



Karisa & another v Dyeka & others (Environment & Land Case E082 of 2019) [2024] KEELC 282 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 282 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E082 OF 2019
FM NJOROGE, J
JANUARY 30, 2024**

BETWEEN

KADZO KAHINDI KARISA 1ST PLAINTIFF

FURAHA KAHINDI KARISA 2ND PLAINTIFF

AND

FURAHA KATANA DYEKA & OTHERS DEFENDANT

RULING

1. The Defendants filed a Notice of Preliminary Objection dated 17th November 2023. They sought dismissal of the entire suit on the following grounds: -
 1. The Honourable Court lacks the requisite and necessary jurisdiction to hear and determine the said suit.
 2. The suit is time barred and defective as it offends the express provisions of section 7 of the Limitations of Actions Act.
 3. The entire suit is bad in law, incompetent, frivolous & vexatious and the same is otherwise an abuse of court process.
2. The Court directed that the Preliminary Objection be canvassed by way of written submissions.

Defendants' Submissions

3. On 21st November 2023, counsel for the Defendants filed submissions in support of the Preliminary Objection. He quoted the definition of a preliminary objection stated in *Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Ltd* [1969] EA 698. Counsel submitted that the Plaintiff's suit filed in 2019 is anchored on a certificate of title issued to the Defendants on 7th December 2005 hence time barred by virtue of Section 7 of the *Limitation of Actions Act*. To counsel, the court



therefore lacks jurisdiction to entertain the claim. He relied on the case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1; *Bosire Ongeri v Royal Media Services* [2015] eKLR, and *Moffat Muriithi Muchai v Wanjiru Wanjobi* Gatundu ELC No. 125 of 2017.

Plaintiffs' Submissions

4. In submissions filed on 30th November 2023, counsel for the Plaintiffs argued that as per paragraph 4 of the plaint herein, the cause of action arose in the year 2015 therefore the suit cannot be said to be statute-barred. He added that if there is no consensus as to when the cause of action arose, then for that reason alone the Preliminary Objection could not stand the test established in the *Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Ltd* [supra] case.
5. Counsel submitted that dismissing the entire suit before delving into its merits will be inconsistent with the principles of striking out encapsulated in the case of *D.T Dobie & Company (Kenya) Ltd -v- Muchina* [1982] KLR; and in *Charo Lewa & 3 others v Mohamed Omar Bawaly & 3 others* [2017] eKLR.
6. To counsel, the issue in the main suit is not for recovery of land under Section 7 of the *Limitation of Actions Act* but an allegation of trespass against the Defendants. For the said reasons, counsel urged the court to dismiss the Preliminary Objection with costs.

Analysis and Determination

7. The Preliminary Objection seeks to strike out the suit herein on the basis that this court lacks jurisdiction to hear and determine it on the basis that the claim is statute barred by dint of Section 7 of the *Limitation of Actions Act*.
8. In order to arrive at a just decision, I have framed the following outstanding issues for determination: -
 - i. Whether the Preliminary Objection meets the fundamental threshold of a preliminary objection;
 - ii. Whether the Plaintiff's claim is time barred.
9. According to the *Black's Law Dictionary* a Preliminary Objection is defined as: -

"In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary...."
10. The above position has been made clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd -v- West End Distributors Ltd*. [supra] where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that: -

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."
11. It is also trite that a preliminary objection can be brought at any time at least before the final conclusion of a case. However, it should be filed at the earliest opportunity of the subsistence of a case, in



order to pave way for the smooth management and determination of the main dispute in a matter. The objection raised goes into the jurisdiction of this court, I therefore affirm that the Preliminary Objection filed by the Defendants herein is founded on the aforementioned principles.

12. What follows therefore is whether the objection as raised is merited. In other words, whether the Plaintiff's claim is time barred.

13. 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.

14. From a cursory perusal of the Plaint herein it is clear that the cause of action that prompted the filing of this suit arose in the year 2015. The Plaintiffs' claim is anchored on the allegation that the Defendants trespassed into the suit property in the year 2015. The present suit was filed on 3rd October 2019, approximately four years after the alleged trespass. It follows that the Plaintiff's claim has not been extinguished.

15. The outcome is that the notice of preliminary objection dated 17th November 2023 lacks merit, it is hereby dismissed with costs.

16. Parties shall comply with Order 11 of the *CPR*, the plaintiff within the first 15 days after the orders herein and the defendant within 15 days after expiry of the plaintiff's said compliance period and this matter shall be mentioned on 21/2/2024 for issuance of a hearing date.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

