



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 83 OF 2016

DORIS NJUTHE MUNYI.....PLAINTIFF

VERSUS

JOSPHAT NJIRU MUTURI.....1ST DEFENDANT

HARRISON NYAGA MUTURI.....2ND DEFENDANT

IN THE COUNTERCLAIM

JOSPHAT NJIRU MUTURI.....1ST PLAINTIFF

HARRISON NYAGA MUTURI.....2ND PLAINTIFF

LAZARO MBOGO.....3RD PLAINTIFF

VERSUS

DORIS NJUTHE MUNYI & 73 OTHERS.....DEFENDANTS

RULING

1. The Plaintiff herein filed a notice of preliminary objection dated 13th February 2018 objecting to the Defendants' entire counterclaim on the following grounds;

a. That the counterclaim was statute-barred under **sections 4(1) and 7 of the Limitations Act (Cap 22)**.

b. That the counter-claim was *res judicata* and in contravention of **section 7 of the Civil Procedure Act (Cap 21)**.

2. When the said preliminary objection was listed for hearing on 11th June 2018, the advocates for the parties who were present agreed to canvass the said preliminary objection through written submissions. It was directed that all concerned parties should file and exchange their respective submissions within 60 days. The matter was thereupon fixed for ruling on 22nd November 2018. By the time of preparation of this ruling, however, only the Plaintiff had filed written submissions.

3. The Plaintiff's advocates correctly described the nature of a preliminary objection in their written submissions. They quoted the famous case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd [1969] EA 696** and the case of **Francis Kamau Murai & Another Vs Gatundu & Mangu Co. Ltd and & Another [2015] eKLR**.

4. In the case of **Mukisa Biscuits Manufacturing Co Ltd** (supra) a preliminary objection was described by **Newbold P.** 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...”

5. The Plaintiff's advocate also quoted the following passage which was quoted from the case of **Quick Enterprises Ltd Vs Kenya**

Railways Corporation, Kisumu HCCC No. 22 of 1999 which was quoted in the case of Francis Kamau Murai & Another (supra);

“When preliminary points are raised, they should be capable of disposing of the matter preliminarily without the court having to result to ascertaining facts from elsewhere apart from looking at the pleadings”.

6. The Plaintiff’s objection on account of limitation of actions was twofold. First, it was contended that the Defendants’ counter-claim was based upon *Adjudication Case No. 20 of 1973* by which it was claimed their clan was awarded the suit property which was part of a larger block of about 750 acres. Second, it was contended that by virtue of the decision of the Eastern Provincial Land Disputes Tribunal Appeals Committee in *Appeal Case No. 18 of 2002*, the matter was decided in favour of the Defendant’s clan. It was, therefore, contended that a period of more than 12 years had lapsed since either 1973 or 2002 and consequently the counter-claim was statute-barred.

7. The Plaintiff’s advocate in his submissions urged the court to hold that the statutory period of 12 years began to run from the “time of determination of *Appeal Case No. 18 of 2002*”. The court was not, however, informed when the Appeal case was determined. The year of filing may not necessarily be the year of determination. The court has perused the pleadings on record and noted that the date of determination does not appear in the pleadings on record. It would appear that the date of determination may have to be established through factual evidence.

8. The court is of the opinion that the mere fact that *Objection No. 20 of 1973* was decided in 1973 does not necessarily mean that time would start running from that date. Similarly, if *Appeal Case No. 18 of 2002* was determined in 2002, it would not automatically follow that time would start running from that date. The provisions of **section 7** are clear that time for purpose of limitation starts running from the date of **accrual** of the cause of action. It is, therefore, important to establish the date on which the Defendant’s alleged cause of action accrued.

9. In the opinion of the court, the Defendants’ cause of action may have accrued at the date when they were effectively deprived of the 750 acres of land they claim to belong to their Muya clan. The court has noted from the documents filed by the Defendants that they only annexed copies of certificates of official search for the various parcels in question. They did not file copies of the green cards which would have shown when the properties in issue were registered. Certified copies of the green cards would have demonstrated the history of registration with respect to the properties in issue. A copy of a title deed may show the current owner of a parcel of land but would not show its history. In the circumstances, the court is not satisfied that the question of limitation is suitable for determination as a preliminary objection in the instant suit. The first objection is accordingly overruled.

10. The second preliminary objection relates to *res judicata*. It was submitted by the Plaintiff that the counter-claim was *res judicata* because the Embu Land Disputes Tribunal (hereinafter the *Tribunal*) and the Eastern Provincial Land Disputes Appeals Committee (hereinafter the *Appeals Committee*) had conclusively determined the dispute between the parties herein. It was submitted that the said Tribunal and Appeals Committee were competent to determine the issues before them hence the Defendants were precluded from instituting the counterclaim.

11. The doctrine of *res judicata* is provided for in **section 7 of the Civil Procedure Act** as follows;

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

12. The court is far from satisfied that the “court” as defined in **section 2 of the Civil Procedure Act (Cap 21)** includes the Land Disputes Tribunal or the Appeals Committee under the provisions of the **Land Disputes Tribunals Act, 1990. Section 2 of the Civil Procedure Act (Cap 21)** defines court as follows;

“‘Court’ means the High Court, or a subordinate court, acting in the exercise of its civil jurisdiction”.

13. The court has noted that there is no material on record to demonstrate that the award of either the Land Disputes Tribunal or the Appeals Committee was ever adopted as a judgement by the Magistrate’s Court. In those circumstances, the court is not satisfied that the Plaintiff’s second objection meets the requirements of **section 7 of the Civil Procedure Act**. Accordingly, the second preliminary objection is also overruled by the court.

14. The upshot of the foregoing is that the court finds no merit in the Plaintiff’s notice of preliminary objection dated 13th February 2018 and the same is hereby dismissed. Costs shall be in the cause.

15. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22nd day of NOVEMBER, 2018.

In the presence of Mr Kamunda holding brief for Mr Ithiga for the Plaintiff and Ms Mutegi holding brief for Ms Rose Njeru for the Defendants.

Court clerk Muinde

Y.M. ANGIMA

JUDGE

22.11.18