



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 183 OF 2017

1. KAZUNGU KOMBE KITHI

2. KAZUNGU K. KAZUNGU

3. HARUN SHAURI KITHI.....PLAINTIFFS

VERSUS

FRANCIS TUVA.....DEFENDANT

RULING

1. This ruling is in respect to the preliminary objection dated 13th April, 2018 by the defendant seeking to have the suit dismissed on the grounds that this court lacks jurisdiction to hear and entertain the suit under the Limitation of Actions Act, that the suit is res judicata and that the suit is bad in law, frivolous, and vexatious.

2. By a plaint dated 25th may, 2017, the Plaintiffs have brought this suit against the defendant seeking the following reliefs:

a. A mandatory injunction directed to the defendant by himself, his servants, agents, employees and/or whosoever is acting on his behalf from ploughing, entering, trespassing, harvesting crops, selling and/or dealing with plot known as MARIAKANI KAWALA 'B'/766.

b. A declaration that the plaintiffs are the proprietors of plot known as MARIAKANI KAWALA 'B'/766.

c. Vacant possession.

d. Costs and interest of this suit.

3. The plaintiffs' claim is that they are the registered owners of the suit plot and that on or about 5th April, 2017, the defendant encroached on it and forcefully planted crops thereon without the Plaintiffs' authority.

4. The defendant filed a statement of defence on 16th June, 2017 in which he has denied the Plaintiffs' claim. The defendant avers that he has cultivated his legally and lawfully acquired piece of land being **TITLE NO. MARIAKANI/KAWALA (B)/900** which is adjacent to the plaintiffs land and which the Plaintiffs had initially illegally and unlawfully grabbed and usurped ownership before various tribunals stopped them. The defendant mentioned **LAND COMMITTEE CASE NO.107 OF 2011, ARBITRATION BOARD CASE NO.31 OF 2011 AND ELC CASE NO. 26 OF 2012** which he avers made judgment in his favour.

5. The preliminary objection was canvassed by way of written submission which the parties duly filed. The defendant submitted that the cause of action herein could have accrued way back in the 1950s and the suit was filed after 67 years, hence statute barred under the law of Limitation. The defendant further submitted that the suit is res judicata and stated that the dispute had gone before the Adjudication Committee on 13th December 2010 when the defendant was allocated the suit land in **LAND CASE NO.107 OF 2011**. That the plaintiffs appealed to the **ARBITRATION BOARD IN CASE NO.31 OF 2011** which was also decided in the defendant's favour. The defendant added that the Plaintiffs also filed **ELC Case No.169 of 2013** which was dismissed. That **ELC No.169 of 2013** and this suit involve the same parties and is over the same subject matter.

6. In their submissions, the Plaintiffs argue that the preliminary objection has no merit and should be dismissed. The Plaintiffs aver that the defendant's documents indicate that title to land parcel No. Mariakani Kawala 'B'/900 was issued in 3rd November, 2014 which is only three

years before this suit was filed and not 67 years as submitted by the defendant. In this regard, the Plaintiffs argue that the suit is not barred by the Limitation of Actions Act. The defendants further submitted that the suit is not res judicata as **ELC NO. 107 OF 2011** and **ELC NO. 26 OF 2012** were not heard and determined as they were dismissed for non-attendance, and that no pleadings were exhibited with regard to **ELC NO.107 OF 2011** for the court to peruse and ascertain its existence.

7. I have considered the rival submissions filed and the authorities cited. In his ruling in the case of **Garden Square Ltd – v – Kogo & Another (2003) eKLR**, Ringera J (as he then was) stated that what constitutes a true preliminary objection is a pure point of law which if successfully taken would have the effect of disposing of the suit or application. This was in line with the then Court of Appeal for East Africa in the case of **Mukisa Biscuits Manufacturing Ltd –V- West End Distributors Ltd (1969) EA 696** in which Sir Charles Newbold, the president of that court stated:

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all 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. The improper raising of points by ways of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. The improper practice should stop.”

8. The preliminary objection by the defendant is mainly that the suit is statute barred and also that it is res judicata. I have perused the pleadings herein. In the Plaint, the plaintiffs allege that the cause of action arose on 5th April 2017 when the defendant allegedly encroached on their parcel of **LAND NO. MARIAKANI/KAWALA ‘B’/766**. On the other hand, the defendant alleges the act complained of took place in his **PARCEL NO.MARIAKANI/KAWALA ‘B’/900**. Both parties are also not in agreement on when the cause of action arose. Whereas the plaintiffs allege that the act complained of took place on 5th April 2017 the defendant on the other hand alleges it took place 67 years ago. In my view, this a matter that can only be ascertained at the trial. It cannot be resolved through the preliminary objection raised. The preliminary objection cannot be said to raise a pure point of law. It raises some issues of fact which have to be ascertained.

9. I have also perused the proceedings which are said to have been taken previously on the same subject matter. It is apparent that there were also other parties. It is also clear that **LAND CASE NO.26 OF 2012** was dismissed for non-attendance. In my view, the issues were never canvassed and determined to conclusion. The issues raised in that suit did not receive a final judgment on merits. A suit will only be barred by res judicata when it has been heard and determined on the substantive merits of the case. The other cases before the land committee did not mention the same titles as this suit. In my view there are so many facts which are not clear and which need to be established. By reason of the foregoing I find that the present suit cannot be said to be barred by the plea of res judicata as there was no determination of the claim between the parties on merit. Section 7 of the Civil Procedure Act only bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

10. For the foregoing reasons, I am inclined to dismiss the preliminary objections and decline to dismiss the suit as requested. The plaintiff shall have costs.

DATED, DELIVERED and SIGNED at MOMBASA this 11TH day of October, 2018

C. YANO

JUDGE