



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 21 OF 2016

PHARIS WEKESA MASIBO.....PLAINTIFF

VERSUS

BEATRICE MANYONGE.....1ST DEFENDANT

PETER OKUMU.....2ND DEFENDANT

DAVIS MUTORO.....3RD DEFENDANT

BENARD CHEMAO.....4TH DEFENDANT

ANTONY MAFURA.....5TH DEFENDANT

RULING

By an amended plaint dated 30th May 2017, the plaintiff sought against the defendants Judgment in the following terms: -

- (a) That the defendants be evicted out of the plaintiff's land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**
- (b) That the defendants be restrained permanently from interfering with the plaintiff's land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106.**
- (c) That the defendants be condemned to pay mesne profits.**
- (d) ca: That the body of the late MANYONGE WASWA be exhumed from land parcel NO EAST BUKUSU/SOUTH KANDUYI/4106 and be buried elsewhere.**
- (e) The costs of this suit.**
- (f) Any other relief this Honourable Court may deem fit to grant.**

The basis of the plaintiff's claim is that he is the registered proprietor of the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/4106** measuring approximately 0.84 Ha (the suit land) having purchased the same from the 1st defendant's father – in – law **MANYONGE WASWA MAYEYE** in 1974 and took possession thereof. That in 1989 the 1st defendant's deceased husband unlawfully and without any colour of right entered onto the suit land and started ploughing as well as constructing house thereon and thereafter sold it to the 2nd, 3rd, 4th and 5th defendants who also took possession without the plaintiff's knowledge. That necessitated this suit.

The 1st, 3rd, 4th and 5th defendants filed a joint statement of defence in which they denied that **MANYONGE WASWA WAMAYEYE** sold the suit land to the plaintiff in 1974 adding that no agreement has been produced to that effect. The defendants pleaded further that the plaintiff has never utilized the suit land and, in any event, the **KANDUYI LAND DISPUTES TRIBUNAL** had heard the plaintiff's complaint and awarded the suit land to **MANYONGE WASWA DANIEL** having found the plaintiff's allegations baseless. That if indeed the plaintiff obtained title to the suit land, he did so fraudulently. That it is the 1st defendant who resides on the suit land with her family and the 3rd, 4th and 5th defendants have purchased plots created from parcels **NO EAST BUKUSU/SOUTH KANDUYI/14753** and **4105** which they have fully developed and that the remains of **MANYONGE WASWA DANIEL** were properly interred on the suit land and there is no justifiable reason why the same should be exhumed.

The 1st, 3rd, 4th and 5th defendants pleaded further that the plaintiff's claim is statute barred by dint of **Section 7 of the Limitation of Action Act** and a Preliminary Objection on a point of law would be raised to have it struck out.

The 2nd defendant appears not to have filed any defence.

A reply to the defence was filed and the plaintiff reiterated the contents of the plaint and joined issues with the defendants.

On 22nd October 2018, the 1st, 3rd, 4th and 5th defendants filed a Notice of Preliminary Objection on the ground that the plaintiff's claim is statute barred by dint of **Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya**.

That Preliminary Objection is the subject of this ruling and has been canvassed by way of written submissions which have been filed both by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the 1st, 3rd, 4th and 5th defendants and the firm of **SITUMA & COMPANY ADVOCATES** for the plaintiff.

I have considered the Preliminary Objection and the submissions by counsel.

In support of the Preliminary Objection on limitation, counsel for the 1st, 3rd, 4th and 5th defendants has cited paragraphs 6(a), 7(a) and 8 of the amended plaint and submitted that the cause of action arose on 28th February 1989 when the 1st defendant's deceased husband unlawfully and without any colour of right entered upon the suit land, started ploughing and constructing thereon and thereafter the other defendants also took possession. Therefore, the plaintiff has brought this suit 27 years after the date on which the right of action accrued to him and citing the cases of **IGA .V. MAKERERE UNIVERSITY 1972 EA 65** and also **HARON ONYANCHA .V. NATIONAL POLICE SERVICE, 2017 eKLR**, counsel submitted that this suit be struck out for being statute barred.

On his part, counsel for the plaintiff submitted that this dispute commenced way back in 1989 when **MANYONGE WASWA** was ordered to vacate the suit land and this dispute did not commence in 2016 when the original plaint was filed before being amended in 2017.

Section 7 of the Limitation of Actions Act provides as follows: -

“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.”

In urging this Court to make a finding that this suit is barred by **Section 7 of the Limitation of Actions Act** cited above counsel for the 1st, 3rd, 4th and 5th defendants has referred me to paragraphs 6(a), 7(a) and 8 of the amended plaint. Those paragraphs read as follows: -

6(a): “On 28th February 1989 the 1st defendant's deceased husband unlawfully and without any colour of right entered upon the plaintiff's said parcel of land NO EAST BUKUSU/SOUTH KANDUYI/4106 and started ploughing the same and constructed some houses on the suit land.”

7(a): “That on diverse dates the deceased MANYONGE WASWA sold land to 2nd, 3rd, 4th and 5th defendants who took possession without the plaintiff's knowledge.”

8: “By reasons of the defendants' interference, the plaintiff has been denied the use of his land and he has suffered losses.”

My understanding of the above pleadings is that the 1st defendant's deceased husband first entered the suit land on 28th February 1989 which he then sold to the 2nd, 3rd, 4th, and 5th defendants. The plaintiff's claim is basically a claim in trespass and that is why among the orders that he seeks is the eviction of the defendants, a permanent injunction, exhumation of the body of **MANYONGE WASWA** the 1st defendant's deceased husband and mesne profits. The plaintiff's claim is therefore one of a continuing trespass which first occurred in 1989 and still continues so long as the defendants remain on the land. In **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.”

The Court then went on and cited **WINFIELD AND JOLOWICZ ON TORT 11TH EDITION** at page 342 where the authors confirm the following: -

“Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”

In **BLACK'S LAW DICTIONARY 10TH EDITION**, a continuing trespass is defined as: -

“A trespass in the nature of a permanent invasion on another's rights such as a sign that overhangs another's property.”

And in **CLERK & LINDSEL ON TORTS 16TH EDITION** paragraph 23 – 01, it is stated that: -

“Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues.”

Therefore, for as long as the defendants’ houses remain on the suit land and the body of the 1st defendant’s deceased husband **MANYONGE WASWA** remains buried thereon unlawfully, that is a continuing trespass which continues every day and cannot be defeated by the **Limitation of Actions Act**. Indeed, from my understanding of the Court of Appeal’s decision in the case of **ISAACK BEN MULWA .V. JONATHAN MUTUNGA MWEKE** (supra), even a plea of res – judicata cannot defeat the plaintiffs claim because what happened on 28th February 1989 when the deceased **MANYONGE WASWA** first entered the suit land and started ploughing and constructing houses thereon is different from the trespass that occurred subsequently when the deceased was buried on the said land.

The up – shot of the above is that the Preliminary Objection dated 22nd October 2018 and raised by the 1st, 3rd, 4th, and 5th defendants to the effect that the plaintiff’s claim is statute barred by dint of **Section 7 of the Limitation of Actions Act Chapter 22 Laws of Kenya** is devoid of merit. It is dismissed with costs.

It is so ordered.

Boaz N. Olao.

J U D G E

11th December 2019.

Ruling dated, delivered and signed in Open Court this 11th day of December 2019 at Bungoma.

Mr Maloba for Mr Kundu for plaintiff present

Mr Murunga for 1st, 3rd, 4th and 5th defendants present

1st defendant present

Plaintiff present

Joy/Okwaro – Court Assistants

Boaz N. Olao.

J U D G E

11th December 2019.