



Chelimo (Suing as the administrator of the Estate of Josiah Kandie Chelimo - Deceased) v Africa Inland Church of Kenya Trustees & 2 others (Environment & Land Case 67 of 2015) [2016] KEELC 1308 (KLR) (22 March 2016) (Ruling)

John Chelimo (suing as the administrator of the Estate of Josiah Kandie Chelimo (Deceased) v Africa Inland Church of Kenya Trustees & 2 others [2016] eKLR

Neutral citation: [2016] KEELC 1308 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 67 OF 2015**

**M SILA, J
MARCH 22, 2016**

BETWEEN

JOHN CHELIMO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOSIAH KANDIE CHELIMO - DECEASED) PLAINTIFF

AND

AFRICA INLAND CHURCH OF KENYA TRUSTEES & 2 OTHERS & 2 OTHERS & 2 OTHERS DEFENDANT

RULING

(Preliminary objection; parameters of a preliminary objection; contention that suit is time barred and plaintiff was wrongfully amended without leave; dispute of fact on when time started running making issue of time out of ambit of preliminary objection; not clear when pleadings closed; cannot be ascertained if leave was necessary to amend; preliminary objection dismissed).

1. This suit was commenced by way of plaintiff filed on 11 March 2015. In the original plaintiff, the 1st defendant is named as A.I.C Barut (Rhonda) whereas the 2nd and 3rd defendants are the Nakuru District Land Registrar and the Attorney General. The plaintiff has instituted this suit as the administrator of the estate of Josiah Kandie Chelimo (deceased).
2. In the plaintiff, it is pleaded that the plaintiff is the beneficial proprietor of the land parcel Miti Mingi Mbaruk Block 3/826 (Barut) measuring about 1.8 acres and which belongs to the deceased. It is pleaded that in the year 1985, the deceased bought 25 shares from a company known as Kalenjin Enterprises Limited, a land buying company, and he was issued with a share certificate. It is averred that in the year 1986, the deceased paid the requisite survey fees. However, he soon fell ill and owing to his



deteriorating health, he did not manage to follow up on the allocation and registration of the suit land in his name until he succumbed to his illness. It is pleaded that while the deceased was in poor health, the defendant took advantage and produced the deceased's share certificate before the committee of the company which rejected it. However, it is claimed that the defendant fraudulently acquired the title deed to the suit land and now occupies the same. In the suit, the plaintiff seeks a cancellation of the title of the 1st defendant, orders of eviction and a permanent injunction against the 1st defendant from the suit land.

3. On 2 April 2015, the 1st defendant entered appearance and filed a Preliminary Objection in the following terms:-
 1. That the suit is time barred under Section 7 of the *Limitation of Actions Act*, No. 21 of 1968.
 2. That the 1st defendant has no capacity to sue or be sued in its own name as it is not a legal personality.
 3. That the suit is brought in bad faith.
 4. That the suit is bad in law and should be dismissed in the first instance.
4. On 19 May 2015, a defence was filed vide which the 1st defendant refuted all the allegations in the plaint.
5. Shortly after this, an Amended Plaintiff was filed on 12 June 2015. The name of the 1st defendant was amended to read Africa Inland Church Kenya Trustees.
6. I gave directions that the Preliminary Objection be argued by way of written submissions and both parties filed submissions.
7. In his submissions, Mr. B.N. Kipkoech for the 1st defendant, submitted that the plaintiff proceeded to amend the plaint without leave of court. He submitted that under Order 8 Rule 3, leave must be sought before amendment of plaint after the close of pleadings. He pointed at Order 2 Rule 3 which provides that pleadings shall be closed 14 days after service of the reply to defence or defence to counterclaim or if neither is served, 14 days after the service of the defence. He submitted that the 1st defendant filed defence on 11 May 2015 and the same was served on 20 May 2015. He submitted that pleadings therefore closed on 3 June 2015. He submitted that the amended plaint was filed on 7 August (although the record shows 12 June 2015), which is after pleadings had closed. He submitted that the rule that leave must be sought is mandatory and relied on the case of *Cenriva Traders Ltd vs County Government of Trans Nzoia* (2014) eKLR where Justice Obaga held that the rule requiring leave to amend is fundamental and cannot be said to be just a procedural technicality. He further submitted that Section 7 of the *Limitation of Actions Act*, provides at Section 7 that an action may not be brought to recover land after 12 years from the date that the right of action accrued. He submitted that the 1st defendant got registered as proprietor on 9 August 1993 and has been in occupation since then. He submitted that the plaintiff's action is time barred. He relied on the case of *Lilian Njeri Muranja & John Muranja Mahinda vs Virginia Nyambura Ndiba & Kajiado County Government* (2014) eKLR.
8. He submitted that the amended plaint and the entire suit should be struck out.
9. Ms. Kipruto for the plaintiff submitted that the 1st defendant compromised his preliminary objection by filing a statement of defence in response to the amended plaint on 3 September 2015. It was argued that the 1st defendant waived his right to argue that the plaint had been filed without leave. It was submitted that even if the amended plaint, which was filed without leave is struck out, the original plaint will still stand.



