



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC PET. NO. 29 OF 2019**

**BETWEEN**

**KENYA AGRICULTURAL AND LIVESTOCK RESEARCH**

**ORGANIZATION (KARLO).....PETITIONER**

**AND**

**EDISON SONJE TAURA.....1<sup>ST</sup> RESPONDENT**

**FUAD SAID.....2<sup>ND</sup> RESPONDENT**

**MASHA MRAMBA.....3<sup>RD</sup> RESPONDENT**

**JOSHUA KATANA JUBA.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Preliminary Objection dated 28<sup>th</sup> October, 2019 raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents which seeks to strike out the Petitioner's case on the grounds that there is a pending suit in relation to the suit land between the same parties before the court being **Mombasa ELC No. 214 of 2018 (OS)** in which the Petitioner is listed as 2<sup>nd</sup> Respondent and that the suit is time barred as per the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya.

2. Ms. Omollo, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the court has already made a ruling in **ELC NO. 214 of 2018** on 19<sup>th</sup> November, 2018 and that the same is for pre-trial directions on 28/1/2020. That **ELC No. 214 of 2018** was filed before the current petition was filed. Counsel submitted that the Preliminary Objection has been brought within a reasonable time. That in the Replying Affidavit filed on 1<sup>st</sup> November 2019 by 4<sup>th</sup> Respondent, Parcel LR. No.109GL being the subject matter as in **ELC No. 214 of 2018** is listed. That the same parcel is the subject of the Petition herein. Counsel urged the court to allow the objection to avoid the danger of two different decisions from the same court. That since **ELC NO. 214 of 2018** was filed earlier, this petition should be struck out.

3. Mr. Ondieki, learned counsel for the 4<sup>th</sup> Respondent supported the objection and submitted that the matter is *sub judice*.

4. Mr. Oluoch, learned Counsel for the Petitioner in opposing the objection submitted that the Preliminary Objection is totally misplaced and that it is not a valid Preliminary objection in law. That the same is not sustainable. Counsel submitted that it is trite law that a valid Preliminary Objection must be on a pure point of law. He relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969) EA 696**. He submitted that the fundamental conditions that must be met are that the Preliminary Objection raises a pure point of law and that a Preliminary Objection must not be raised if any fact has to be ascertained or if what is sought is the exercise of the court's discretion. That whenever a Preliminary Objection calls for proof of a fact alleged, then that ceases to be a Preliminary objection. Counsel submitted that the objection is raised on the ground that there exists another suit, **ELC No.214 of 2018**. That the court is essentially being called upon to verify whether or not the parties and the subject matter in that case are the same as those in the present case. Counsel further submitted that the second ground of the Preliminary objection is based on allegation of disputed facts which must be proven through evidence. The Petitioner's counsel urged the court to dismiss the Preliminary Objection with costs.

5. I have considered the submissions made. In the Preliminary Objection herein, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the petition herein ought to be struck out because there is a pending suit in relation to the suit land between the same parties, to wit **ELC No. 214 of 2018**. Secondly, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submit that the petition is statute barred by dint of the provisions Section 7 of the Limitation of Actions Act for it seeks for recovery of the suit land after 12 years. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents allege that they have been staying on the

land for than 27 years.

6. In the celebrated case of **Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd (1969)EA 696** at page 701, Sir Chares Newbold P. stated:

***“A Preliminary objection is in the nature of what used to be a demurer. 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 discretion. The improper raising of points by ways of Preliminary objection does nothing but unnecessarily increase costs, and, on occasion, confuse the issues. The improper practice should stop.”***

7. In the Petition herein, the Petitioner seeks various orders, including a declaration that the petitioner is entitled to exclusive and unimpeded right of ownership, possession, occupation and use of all that property known as LR NOS. MAINLAND NORTH/11/2944, 2945 and 2946 comprised in the petitioner’s ocean front land being LR. NO. PLOT NO. MN.111/1450 (original) measuring approximately 13.40 hectares, and a declaration that the Respondents have no right, interest and or title to the said parcels and are wrongfully in occupation of the same and are accordingly trespassers. The petitioner is also seeking for orders for vacant possession and permanent injunction as well as general damages. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are yet to file a response to the petition. Instead, they have raised the Preliminary objection herein. A Preliminary objection can only be argued on the assumption that all the facts pleaded are correct. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that the petition should be struck out because there is a pending suit before the court in relation to the suit land and between the same parties. The court, in my view, and as rightly submitted by Mr. Oluoch for the petitioner, is being called upon to verify various facts which have not been availed to the court. This includes the existence of **ELC NO. 214 of 2018**, the parties in that case and whether the subject matter therein is the same as in this suit. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have also submitted that they have been staying on the suit land since 1992, that is a period of over 27 years. Of course there is no evidence so far to support that submission as none have been filed.

8. Does the Preliminary Objection raised herein raise points of law? In my considered view, it does not. This is so because the facts raised have to be ascertained whether or not they are correct. The court cannot properly make a finding on whether the suit is caught by limitation of time unless it investigates on evidence when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a Preliminary Objection is valid, then that Preliminary Objection itself ceases to be a Preliminary Objection. This cannot be regarded as a pure point of law as it requires investigation of some facts. At this stage, I am only beholden to look at the pleadings rather than consider any statement of fact detailed in submissions. Instead, these are matters that are fit and proper for arguments in the substantive suit or a proper application for striking out.

9. For the foregoing reasons, I am inclined to dismiss the Preliminary Objection with costs and decline to strike out the suit as requested by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

**DATED, SIGNED and DELIVERED at MOMBASA this 2<sup>nd</sup> day of March 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Oluoch for Petitioner/Respondent

Ondieki for 4<sup>th</sup> Respondent

No appearance for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

No appearance for 3<sup>rd</sup> Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**