



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 22 OF 2018

TONY OBARE OGOLLA.....1ST APPELLANT

TERRY MUTHONI MAINA.....2ND APPELLANT

VERSUS

JACOB OLANG AJERO (Suing as the administrator of

The Estate of Jeremiah Olang – deceased).....1ST RESPONDENT

DISTRICT LAND REGISTRAR, NYANDO.....2ND RESPONDENT

JUDGEMENT

The Appellants filed a Memorandum of Appeal against the whole ruling of Hon. Onzere E.M – SRM Tamu delivered on 27th July 2018 on the grounds that the Learned Magistrate erred in law by:

- 1. Failing to appreciate and find that the Plaintiff’s cause of action against the Defendants was statute barred under Section 7 of the Limitation of Actions Act.**
- 2. Misdirecting herself that the question of limitation could be determined at the hearing.**
- 3. Relying on unpleaded issues and extraneous matters thus arriving at an erroneous finding and decision.**
- 4. Applying the general principles in Kisii HC ELC No. 126 – Justus Tureti Obara v Peter Koipeitai Nengisoi [2014] eKLR in determining the preliminary objection before her.**
- 5. Failing to consider the Defendants’ submissions.**
- 6. Dismissing the Appellants’ preliminary objection and thus improperly exercising her discretion.**

For these reasons the Appellants are seeking orders setting aside the ruling of the court, dismissing the suit and that the cost the appeal be borne by the Respondent.

This being a first appeal, this court is obliged under Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya to reassess, reconsider and re-examine the evidence and extracts on record and arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses as they testified and therefore giving due allowance to that. (See **Sielle V Associated Motor Boat Company Ltd [1968] EA 123**.)

Brief Facts

The 1st Respondent filed suit on 24th June 2013 seeking orders that the suit property be declared to be the property of his father and that the title be transferred to his name. He claimed that his father and the 1st Appellant’s father had entered into sale of the suit property for a consideration of Kshs. 250,000/= of which the 1st Appellant’s father only paid Kshs. 130,000/= leaving a balance of Kshs. 120,000 to be paid on 30th January 1990. That the balance was not paid to date. The Plaintiff pleaded that the Appellants and 2nd Respondent then fraudulently transferred the land in the name of the 1st Appellant.

The Appellants raised a preliminary objection on the ground that the Plaintiff’s right of claim over the land was time barred by virtue of

Section 7 of the Limitation of Actions Act, arguing that the cause of action arose on 30th January 1990 when the purchase price of the land became due. The 1st Respondent on the other hand asserted that he discovered that the transfer had been effected in 2013 and immediately moved the court by filing the suit. According to the 1st Respondent time started running from the time he discovered the fraud.

The Learned Magistrate held that with regard to Section 7 of the Limitation of Actions Act, the cause of action in such cases arises from the date of registration of the title, but the pleadings, plaint, amended plaint, defence, and reply to defence did not reveal details of when the transfer was effected. The Learned Magistrate held that in determining a preliminary objection, the court is to restrict itself to the pleadings and should not consider any evidence tendered by the parties. The Learned Magistrate therefore declined to consider the parties' list of documents which contain the dates of registration because the Learned Magistrate considered the documents as a form of evidence. That the date when the cause of action arose was an issue that could only be determined by way of adducing evidence.

Similarly where the Plaintiff claimed that the criteria should be when he discovered the fraud as per Section 26 of the Limitation of Actions Act, the Learned Magistrate held that the Plaintiff's submission that he discovered the fraud in 2013 was not pleaded in his amended plaint. That the court needed to interrogate further before a decision was made on whether it affected the limitation period. The Learned Magistrate relied on the case of *Oraro v Mbaja* [2005] 1 KLR 141 where it was held that a preliminary objection must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence.

The Learned Magistrate also considered in *Kisii HC ELC No. 126 – Justus Tureti Obara v Peter Koipeitai Nengisoi* [2014] eKLR for the proposition that that the issues to do with who the registered owners of the land are and when the registration was effected are issues which cannot be determined by way of preliminary objection as evidence is required to that effect. The Learned Magistrate dismissed the preliminary objection with costs to the 1st Respondent.

Appellants' Submissions

Counsel for the Appellant submitted that since the date when the 1st Respondent discovered the alleged fraud was not indicated in his plaint, it would be improper to move the court with a speculative date of when time started to run for purpose of the statutory limitation. That the Learned Magistrate erred in uphold that this was an issue to be determined at full trial. Counsel submitted that limitation is not a procedural technicality but a substantive law which takes precedence over the Civil Procedure Act.

