court held that a plaintiff barred by limitations is barred by statute and the same must be rejected is also cited. Citing **Gathoni v KCC [1982]** it is Defendants contention that the suit ought to have been brought within the time limits as required by law. That suit is therefore barred by limitation and hence the preliminary objection should be upheld.

#### **Plaintiff's submissions**

1.5 The Plaintiffs submissions were filed on 28/7/2021. The Plaintiff based on the grounds of the PO submitted on each as follows; -

1.6 On whether the Plaintiff lacked locus standi- it is submitted that the Plaintiff derived locus from being the bonafide owner of the suit property since 1943 before the illegal transfer of the same to the Defendants. It is urged the objection herein goes to the depth of ascertaining the Plaintiffs beneficial interest. To be able to ascertain if the Plaintiff indeed had any interest on the suit property the court must take evidence from the parties during the hearing. That it would be imprudent for the court to dismiss the Plaintiffs suit at preliminary stage. **Daykio Plantations Limited V National Bank of Kenya Limited & 2 Others [2019] eKLR** is relied upon.

1.7 On whether the claim is time barred - it is submitted that the same was based on ownership and possession of land as envisaged under Article 40 of the Constitution. That whereas section 7 of the Limitation of Actions Act provided for a suit for recovery of land to be filed within 12 years, the constitution provided that limitation of time in instituting a claim was a violation of a constitutional right. The Plaintiff emphasised that there is no limitation of time on both the repealed and current Constitution on enforcement of fundamental rights. Reliance was placed on **David Gitau Njau & 9 Others v The AG [2013] eKLR**, **Wachira Weheire V AG [2010] eKLR**, **Dominic Arroyo Amolo V AG HC Misc 494/2003**.

1.8 It is further pointed that while mindful of the absence of limitation of time on enforcement of fundamental rights, the Plaintiff had also given a reasonable explanation for the delay. That there was follow up on the suit property as evidenced by the various letters produced to the Ministry of Land & Settlement and to the Defendants which did not bear fruits.

1.9 According to the Plaintiff the cause of action as against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants arose on 1/3/2012 when the Defendants acquired the leasehold interest. Further that despite that the actions of the Defendants may have happened almost 12 years, the cause of action is still alive as the breach of the Plaintiffs rights is still ongoing.

2.0 On whether the Plaintiff had a cause of action against the 3<sup>rd</sup> and 7<sup>th</sup> Defendants - it is contended that a cause of action is an 'act on the part of the defendant which gave the Plaintiff a cause of complaint'. In this regard the Plaintiff had disclosed in her suit facts which found her complaint against the 3<sup>rd</sup> and 7<sup>th</sup> Defendants viable. That the suit property was registered as a leasehold under the Defendants names while the Plaintiff too lay claim on the said property. The Plaintiff therefore had a cause of action against the defendants.

2.1 On whether the Plaintiffs claim was an abuse of the court process it is urged that a cause of action had been established by the Plaintiff as between her and the 3<sup>rd</sup> and 7<sup>th</sup> Defendants and the same could only be determined if the suit was set down for hearing and not struck out as sought by the defendants.

#### **ANALYSIS AND DETERMINATION**

2.2 I have studied the PO, the arguments for it and against it. I have also looked at the pleadings and authorities cited. The issues calling for determination are 1) Whether the grounds set out in the notice of preliminary objection are point of law 2) Whether the suit before court is statute barred and Whether the suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be dismissed.

#### **Whether the ground set out in the notice of preliminary objection is a point of law**

2.3 The definition or character of a preliminary objection has already been set by Counsel as derived from the *Mukisa Biscuits Manufacturing Co. Ltd case*. This court has also considered the case of **David Nyekorach Matsanga & Another v. Philip Waki & 3 Others [2017] eKLR** where the three-judge bench of the High Court (Lenaola, J. (as he then was), Odunga and Onguto, JJ.) considered various holdings of the Supreme Court of Kenya on the question of Preliminary Objections vis a vis the strict approach of preliminary objections in the Mukisa Biscuits Limited case. The decisions considered were **Nitin Properties Ltd v Singh Kalsi & another [1995] eKLR**; **Oraro –v- Mbaja (2005) eKLR**; **Hassan Ali Joho & Another -V- Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR**; **Kalpana Rawal & 2 Others v Judicial Service Commission & 6 Others [2016] eKLR** and **Independent Electoral & Boundaries Commission –V- Jane Cheperenger & 2 Others [2015] eKLR**. The Court observed that it is clear that in recent times and emerging jurisprudence, courts are adapting to a less strict approach in dealing with preliminary objections. It has been well articulated in the authorities that a preliminary objection cannot be raised if any fact has to be ascertained or the suit is an exercise of judicial discretion.

2.4 The facts as raised in the present suit are on ownership of the suit property. It has been stated by the plaintiff that she has been in

actual physical possession of the same and had not been aware that the suit land had been registered in the names of the 1<sup>st</sup> Defendant. This court has gathered from her pleadings filed before court that she caused a restriction to be placed on the land but the same was later removed and further dealings were imposed on the land without her knowledge. The said allegations are however disputed by the defendants who claim that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had a clean title to the property before leasing the same out to the 3<sup>rd</sup> and 7<sup>th</sup> defendants.

2.5 Clearly from the foregoing, there is a dispute in facts as regards the ownership of the suit property. The same can only be resolved judicially by setting down the case for hearing where both parties will ventilate their cases and leave the court to exercise its discretion in determining the issues of ownership and legality of the subsequent transfers. Based on the legal position that a preliminary objection cannot be raised if any fact has to be ascertained I agree with the Plaintiffs submission that the objection goes to the depth of ascertaining the Plaintiffs beneficial interest. Which can only be determined through a full hearing. It is not therefore a point of law and the PO has not been properly raised. The court is also guided by the case of *David Nyekorach Matsanga & Another* in arriving at this finding.

#### **Whether the suit before court is statute barred**

2.6 The preliminary objection raised herein relates to section 7 of The Limitation of Actions Act CAP 22 Laws of Kenya which 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.”*

2.7 It is the Defendants contention that the suit ought to have been brought within the time limits as required by law that is by 13/10/2020 since time started running on 14/10/2008 being the date of registration of the certificate of lease. This position is sustainable when considered against the provisions of Section 9(1) of the Limitations of Action Act which states; -

*‘Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.’*

2.8 On the other hand the Plaintiffs argument can be sustained from the point of view that the leasehold was registered on 12/01/2021 yet the transaction took place on 6/11/2013. In any case this court is aware of court decisions that before registration this lease was only binding between the parties to it and not against 3<sup>rd</sup> parties in this instance the Plaintiff.

2.9 Further Section 26 of the Limitation of Actions Act is to the effect that; -

*“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 defendant or his agent or through any person through whom he claims or his agent or the*

*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 plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:*

2.10 It is this courts view that, it is at the point of the search that the alleged fraudulent lease transaction as pleaded in the Plaint, was ascertained by the Plaintiff. Moreover, it was not ascertainable prior to registration. The Plaintiff is therefore entitled to protection under this section considering the claims of fraud against the defendants as pleaded in the Plaint.

#### **Whether the suit against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants should be dismissed?**

2.11 On whether the Plaintiff had a cause of action against the 3<sup>rd</sup> and 7<sup>th</sup> Defendants - it is contended that a cause of action is an ‘act on the part of the defendant which gave the Plaintiff a cause of complaint’. This definition is cited in the court of appeal judgement in **Civil Appeal no. 37 of 1978 D.T. Dobie & Company Limited vs Joseph Mbaria Muchina & Ano**. As having been extracted from Words & Phrases Vol.1 pg. 228. This case also lays out the principles for striking out pleadings for failure to disclose a reasonable cause of action and for being an abuse of the court of process. In this regard the Plaintiff has disclosed in her suit facts which found her complaint against the 3<sup>rd</sup> and 7<sup>th</sup> Defendants viable. That the suit property was registered as a leasehold under the Defendants names while the Plaintiff too lay claim on the said property. Further guided by the above decision I find that the Plaintiff has a cause of action against the 3<sup>rd</sup> and 7<sup>th</sup> defendants.

2.12 In view of the foregoing the Defendants Preliminary objection herein is dismissed.

2.13 Costs to the Plaintiffs.

**DELIVERED AND DATED AT KWALE THIS 9TH DAY OF DECEMBER, 2021.**

A. E. DENA

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO  
CONFERENCING PLATFORM IN THE PRESENCE OF:**

MS. UMARA FOR THE 3RD AND 4TH DEFENDANT

MS. KANAZI HOLDING BRIEF FOR ONYANGO FOR PLAINTIFF/APPLICANT

THE REST OF THE PARTIES HAVE NEVER ENTERED APPEARANCE DESPITE SERVICE

COURT ASSISTANT – MR. DENNIS MWAKINA