10. On the question whether the suit is time barred, it was submitted that the plaintiff came to learn of the fraudulent deeds in the year 2014. It was submitted that it was not within the knowledge of the plaintiff that the defendant obtained title in the year 1993 until the year 2014 when he visited the property. She relied on Section 26 of the *Limitation of Actions Act* and submitted that time started running in the year 2014.
11. She further submitted that there are issues of fact which first need to be ascertained and this cannot be a proper preliminary objection. She relied on the case of *Oraro vs Mbaja and Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*.
12. In his oral submissions, Mr. Kipkoech submitted that assuming the plaintiff became aware of the alleged fraud in the year 2014, there is nothing on record to show this discovery. He submitted that the deceased died in the year 1998, 5 years after the 1st defendant acquired title. He wondered why the deceased never challenged the 1st defendant's title while he was still alive. He pointed out that people worship conspicuously.
13. In her oral submissions, Ms. Kipruto submitted that on the issue of amendment, pleadings had not closed and that the issue was compromised when the defendant filed a defence after the amended plaint. She again relied on Section 26 of the *Limitation of Actions Act* to resist the contention that the suit is time barred. She submitted that the issue of fraud which will be relied on is a question of fact.
14. I have considered the matter. What I have is a preliminary objection. As was stated in the case of *Mukisa Biscuit vs West End*, a preliminary objection needs to be a pure point of law. The court pronounced itself as follows :-

“So far as I may aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

15. It follows that the issue must be only on a point of law. Where there has to be a determination of facts then the issue cannot be raised as a preliminary objection and instead, one needs to file an application so that the parties can ventilate the facts by way of affidavits. This was well put by Ojwang J (as he then was) in the case of *Oraro vs Mbaja*, where the learned judge stated as follows :-

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

16. I am in agreement with the above dictum.
17. In our case, there are two broad issues raised through the preliminary objection. The first is that the amended plaint ought to be struck out as it was filed without leave. The second is that the suit is time barred owing to limitation of time.
18. In my view, the first issue is a true preliminary objection but I have doubts as to the second. Although limitation may be raised as a preliminary objection, in my view, it can only be raised as a preliminary objection if there is no factual contention of when time started or stopped running. Where there is a



factual contention, then the question of fact has to be determined and the issue will go beyond the parameters of a preliminary objection. For example, if a party sues under contract and the date of contract is not disputed, then it can be argued through a preliminary objection, whether or not the suit is within time. But if there is contention as to when the contract was made, then the date of contract becomes a question of fact which cannot be determined through the preliminary objection. In this case, it is said that the 1st defendant acquired title in the year 1993. It is also said that the deceased died in the year 1998. It is argued that the 1st defendant has been worshipping on the suit land since acquiring title and that worship is conspicuous. The plaintiff's counsel in addressing the preliminary objection stated that the plaintiff only became aware of the fraud in the year 2014 and that is when time should be deemed as having started running. All these are questions of fact and I have no affidavit to support them. Neither are they in the pleadings. Given the circumstances in this case, I do not think the issue of limitation can be argued as a preliminary objection.

19. I will only address the preliminary objection in so far as it touches on the competency of the plaintiff which to me is a pure point of law. As I mentioned earlier, the original plaintiff was filed on 11 March 2015. The 1st defendant was named as A.I.C Barut (Rhonda). A preliminary objection was raised that the 1st defendant as named has no legal capacity. It is probably mindful of this objection that the plaintiff filed the amended plaintiff on 12 June 2015. The question that arises is whether at this time, the pleadings had closed. This will fall under the interpretation of Order 2 rule 13 which is drawn as follows :-

The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.

20. The defence was filed on 19 May 2015. Pleadings would close 14 days after service of this defence, that is if there is no reply to defence, and in our case there is no reply to defence. Mr. Kipkoech submitted that the defence was served on 20 May 2015. Unfortunately, there is no affidavit of service to back this up, and in the face of the denial by Ms. Kipruto that pleadings had closed by the time the amended plaintiff was filed, I think an affidavit of service was necessary. Without the same, it will be unsafe to assume that the defence was served on 19 May 2015. I cannot therefore make the determination that the amended plaintiff was filed without leave after close of pleadings.
21. I have already stated that the issue of limitation cannot be addressed as a preliminary objection in the circumstances of this case, and I am unable to hold, in the absence of an affidavit of service, that the amended plaintiff was filed beyond 14 days of service of the defence. In the premises, I find no merit in the preliminary objection and it is dismissed with costs.
22. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 22ND DAY OF MARCH, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -



Mr. Gordon Ogolla for 1st defendant/applicant

Mr Mwalo holding brief for Ms. Caroline Kipruto for plaintiff/respondent.

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

