



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 177 OF 2018

MARY WAMBUI SIRONGA RUPANDE AND

MARY NJERI KARUGA (Suing as the Administratrices of

state of the late Joseph Sironga Rupande.....PLAINTIFFS

VERSUS

RAPHAEL MANKA OLE SEYA.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Preliminary Objection dated the 4th February, 2019 where he seeks the following prayers:

1. That the Plaintiffs' suit in its entirety be struck out and be dismissed in limine.
2. That the costs of this motion, the notice of motion and the substantive suit be to the Defendant.
3. That there be such other or further reliefs as the Honourable Court may deem fair and just to grant in the circumstances.

Both the Defendant and the Plaintiffs filed submissions to canvass the Preliminary Objection.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection including the parties' submissions, the only issue for determination is whether the Plaintiffs' suit should be dismissed with costs. The Defendant contends that the Plaintiffs have no locus to institute and prosecute this suit which is statute barred and totally flawed. He relied on section 7 of the Limitation of Actions Act as well as the decisions of **Nairobi Election Petition Appeal No. 2 of 2018, Meymuna Osman Gabow & 16 Others V Mariam Abdi & 2 Others and Bosire Ongero Vs Royal Media Services (2015) eKLR** to support his averments. The Plaintiffs submitted that the Defendant's Preliminary Objection does not raise pure points of law. They insist the Defendant's averments are not supported as there is no proof there was transfer of suit land from deceased to him. They insist the Defendant has wrongly invoked section 7 of the Limitation of Actions Act as he has not provided evidence that the right to action accrued to the Plaintiffs over 12 years ago. They reiterate that the Defendant should have filed a replying affidavit and Defence to prove the existence of any Sale Agreement, Land Control Board Consent and Transfer but without these documents he cannot purport to have legally bought the suit land. The Plaintiffs relied on the cases of **Mukhisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd (1969) EA 696 and David Karobia Kiiru V Charles Nderitu Gitoi & Another (2018) eKLR** to oppose the Preliminary Objection.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held 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 has 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 nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop. '

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: 'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. '

Section 7 of the Limitation of Actions Act provides that: **‘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.’**

I note the Defendant has not filed a Defence nor Replying Affidavit to present evidence and confirm when he acquired the suit land. In the instant Preliminary Objection, I note the Defendant contends that the suit is statute barred but on perusal of the Plaintiff, the Plaintiffs who are administratives of JOSEPH SIRONKA RUPANDE seek to recover land that belongs to the deceased estate. Further, the Defendant has not opposed the averments in the Plaintiff nor in the Notice of Motion Application but instead opted to raise the Preliminary Objection. He has not provided proof on when he acquired the suit land and when the Plaintiffs’ right to claim the land ceased. It is hence my considered view that in the absence of Statement of Defence or Defendant’s documents, it is difficult for the Court to decipher if all the facts raised in the preliminary objection are correct. Further, I opine that the the issues raised by the Defendant have to be ascertained before the Court can make a final determination of the dispute herein.

Based on my analysis above as well as relying on the legal provisions and authorities I have cited, I decline to find that the claim herein is statute barred and direct that the matter be set down for hearing on its merits.

In the circumstance, I find the instant Notice of Preliminary objection dated the 4th February, 2019 unmerited and will disallow it.

Costs will be in the cause

Dated signed and delivered via email this 24th day of April, 2020

CHRISTINE OCHIENG

JUDGE