



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 6 OF 2018**

**MILDRED AKOTH WARRAKAH** suing as the Administrator and legal representative of the estate of  
**GAKWELI MOHAMED WARRAKAH –(DECEASED).....APPLICANT**

**VERSUS**

**MWAFUMBIRI HAMISI MWATSAMI.....RESPONDENT**

**RULING**

1. This ruling is in respect of the notice of preliminary objection dated 5<sup>th</sup> March 2019 by the plaintiff and another dated 20<sup>th</sup> March, 2019 by the defendant. The plaintiff's objection seeks to have the defendant's counter-claim struck out on the ground that the same is statutory barred by Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya. On his part, the defendant's objection seeks to dismiss the plaintiff's suit also on the grounds that the same is statutory time barred under Section 7 of the said Act; that the agreement is null and void as it is contrary to Section 6 of the Land Control Act, and that the plaintiff is unavailable to establish a prima facie case as required in the case of **Giella –v- Cassman Brown (1973) EA 358**. Both preliminary objections were canvassed by way of written submissions.
2. The plaintiff's counsel submitted that the defendant's counter-claim which is for recovery of land is time barred by virtue of Section 7 of the Limitation of Actions Act for the reason that the land was, and is registered in the name of the plaintiff's late husband as per the certificate of title issued on 1<sup>st</sup> March 1994. That 25 years have since passed and the plaintiff has always been in occupation of the land together with all beneficiaries of the estate of Gakweli Mohamed Warrakah. It is submitted that if the defendant was aggrieved and had knowledge of fraud or any wrong doing in registration of the suit land in favour of the late Gakweli Mohamed, he ought to have brought an action within 12 years. That since the defendant failed to bring an action within 12 years when the right of action accrued, it follows that the action for recovery of the suit land by the defendant is time barred and therefore the counter-claim ought to be dismissed. The plaintiff's counsel relied on the case of **Benson Mogeni Arita (suing as the personal representative of Stephano Mogeni –deceased –v- Abel Karura Tineka & 7 Others (2017)eKLR**.
3. In reference to the preliminary objection dated 20<sup>th</sup> March, 2019, the plaintiff submitted that this suit was initially filed by the defendant's father, the late Abdalla Mwamtsame on 12<sup>th</sup> October, 2017 as Mombasa ELC Case No. 368 of 2017 being 11 years after the death of the plaintiff's husband and argued that the suit is not statutorily time barred. The plaintiff has attached copies of the pleadings. The plaintiff further submitted that the issue of whether the agreement is null and void can only be determined at the hearing of the main suit.
4. On the preliminary objection dated 5<sup>th</sup> March 2019, the defendant submitted that he is in occupation of the suit land and has been so until the plaintiff filed this suit whereafter the defendant filed his defence and counter-claim. It is the defendant's submission that the issues raised can only be determined through adduction of evidence at the hearing and not through a preliminary objection. The defendant relied on the case of **Eunice Karimi Kibunja –v- Rigi Maingera Kibunja C.A. No. 103 of 1996**.
5. With regard to the preliminary objection dated 20<sup>th</sup> March 2019, the defendant submitted that the plaintiff has no capacity to sue in this suit as there is no authority of the co-administrator filed. The defendant further submitted that the statutory requirement of obtaining consent from the Land Control Board was never adhered to by the plaintiff and as such the plaintiff's suit is based on an illegality. The defendant relied on the case of **BIB Insurance Agencies Limited –v- Nitin Shah & Others (2006) 2 EA 26; Mistry Amary Singh –v- Kulibya (1963) EA 408**.
6. I have carefully considered the two preliminary objections and the submissions by the parties. What the court is called upon to decide is whether the suit and the counter-claim ought to be struck out by virtue of being statute barred, and whether the agreement is null and void as it is contrary to section 6 of the Land Control Act.
7. In the case of **Mukisa Biscuits Manufacturing Ltd –v- West End Distributors Ltd (1969)EA 696**, Sir Charles Newbold, the President

of that court stated:

***“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 ways of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The improper practice should stop.”***

In the same case Law, JA stated as follows:

***“So far as I am aware, 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.”***

8. Going by the holding in Mukisa case (supra), it is only the question of limitation that is indeed a proper objection on points of law. The objection on lack of consent of the Land Control Board relies on disputed facts and ought to have been ground for an application and not a preliminary objection.

9. The issue of limitation has been raised by both parties on the basis that the other’s claim is statute barred by the provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. It is quite clear that the parties are not in agreement as to when the causes of action in this matter arose. I have perused the pleadings herein. In the plaint dated 16<sup>th</sup> January, 2018, the plaintiff avers inter alia, that the suit plot was bought by the late Captain Gakweli Warrakah in 1988 through an auction and subsequently registered in his favour in 1994. The plaintiff further avers that the defendant is a trespasser on the said parcel of land and has been over a period of time been informed to vacate from the said land and not to develop it while in occupation. The plaintiff prays for a declaration that the defendant is a trespasser on the suit premises and for orders of eviction of the defendant therefrom and demolition of the structures standing thereon.

10. In his written statement of defence and counter-claim, the defendant denies being a trespasser. The defendant states that he is a son of Abdallah Mwamtsame Ali Chuvi who was the legal owner of the suit property hence not a trespasser but rightly in possession, occupation and use of the same. The defendant further states that the auction pleaded by the plaintiff was fraudulent. The defendant avers that he lives on the suit property together with his mother, siblings and their children. In his counter-claim, the defendant prays for an order to have the suit property revert back to his father and an order of permanent injunction against the plaintiff.

11. Section 7 of the Limitation of Actions Act provides as follows:

***“7. 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.”***

12. From the pleadings herein, it is clear that the cause of action in this matter arose in 1994 when the suit land was registered in the name of the late Captain Gakweli Warrakah pursuant to the auction carried out in 1988. Under the provisions of Section 7 of the Limitation of Actions Act, both the plaintiff and the counter-claim would be statutorily barred from bringing their respective actions. Both the suit and the counter-claim are time barred and cannot be sustained.

13. Subsequently and going by the above reasons, both the plaintiff’s preliminary objection dated 5<sup>th</sup> March 2019 and the defendant’s preliminary objection dated 20<sup>th</sup> March 2019 are merited and I uphold the same.

14. Accordingly, I order the suit and the counter-claim to be struck out in their entirety. I make no order for costs and I direct that each party will bear their own costs of the preliminary objections and the suit.

15. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 15<sup>th</sup> day of July 2020**

---

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**