Counsel asserted that the Learned Magistrate relied on unpleaded issues, namely the 1st Respondent's submission indicating that he learnt of the fraud in 2013, an issue which was not pleaded in the amended plaint. That, therefore, the Learned Magistrate should not have made findings on that issue. Counsel further asserted that the issue of fraud was not included in the amended plaint and should have been disregarded. That the Learned Magistrate erred in determining that the issue of fraud should be heard at the full hearing yet it was not an issue pleaded in the amended plaint.

1st Respondent's Submissions

Counsel for the 1st Respondent asserted that the backbone of the 1st Respondent's case was that the transfer of the suit parcel to the 1st and 2nd Appellants was fraudulent. That 1st Respondent pleaded fraud at paragraph 15 of the plaint and even set out the particulars of fraud. That the 1st Respondent only discovered the fraudulent activities of the Appellants in 2013 which triggered the demand letter to them on 2nd April 2013. Counsel reiterated that the 1st Respondent was within the time stipulated by Section 26 of the Limitation of Actions Act to bring an action based on fraud. Counsel cited *Justus Tureti Obara v Peter Koipeitai Nengisoi* [2014] eKLR.

Issues for Determination

1. Whether the Learned Magistrate relied on unpleaded issues or extraneous matters

The Appellant's assertion that the Learned Magistrate should not have considered the issue on the discovery of fraud because it was unpleaded was wholly inaccurate. In his amended plaint, the 1st Respondent clearly pleaded at paragraph 13 that he discovered that the transaction relating to the suit parcel was laced with fraud. Further the 1st Respondent expressly averred that the Appellants involvement in the suit parcel was fraudulent, irregular and illegal, and enumerated the particulars of irregularity and fraud on the part of the Appellants and the 2nd Respondent. Therefore the Learned Magistrate rightly considered the issue of discovery of fraud for the purposes of determining when time began to run with respect to the statutory limitation period.

2. Whether the Learned Magistrate erred in holding that the issues raised by the preliminary objection could only be determined at trial

The threshold for preliminary objections is now trite law as per Law, JA and Newbold, P in *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited* [1969] EA 696:

“... a 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...A preliminary objection is in the nature of what used to be 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

Ojwang J. (as he then was) in *Oraro v Mbaja* [2005] 1 KLR 141 elucidated the underpinning of preliminary objections as involving pure points of law and not contentious factual issues requiring evidence to be adduced for their authentication:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

Gikonyo J. in *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] eKLR, while holding that the defence of limitation of time was a matter for determination at the trial and not to be summarily dealt with as a preliminary objection cited with approval the cases of *Oruta & Another vs. Nyamato* [1998] KLR 590 and *Divecon Ltd vs Shirinkhanu S. Samani* Civil Appeal No. 142 Of 1997 as follows:

“The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of *Oruta & Another vs. Nyamato* [1998] KLR 590, where the court held that limitation of action:-

“... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

See also the case of *Divecon Ltd vs Shirinkhanu S. Samani* Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (ibid) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act...”

Gikonyo J. in the same case further held:

“I should also think that the requirement in Order 2 rule 4 (1) of the Civil Procedure Rules that the relevant statute of limitation should be specifically pleaded in the defence underscores the legal necessity to make limitation a matter for determination at the trial. The policy underpinning this position of the law is that a successful defence of limitation makes the claim not maintainable and the plaintiff is not entitled to a remedy. Doubtless, this is a matter that affects rights of the claimant and therefore substantial, for under the Constitution a right cannot be taken away in a summary manner especially where the law requires plenary hearing and determination of the issue.”

Analysis and determination.

Both the issues as to when the title was registered and when the Respondent discovered the alleged fraud could not be clearly established on the face of the pleadings and consequently required evidence to be adduced for their authentication. The Learned Magistrate therefore rightly held that the Appellants could not raise a preliminary objection on the ground that the cause of action was statute barred under Section 7 of the Limitation of Actions Act (as they actually did) or on the ground that the cause of action was statute barred under Section 26 of the Limitation of Actions Act (had they hypothetically done if they had correctly identified the cause of action as being based on fraud). I do find that the appeal lacks merit and is dismissed with costs.

DATED AND DELIVERED THIS 5TH DAY OF MARCH, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the Presence of:

Mr. Omondi T for 1st Respondent

No appearance for 1st and 2nd Applicant

Mr. Emukule holding brief for Ogola Okelo for 1st and 2nd Applicants.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE