

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 425 OF 2017

DR. EDGAR KADENYI.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL

THE KAKAMEGA MUNICIPAL COUNCIL.....DEFENDANTS

NATIONAL WATER CONSERVATION &

PIPELINE CORPORATION.....INTERESTED PARTY

RULING

The interested party raised a preliminary objection, to be determined in limine, that the application dated 2nd May, 2019 by the plaintiff be dismissed on the grounds that the same has been overtaken by time as per section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya. The interested party submitted that the plaintiff neglected and or refused to execute the judgement for a period of 19 years and this is in violation of section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya. They relied on the following authorities; Danson Murithii vs Evanson Mithamo Muroko Kerugoya HCC 305 of 2013, Willis Onditi Odhiambo vs Gateway Insurance Co. Ltd Kisumu Civil Appeal No. 37 of 2013 (2014) eKLR and Moses Kipkurui Bor vs John Chirchir (2019) eKLR.

The plaintiff opposes the preliminary objection raised by the interested party through the firm of Justus A. Wabuyabo Advocate. The first ground of opposition to the preliminary objection is that it was filed on 8th July 2019 by an advocate who was not formally on record in this matter. The said firm of Justus A. Wabuyabo filed their notice of appointment on 31st July 2019 way after they had raised the preliminary objection. Secondly, the preliminary objection is an afterthought aimed at delaying this matter further and denying the plaintiff substantive justice. To prove this, they have reiterated a chronology of events in this matter which the interested party seems not to be aware of. That on 19th September 2017, the plaintiff filed an application for leave to execute out of time the judgment delivered on 4th February 2000. The said application was served on all parties on record then and was slated for hearing on 24th September 2018. On 24th September 2018, they took directions in this honourable court that the applications dated 26th January 2018 and 18th September 2018 be consolidated and canvassed by way of written submissions. The court gave parties a mention date for 8th October 2018 to confirm filing of submissions in respect to the applications by the plaintiff. When they came in court on 8th October 2018, the advocates on record consented in court that the applications by the plaintiff dated 26th January 2018 and 18th September 2018 be withdrawn and that parties do negotiate on a firm of valuers to do valuation on the suit land herein. This matter was mentioned on 19th February 2019 to confirm if they had agreed on the firm of valuers. As at that date they had not agreed. The court gave them a last adjournment and fixed the same for mention on 18th March 2019. That on 8th March 2019 and 28th March 2019 they did a letter to all the counsels on record in this matter and the government valuer proposing that the government valuer does the valuation, which letter was received and a copy thereof is annexed. They had proposed the day for valuation as 3rd April 2019 which date seemed not to be convenient to other parties in this matter. On 8th April 2019 they did another letter to parties indicating that the valuation will be on 25th April 2019. The other parties received the letter and when they visited the suit land on 25th April 2019 for valuation, the exercise could not proceed as the interested party herein through their officials opposed to the commencement of the valuation exercise. That it is after this opposition that they filed an application dated 2nd May 2019 that was slated for hearing on 8th July 2019. On the day for hearing the interested party raised this preliminary objection.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... 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”

In the same case, Sir Charles Newbold said:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the 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 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 that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.

I find that the issue whether the application dated 2nd May, 2019 by the plaintiff has been overtaken by time as per section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya matters of fact as the same appears to have been compromised by the parties when they entered a consent to undertake a joint valuation. The application needs to be heard for this court to determine the matter. The court needs to investigate the facts in order to make a final determination. I find that this preliminary objection is not merited and I strike it out with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 27TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE