



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 120 OF 2018**

**SILVESTER K. KAITANY.....PLAINTIFF**

**VERSUS**

**NYAYO TEA ZONES DEVELOPMENT CORPORATION.....1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**KENYA FOREST SERVICES.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

This ruling is in respect of a preliminary objection by the 1<sup>st</sup> defendant/applicant on the grounds that the plaintiff's suit is statute barred under the provisions of the Limitation of Actions Act, Cap. 22 Laws of Kenya hence the Honourable Court has no jurisdiction to entertain the same and it should therefore be struck out with costs to the 1<sup>st</sup> Defendant.

Counsel agreed to canvas the preliminary objection vide written submissions which were duly filed.

**1<sup>ST</sup> DEFENDANT/APPLICANT'S SUBMISSIONS**

Counsel for the 1<sup>st</sup> defendant applicant gave a brief background to the case and referred the court to paragraph 8 of the Plaintiff where the plaintiff pleaded that "sometimes in the year 2004, he learnt that the 1<sup>st</sup> Defendant had wrongfully, illegally and unlawfully invaded, encroached onto, trespassed and taken possession of a portion of the suit property, [i.e. L.R. No. 22209 [I.R. NO. 82519], by planting tea on it and has thereafter remained in possession thereof to date.

Counsel further referred the court to paragraph 12 of the Plaintiff whereby the plaintiff pleaded that initially the 1<sup>st</sup> Defendant had illegally occupied a total of 30 Acres of the suit property but later on, sometimes in 2016 they proceeded to occupy the remaining 13 acres of the suit property. Further that the plaintiff sought for a declaration that he is the absolute and indefeasible owner of the suit property.

Mr Kimondo submitted that although the cause of action as per paragraph 8 of the plaintiff is founded on a tort of trespass, the same also seeks for a declaratory order as to the ownership of the suit property, the Plaintiff's claim is a claim for damages on trespass and a declaratory order to the effect that he is the absolute owner with an indefeasible title.

Counsel cited the provisions of Section 4(2) of the Limitation of Actions Act which provides that:

*"an action founded on tort may not be brought after the end of 3 years from the date on which the cause of action accrued provided that an action for Libel or slander may not be brought after the end of twelve months from such date".*

It was Mr. Kimondo's submission that trespass being a tort, the plaintiff ought to have filed his claim within 3 years from the year 2004 when he allegedly learnt that the 1<sup>st</sup> Defendant had trespassed and encroached onto the suit property as pleaded at paragraph 8 of the Plaintiff.

Counsel also submitted that the plea at paragraph 12 to the effect that the Plaintiff occupied the remaining portion of the suit property

measuring 13 acres cannot defeat the plea of limitation in that the alleged encroachment was a continuation of the alleged encroachment of the suit property sometimes in 2004 when the action first accrued.

Counsel also relied on the provisions of Section 7 of the Limitation of Actions Act which 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."*

It was submitted that the plaintiff filed the claim in November 2018 therefore it is time barred as it is outside the mandatory statutory period of 12 years for an action to recover land.

Counsel cited the case of **Attorney General & Another v Andrew Maina Githinji [2016] eKLR**, where learned Judges of the Court of Appeal in their respective judgments cited the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**, where Pr. D-F Law JA at page 700 had this to say:-

*"...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. 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."*

Sir Charles Newbold P, on the other hand at page 701 paragraph B-C added the following:-

*"A preliminary objection is the nature of what used to be demurrer. It raises a pure point of law which is usually 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..."*

In that case, Nambuye JA, while expounding on the threshold set out by Sir Charles Newbold P stated that:

- i first test is that the Preliminary objection raises a pure point of law;
- ii second, that there is demonstration that all the facts pleaded by the other side are correct; and
- iii third, that there is no fact that needs to be ascertained.

Mr. Kimondo submitted that the objection is that the plaintiff's claim is time barred hence it goes to the root of the jurisdiction of this court and it ought to be dealt with first. Counsel cited the case of **Bosire Ogero v Royoa Medial Services [2015] eKLR**, where the court held that

*"...The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over..."*

Counsel further relied on the case of **Chevron Ltd V Harrison Charo Wa Shutu [2016] eKLR**, where the Court of Appeal while dealing with an appeal arising from a claim from the Superior Court which was founded on trespass expressed itself at paragraph 8 on page 6 that:

*"It was the appellant's contention that the learned Judge wholly misunderstood its case by basing his decision on the doctrine of adverse possession while the claim was premised on the tort of trespass to land; and that the issue before the trial court was whether the respondent entered on the suit premises without its permission. We think it is futile to draw such a distinction. Section 13 and 38 of the Limitation of Actions Act, respectively simply recognize "some person in whose favour the period of limitation can run" and "where a person claims to have become entitled by adverse possession to land..." Invariably, all cases of adverse possession arise from claims to recover land from person regarded as trespassers."*

Mr. Kimondo counsel for the applicant submitted that although the 1<sup>st</sup> Defendant does not have a counterclaim to be registered as the proprietor of the suit property under the doctrine of adverse possession, it is nevertheless entitled to raise a defence of statute limitation under the doctrine of adverse possession as long as it does not apply to be registered as the proprietor of the land by adverse possession.

Counsel further cited the case of **Haron Onyancha V National Police Service Commission & another [2017] eKLR**, where Mutungi J quoted the case of **IGA V Makerere University [1972] EA 65** where Mustafa J.A and LAW, Ag. VP, held as follows:-

*"A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court "shall reject" his claim. The appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief sought."*

.”. The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, the suit must be rejected.”

Counsel therefore urged the court to uphold the preliminary objection and strike out the plaintiff’s suit with costs to the 1<sup>st</sup> defendant.

### **PLAINTIFF/RESPONDENT’S SUBMISSIONS**

Counsel for the plaintiff/respondent gave a background to the suit and submitted that the issues for determination are as to whether the objection meets the threshold for a preliminary objection and whether there is merit in the preliminary objection.

On the first issue as to whether the preliminary objection meets the threshold, counsel relied on the case of **Two Thirds Investment Limited & 9 others v Katana Said Kalama & 3 others [2018] eKLR** where A Omollo J while dismissing the 1<sup>st</sup> defendant’s preliminary objection cited the **Mukisa Biscuits Case** where it was stated that :

*‘So far as I’m 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.’*

Counsel submitted that for a preliminary objection to succeed it must be on a point of law, it should be argued on the assumption that all the facts pleaded by the other side are correct and finally that it cannot be raised if any fact has to be ascertained.

Mr. Samora submitted that the plaintiff has sought for a declaration that he is the indefeasible owner of the suit land having been registered as such on 29<sup>th</sup> March 2001 which fact is contested by the 1<sup>st</sup> defendant at paragraph 3 of their statement of defence and therefore the court should ascertain the rightful owner of the suit property. That such an issue can only be determined through production of evidence.

Counsel relied on the case of **Two Thirds Investment Limited & 9 others v Katana Said Kalama & 3 others [2018] eKLR** (supra) where the court stated that:

*“ I have taken into consideration all the issues raised by the submissions of both counsel. To begin with, it is my opinion that the 1<sup>st</sup> defendant has misunderstood the meaning of section 7 of Cap 22. I say so because a registered owner’s rights can only be extinguished as provided for by law. Where nothing occurs that would extinguish those rights, they remain ad infinitum. It is therefore a misapprehension to state that the plaintiff’s cause of action accrued from 1993 when they became registered proprietors. A cause of action is defined by the dictionary as “the fact of combination of sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party.*

*It follows that the plaintiffs’ right to sue accrued only when they wanted to enforce their rights against the defendants. To prove whether there is a valid cause of action, you must do so by evidence.”*

Counsel submitted that the 1<sup>st</sup> defendant waited until the matter was fixed for hearing then raised an oral preliminary objection and did not file a notice to enable the respondent prepare adequately to respond hence a trial by ambush.

Counsel cited the case of **Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya [2017] eKLR** where the Court of Appeal stated that :

*“We are of the view that the learned Judge misapprehended the preliminary objection, it did not raise a clear point of law that was not contested. For the aforesaid reasons, we find merit in this appeal which we allow and set aside the ruling of 17<sup>th</sup> April 2014 by Mbaru, J. We substitute it with an order dismissing the preliminary objection. Consequently, we order that the claim by the appellant be heard by another Judge other than Mbaru, J. on priority basis.”*

Further in the same case while quoting the case of **Bashir Haji Abdullahi v Adan Mohammed Noor & 3 others [2004] e KLR**, this Court stated as follows:

*“We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that „the application is bad in law? without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged.”*

Mr Samora therefore submitted that the applicant’s preliminary objection does not raise a clear point of law that is not contested. That the preliminary objection does not meet the threshold laid down in the Mukisa Biscuits’ case.

Counsel also submitted that in response to paragraph 13 of the 1<sup>st</sup> defendant’s submission, that the plaintiff does not seek for recovery of land as he is the registered owner, that what he seeks for is prompt payment in full of just compensation for the deprivation of his interest in the suit land hence the limitation of actions does not apply.

The other issue that the court should determine is whether limitation of action can run in favour of the 1<sup>st</sup> defendant.

Counsel submitted that the suit property is not in possession of a person in whose favour the period of limitation can run, the 1<sup>st</sup> defendant being a State Corporation hence section 7 does not apply. Counsel relied on Section 3 (1) of the Limitation of Actions Act which states that:

*“ A right of action to recover land does not accrue unless is in the possession of some person in whose favour the period of limitation can run(which possession is in this Act referred to as adverse possession)”*

That the 1<sup>st</sup> defendant is not claiming any ownership over the suit property as per their letter date 17<sup>th</sup> July 2015 denying any proprietary rights with direction that the plaintiff makes a follow up with the 1<sup>st</sup> interested party for any compensation due for loss of use of the suit property.

Counsel therefore urged the court to dismiss the preliminary objections with costs to the plaintiff.

### **ANALYSIS AND DETERMINATION**

The issues for determination is a preliminary objection are now settled as per the **Mukisa Biscuits’ case**. A party raising preliminary objection must confine itself to points of law, it should be on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained.

In the case of **Oraro v Mbaja [2005] eKLR** where it was held that:-

*“Anything that purports to be a Preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.*

The plaintiff is seeking for various reliefs in his plaint namely, a declaration that he is the absolute owner of the suit land, that the 1<sup>st</sup> defendant is a trespasser, permanent mandatory injunction, general damages, special damages, punitive damages and costs of the suit. The plaint indicates when the alleged illegal activities or entry started and also states that the activities continued in 2016 with encroachment on additional 13 acres.

The 1<sup>st</sup> defendant filed a statement of defence dated 10<sup>th</sup> January 2019 where it stated in paragraph 6 that :

*6.The claim by the plaintiff of parcel of land known as LR NO 22209 comprise of a Grant No. I.R No. 8251 and measuring 17.34Ha (approx.. 43 acres (the suit property) falls within the tea zone established by the Corporation along the buffer zone belt of Kaptagat Forest and which is a gazetted forest.*

The defence at para. 8 states as follows:

*8. Since the Corporation took possession of the said tea zone along Kaptagat Forest (hereinafter referred to as “the Buffer zone”), no legal process as provided by law for alienation of any part of the suit property as alleged, the same was obtained fraudulently and illegally and more so taking into consideration that the Corporation which was at the time not only in possession of the area claimed but also had tea plantations thereon*

From the statement of defence it is clear that there are contested facts which must be adjudicated upon to ascertain whether the defendant is right by stating that the plaintiff acquired the title irregularly. If there was any fraud as alleged by the 1<sup>st</sup> defendant, then the limitation of actions starts running when the fraud was discovered. The 1<sup>st</sup> defendant makes general allegations that the plaintiff obtained the title to the suit land by fraud and does not state when they discovered the fraud if any.

Even though Section 26 of the Limitation of Actions Act provides that the discovery of fraud should be by the plaintiff, in my opinion, the fact that the defendant has alleged fraud in its defence, such allegation should not be taken lightly by the court as issues of land fraud have bedeviled the country which should be stemmed.

Section 26 of the Limitation of Actions Act provides as follows;

*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 of any person through whom he claims or his agent; or*

*(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:*

In the case of **Justus Tureti Obara vs Peter Koipeitai [2014] eKLR** wherein J. Okong’o held that;

*“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”*

Why would the 1<sup>st</sup> defendant want the case to be terminated at a preliminary stage without going to the root of the case where rights are at stake? The evidence will bring to fore whether the plaintiff is entitled to compensation or whether the land had been gazetted as a Forest and if so whether the parties were compensated as per the law. There will be no harm or prejudice to any of the parties if these issues are ventilated and settled substantively.

In the case of **Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] eKLR**:- the court held that:

*“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.”*

I am also in agreement with the above observation that the power of the court to strike out pleadings is a powerful one that should be exercised sparingly so as not to lock out parties from the seat of justice. This is not to mean that when the court is faced with cases which have no head or tail and are filed in abuse of the court process, then they cannot strike out the suits. The court has discretion in such matters and can apply such discretion judiciously to dispense justice.

In the case of **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga ...Vs...Eliud Timothy Mwamunga & Sagalla Ranchers Limited [2017] eKLR**, where the Court held that:-

*“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application.*

*Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.*

There are facts which are contested therefore the preliminary objection does not meet the threshold as the court would be obliged to look for facts outside the objection.

Counsel for the 1<sup>st</sup> defendant/applicant stated that the plaintiff claimed that acts of trespass started in 2004 and further acts of trespass occurred in 2016 which to him was a continuation of the previous acts.

In the case of **ISAACK BEN MULWA .V. JONATHAN MUTUNGA MWEKE C.A CIVIL APPEAL NO 6 OF 2015 [2016 eKLR]**, the Court of Appeal stated as follows about such trespass: -

*“Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be res – judicata simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”*

It is trite law that continuous injuries to land create separate actions.

Having considered the pleadings, the submissions by counsel, I find that the preliminary objection by the 1<sup>st</sup> defendant lacks merit and is therefore dismissed with costs to the plaintiff. The parties to fast track the hearing the case by complying with order 11 within 30 days.

**DATED and DELIVERED at ELDORET this 24<sup>TH</sup> DAY OF NOVEMBER, 2020**

**M. A. ODENY**

**JUDGE**