



**Mabwai v Mabwai (Environment & Land Case E048 of 2022)  
[2024] KEELC 719 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 719 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E048 OF 2022  
LA OMOLLO, J  
FEBRUARY 15, 2024**

**BETWEEN**

**SAMWEL KIPNGETICH MABWAI ..... PLAINTIFF**

**AND**

**JOSEPH KIPKEMOI MABWAI ..... DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the Defendant’s Preliminary Objection dated 6<sup>th</sup> February, 2023 which is on the following grounds:
  - a. That the entire suit offends the mandatory provisions of the *Land Registration Act*, 2012 of the Laws of Kenya.
  - b. That the entire suit offends Section 7 of the *Limitations of Actions Act*, Chapter 22 of the Laws of Kenya since the cause of action herein arose more than twenty-four (24) years ago when the transfer pertaining to and/or concerning the original parcel of land having taken place on the year 1995.
  - c. That the Plaintiff herein does not disclose any reasonable cause of action against the Defendant.
  - d. That the instant application constitutes and/or amounts to abuse of the court.

**Factual Background.**

2. The suit was commenced by way of a Plaintiff dated 25<sup>th</sup> July, 2022. The Plaintiff seeks the following prayers:
  - a. A declaration that land parcel number Elburgon/Elburgon Block 9 (Saptet)/ 20 is a family land comprising the estate of the late Jonathan Kimabwai Arap Cheroigin thus further declaring



that the registration, transfer and issuance of title deed in respect to land parcel number Elburgon/Elburgon Block 9 (Saptet)/ 20 in the Defendant's name is illegal, null and void.

- b. Any other relief that this Honourable Court may deem just and fit to grant.
- c. An award of costs.
3. The Defendant/Applicant filed his statement of defence on 27<sup>th</sup> October, 2022 wherein he stated his intention to raise a preliminary objection against the entire suit.
4. The Defendant's preliminary objection first came up for hearing on 4<sup>th</sup> July, 2023 and was adjourned to 17<sup>th</sup> July, 2023 with directions that the Defendant shall serve the objection upon the Plaintiff/ Respondent.
5. On 17<sup>th</sup> July, 2023, directions were issued that the Preliminary Objection shall be heard by way of written submissions.
6. On 25<sup>th</sup> October, 2023, the matter was reserved for ruling on 15<sup>th</sup> February, 2024.

### **Issues for Determination.**

7. The Defendant/Applicant filed submissions on 4<sup>th</sup> September, 2023 and identified the following issues for determination:
  - a. Do the issues raised by the Plaintiff in his plaint qualify as discoveries of 2019 yet the Plaintiff frustrated the succession process demanding to be the administrator for twenty- six (26) years and having admitted in his submissions in the Succession Court that the Defendant was not a beneficiary of the Kericho agricultural properties owing to having been settled in Elburgon?
  - b. Whether the entire suit offends Section 7 of the *Limitation of Actions Act*?
  - c. Does the Defendant occupation and public use of the land since 1984 confer him the adverse possession in law?
  - d. Who pays the costs of this suit?
8. The Defendant/Applicant submits that from the foregoing, this suit has been filed more than twenty-eight (28) years after the cause of action arose. He submits that at the time of registering this parcel in the Defendant's name, in 1995, the Plaintiff had the capacity to challenge his deceased father's decision to bequeath Elburgon/Elburgon Block 9 (Saptet)/ 20 to the Defendant.
9. He submits that the Defendant became the registered owner of Elburgon/Elburgon Block 9 (Saptet)/ 20 in 1995 with the knowledge and the express consent of his father Jonathan Kimabwai Arap Cheroigin (deceased) and all his family members including the Plaintiff, an issue that was raised in the succession proceedings, Kericho Succession HCC No 98 of 1984.
10. The Defendant/Applicant submits that this Preliminary Objection is purely on a point of law which has arisen from pleadings as filed by the Plaintiff. He submits that the Plaintiff allegation of a discovery in 2019 of fraud by the Defendant is a farce. He submits that since 1984, the Plaintiff has vehemently fought his mother and his siblings with a goal of taking the prime properties of the estate while well aware that the Defendant would not get any further share of the agricultural parcels in Kericho having been registered as the proprietor of Elburgon/Elburgon Block 9 (Saptet)/20.
11. The Defendant/Applicant submits that the Plaintiff is mischievous and has come to court with unclean hands. He submits that whereas he has had twenty-six years within which to raise issued on



