



**Njoka (Suing on his Behalf and a Next Friend to Mwambura Ngatho - Deceased)  
v British American Tobacco Kenya PLC & 3 others (Environment & Land  
Case E033 of 2022) [2024] KEELC 944 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 944 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E033 OF 2022  
A KANIARU, J  
JANUARY 31, 2024**

**BETWEEN**

**JOHN KINYUA NJOKA (SUING ON HIS BEHALF AND A NEXT FRIEND TO  
MWAMBURA NGATHO - DECEASED) ..... PLAINTIFF**

**AND**

**BRITISH AMERICAN TOBACCO KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**CBRE EXCELLERATE KENYA LTD ..... 2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF LANDS EMBU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before me for determination is a Preliminary Objection dated 20.01.2023 and filed on 25.01.2023. The objection has been brought by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants – British American Tobacco Kenya Plc & CBRE Excellerate Kenya Ltd - on the grounds that;
  1. The plaintiff's suit is time barred as it is brought contrary to the provisions of Sections 7 & 9 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
  2. The plaintiff's cause of action is premised on a supposed contract for the disposition of an interest in land, in the absence of any written contract signed by the parties and any documentary evidence, contrary to the provisions of law.
  3. The plaintiff's suit is fatally defective as it is supposedly instituted by a “next friend” of a deceased person.



2. It was agreed that the preliminary objection be canvassed through written submissions. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants submissions were filed on 20.06.2023 whereas the Plaintiff's submissions were filed on 04.08.2023. The 3<sup>rd</sup> & 4<sup>th</sup> Defendants filed their submissions on 07.11.2023 and the plaintiff filed Supplementary submissions on the same date.
3. I have considered the Preliminary Objection and the rival submissions. The issue for determination is whether the preliminary objection meets the fundamental threshold and whether the same is merited.
4. The circumstances in which a preliminary objection may be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, as follows:

“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. Emphasis mine.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

5. From the above, it is clear that for a preliminary objection to succeed, it ought to satisfy the following requirements: Firstly, it should raise a pure point of law; secondly, it should be argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
4. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants have raised an objection to the plaintiff's suit on three grounds. The first ground is that the plaintiff's suit is time barred as it is brought contrary to the provisions of Sections 7 & 9 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

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.”

Section 9 of the *said Act* on the other hand provides;

“(1)Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance. (2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death. (3) Where a person brings an action to recover land, being an estate or interest in possession assured otherwise than by will, to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been



in possession of the land by virtue of the assurance, the right of action accrues on the date when the assurance took effect.”

6. The Plaintiff in this case filed a plaint seeking a declaratory order recognizing him as the legal owner of land parcel No. Nthawa/Riandu/11755. He says that he has been the beneficiary and occupant of the said land and that he entered into an agreement in the year 1952 to lease the suit land for 20 years to the 1<sup>st</sup> Defendant, which land he says sits next to his home. That since the expiration of the lease in 1972, he has had various correspondence with the 1<sup>st</sup> defendant demanding issuance of rent payment and vacant possession by the 1<sup>st</sup> Defendant with no success. That it was not until recently (that is in the daily newspaper of 24<sup>th</sup>, 25<sup>th</sup> and 27<sup>th</sup> November 2022) that he noted an advertisement for the sale of a portion of 5.16 acres out of 7 acres of the suit property by the 2<sup>nd</sup> Defendant as an agent of the 1<sup>st</sup> Defendant. He avers that he is the legal owner of the suit property measuring 7 acres pursuant to a gazette notice of 25.09.1951, which enabled him to lease out the property to the 1<sup>st</sup> Defendant.
7. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants posit in their submissions that the plaintiff has pleaded that he allegedly entered into a contract for the lease of the suit property with the 1<sup>st</sup> Defendant in the year 1952 for 20 years. Going by that, the supposed lease would determine in 1972. That the plaintiff's claim being one for recovery of land ought to have been brought after the end of 12 years from the commencement of the cause of action, that is on or before 1984. That this suit having been filed on 02.12.2023 is clearly time barred. That further, in line with Section 9(1) of the *Limitation of Actions Act*, the plaintiff's right of action accrued on the date of dispossession of the suit property, that is in 1972. That even if the court were to consider that the plaintiff brought the suit as a representative of his father's estate, his action would have accrued on the date of his father's death which according to the Certificate of death produced by the plaintiff, shows he died on 07.01.1981. That however one looks at it, the plaintiff's suit was brought outside the 12 year limitation period and is therefore time barred.
8. The plaintiff on the other hand argues that the cause of action arose on 24.11.2022 when the suit land herein was advertised for sale. That the said advertisement is what made the plaintiff aware of the fact that the 1<sup>st</sup> Defendant had converted the suit land into their own and thus prompted the plaintiff to seek redress as per his plaint. That the Defendant's preliminary objection is based on the Lease Agreement when indeed the plaintiff has only referred to it to show that his father owns the suit land and he is the one who initially leased it to the 1<sup>st</sup> Defendant. He further argues that ownership of the suit property has never been an issue until the said advertisement for sale.
9. I have considered the parties submissions and I can see how each one of them could possibly be right. However, as has already been stated, one of the crucial elements of a valid preliminary objection is that it should be based on the assumption that the facts pleaded are correct and unopposed by the rival party. A preliminary objection cannot successfully be raised on disputed facts. Clearly, the parties herein cannot be said to be in agreement as to the facts of the case. In my view, a determination on when the cause of action arose in this case can only be made after the court has examined the evidence of the parties as well as hearing their testimonies which can only be done at trial and not at this stage.
10. The second objection was on the ground that plaintiff's cause of action is premised on a supposed contract for the disposition of an interest in land in the absence of any written contract signed by the parties which they say is contrary to the provisions of law. Again and with due respect to the Defendants, this also requires the Court to inquire into evidence to ascertain the fact. As stated above, a preliminary objection cannot be raised and sustained if any fact has to be ascertained. Whenever the court retires to ascertain facts, no objection can be sustained.



11. The third issue was that the plaintiff's suit is fatally defective as it is instituted by a next friend of a deceased person. The 1<sup>st</sup> & 2<sup>nd</sup> Defendants argue that no suit can be brought by or against a deceased person by a next friend as only a legal representative holding a grant can institute a suit as a personal representative of a deceased person. The 3<sup>rd</sup> & 4<sup>th</sup> Defendants hold a contrary view which I am inclined to agree with. They submit that the plaintiff's error in instituting the suit as next of friend is a technicality that can easily be cured by an amendment as the Plaintiff has acquired a grant ad litem to administer the estate of the deceased. In addition, I am of the view that this is a proper case where the provisions of [Article 159\(2\)\(d\)](#) which require this court to administer justice without undue regard to procedural technicalities apply. I therefore direct that the plaintiff amends the plaint accordingly.
12. The upshot of the foregoing is that I find that preliminary objection dated 20.01.2023 does not meet the fundamental threshold of a preliminary objection and that the same lacks merit. I hereby dismiss the same.
13. Costs shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 31<sup>ST</sup> DAY OF JANUARY, 2024.**

**A.K. KANIARU**

**JUDGE**

**31. 01.2024**

In the presence of;

Plaintiff – present

Ms cheptoo for Ms Onyango for 1<sup>st</sup> and 2<sup>nd</sup> Defendant – Present

Court Assistant - Leadys

