



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 152 OF 2013

ALIMA ABDI MUTAI.....PLAINTIFF

VERSUS

GEOFFREY MUTAIDEFENDANT

RULING

1. When this suit came up before this court the third time for hearing on 22/8/2017, the court was informed that a Notice of Preliminary Objection dated 18/8/2017 had been filed by the defendant and served upon the plaintiff. The court then, opting to hear the substance of the preliminary objection, ordered the parties to file submissions on the same. The defendant filed his submissions on 22/9/2017 while the plaintiff filed his in reply on 24/10/2017.

2. The preliminary objection raises only one ground as follows:-

“That the instant suit is time-barred by the Limitation of Actions Act Cap 22 hence the suit is an abuse of the court process”.

3. The court notes that before this notice of preliminary objection was filed, a defence had been filed on 16/12/2013 which raised the same objection at paragraph 6.

4. In order to understand the preliminary objection better, a brief background to the suit is needed. The plaintiff filed on 7/11/2013 states that the plaintiff was a beneficiary of **10.5 acres** out of **LR. No. 5766** known as **Tulwet Farm** by virtue of her being the beneficiary of the Estate of the late **Joseph Malakwen Maina** (deceased).

5. The plaintiff states that on or about 26/7/2001 the plaintiff was confirmed as the beneficiary of **10.5 acres** out for **LR. No. 5706 in Kitale High Court Succession Case No. 149 of 1999** - In the matter of the Estate of the late **Joseph Malakwen Maina**. She was again confirmed as such in the Amended Certificate of Confirmation of Grant in the same Estate in the same Succession Cause on 26/3/2012.

6. The plaintiff avers that the defendant has taken possession of the 10.5 acres and is leasing it out, and her prayer is that the defendant be evicted from 10.5 acres out of LR. No.5766 and a permanent injunction do issue to restrain the defendant or his agents from the piece of land.

7. The defendant’s defence is quite elaborate but the focus of this court is upon the allegation of time bar. In the submissions dated 21/9/2017 the defendant avers that the **Limitation of Actions Act Cap 22** is very explicit at **Section 7** on the period within which a claim in land should be filed in court - **12 years**. The defendant avers that the plaintiff brought this suit without any order extending the time.

8. The defendant avers that he never purchased the 10.5 acres from **Joseph Malakwen Maina**, under whose estate the plaintiff claims as a beneficiary, but from one **Loboywa Arap Too** who was a shareholder of **Tulwet Farm LR. No. 5766**. As such, states the defendant, there is no privity whatsoever between the plaintiff as a beneficiary of that estate and the defendant. Further, the defendant claims that for the last **42 years and 8 months** he has been in exclusive possession/occupation of the said land. the defendant further states that notwithstanding the above, from the **26/7/2001** when the plaintiff was named a beneficiary she had 12 years to claim her perceived interest from the applicant and the 12 years statutory period provided or under **Section 7 of the Limitation of Action Act Cap 22 of the Laws of Kenya** expired on **25/7/2013** yet this suit was filed on **7/11/2013**. For those reasons the defendant urges this court to strike out this suit.

9. The plaintiff on the other hand states that there are several issues, including whether the defendant bought 10.5 acres from Liboywa and whether there was a suit between the plaintiff and the defendant filed in 1994 which can only be canvassed at the hearing of the substantive suit. The plaintiff cites the case of **Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors. 1969 EA 696**.

10. In my understanding a preliminary objection is argued, as stated in the Mukisa case, 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.

11. I have examined the plaint and the defence in this case. I agree as urged by the plaintiff that to ascertain some of the matters, forming the basis of the objection, this court would need evidence from the parties. Though there is no reply to defence my understanding of the law is that the matters raised in the defence are not necessarily admitted as the truth by the plaintiff since, according to the provisions of **Order 2 Rule 12 of the Civil Procedure Rules:-**

“If there is no reply to defence, there is a joinder of issue on that defence”.

12. This court cannot presume that the facts relied on in the defence are the gospel truth in view of this rule. The objection by the defendant cannot therefore, going by the judgment in the Mukisa Biscuits case, be considered a proper preliminary objection. It remains an objection in the suit nevertheless.

13. The upshot of the above is that the preliminary objection is dismissed. The suit shall proceed to substantive hearing on the merits. The costs of the preliminary objection shall be borne by the defendant.

Dated, signed and delivered at Kitale on this 30th day of October, 2017.

MWANGI NJOROGE

JUDGE

30/10/2017

Coram: before Mwangi Njoroge - Judge

Court Assistant – Isabellah/Picoty

Ms. Mufutu for the defendant

N/A for the plaintiff (plaintiff however, present)

COURT

Ruling read in open court in the presence of the plaintiff and counsel for the defendant.

MWANGI NJOROGE

JUDGE

30/10/2017