- his bequest in Elburgon/Elburgon Block 9 (Saptet)/20 at the Succession Court in Kericho, he has chosen to misrepresent facts to this Honourable Court by alleging that he discovered, in 2019, that the Defendant was the registered owner of Elburgon/Elburgon Block 9 (Saptet)/20.
12. The Defendant/Applicant submits that the Plaintiff wants to use the court process to validate a suit that is time barred hence incompetent and bad in law. He further submits that it is noteworthy that the succession cause in Kericho was filed in a court of concurrent jurisdiction.
  13. He submits that the Plaintiff is an Administrator in the estate of his deceased father, who in 1994 consented to the Defendant being registered as the sole proprietor of Elburgon/Elburgon Block 9 (Saptet)/20.
  14. The Defendant/Applicant submits that the Plaintiff made numerous application in the succession cause in Kericho during the twenty-six years he fought to be the Administrator. The Defendant/Applicant questions why he chooses to file a suit after the succession process. He submits that the Plaintiff should have sought a rectification of the grant in the High Court in Kericho and pursue his claim for Elburgon/Elburgon Block 9 (Saptet)/20.
  15. The Defendant/Applicant submits that the Plaintiff is a vexatious and insincere litigant whose sole purpose is not to administer, distribute and transmit the estate of the deceased, but is intent (through spurious litigation) to delay the process and complicate the transmission to the detriment of the beneficiaries. He submits that this must be stopped forthwith by finding that the suit is barred by the law of limitation.
  16. The Defendant further submits that the Defendant has satisfied the principles set out in the judicial decision of *Avtar Singh Bhamra & Anr v Orient Commercial Bank* HCC No 53 of 2004. The Defendant relies on Section 7 of the [Limitation of Actions Act](#) and the judicial decision of [Dickson Ngige Ngugi v Consolidated Bank Ltd \(Formerly Jimba Credit Corporation Limited\) & Another](#) [2020] eKLR.
  17. The Defendant/Applicant submits that in the present suit, the cause of action arose twenty-eight years ago and the Plaintiff has been aware for that long hence the same is time barred and the same ought to be dismissed with costs.
  18. The Defendant/Applicant submits that the said parcel of land was transferred in 1995 and the defendant has been in occupation since then with the knowledge of all family members. The Defendant/Applicant submits that no suits and or claims were ever filed by the Plaintiff within the mandatory twelve years after the cause of action arose in 1994. The Defendant/Applicant relies on the principles set out in the judicial decision of *Mukisa Biscuit Manufacturing Limited v West End Distributors* [1969] EA 696.
  19. The Defendant/Applicant submits that the Plaintiff has come to court with unclean hands by choosing to omit and failing to disclose vital information to the Court. He submits that he who seeks equity must come to court with clean hands and not conceal any information. He avers that the Plaintiff's suit is barred by the limitation hence his claims are bad and barred in law therefore by dint of the operation of the law, the court cannot grant the reliefs sought. The Defendant relies on the judicial decision of [Sobanlaldurgadass Raiput & another v Divisional Integrated Development Programmes Co Ltd](#) [2021] eKLR.
  20. It is the Defendant/Applicant's submission that the suit is time barred therefore frivolous and is an abuse of the court process. He submits that being time barred the court lacks the jurisdiction to hear and determine this case. The Defendant/Applicant relies on the judicial decisions of [Bosire Ongero v](#)



Royal Media Services [2015] eKLR, Mebta v Shah [1965] EA 321 and Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104.

21. The Defendant/Applicant submits that regardless of the alleged discovery in 2019 by the Plaintiff, the Defendant has occupied, used, developed and procured the title deed of Elburgon/Elburgon Block 9 (Saptet)/20 with the full knowledge of his siblings and the public since 1984.
22. The Defendant/Applicant submits that the Limitation Act offers him the latitude to invoke the principle of adverse possession over Elburgon/Elburgon Block 9 (Saptet)/20 and he relied on the judicial authority of Kasuve v Mwaani Investments Limited & 4others 1 KLR 184
23. The Defendant/Applicant submits that the Plaintiff in his plaint claims that he discovered the fraud in 2019 and yet has not put himself within the limitation period as provided for in the Limitation of Actions Act 2012. He submits that the Plaintiff has failed to disclose to the Honourable Court that he was already aware that Elburgon/Elburgon Block 9 (Saptet)/20 belonged to his brother and the Defendant herein; who has had possession of the land since 1984 and was issued with the land title deed in his name since 1995. He submits that due to this knowledge, the Defendant was not included in the distribution of the agricultural parcels of land situated in Kericho as the Defendant was already the beneficiary and owner of Elburgon/Elburgon Block 9 (Saptet)/20.
24. The Defendant/Applicant submits that the entire family and the clan of Jonathan Kimabwai Arap Cheroigin (deceased) were aware of their deceased father's consent to the Defendant to occupy and have title deed of Elburgon/Elburgon Block 9 (Saptet)/20 registered in the Defendant. He submits that when succession was filed in Kericho High Court Succession Cause No 98 of 1994, Elburgon/Elburgon Block 9 (Saptet) was not included as part of the assets and estate of Jonathan Kimabwai Arap Cheroigin for the sole reason that all beneficiaries of the estate of Jonathan Kimabwai Arap Cheroigin were aware that Defendant had already benefited from that portion of land known and referred to as Elburgon/Elburgon Block 9 (Saptet)/20 measuring 11.95 hectares.
25. The Defendant/Applicant submits that the Plaintiff in his submission and the distribution schedule dated 16<sup>th</sup> July, 2019 acknowledged the Defendant's ownership of Elburgon/Elburgon Block 9 (Saptet) hence the Plaintiff did not provide the Defendant with any agricultural land within Kericho. He submits that further, the family held a meeting on 18<sup>th</sup> July, 2019 wherein the family came up with a proposed mode of distribution, whose minutes were filed in Court on 7<sup>th</sup> August, 2019 and it was clearly stated that Elburgon/Elburgon Block 9 (Saptet)/20 is under the Defendant herein Joseph Kipkemoi Mabwai.
26. He submits that the then Judge while appointing the Plaintiff as the Administrator of the estate of his deceased father, gave his ruling on 12<sup>th</sup> March, 2020 wherein he clearly stated that the proposed mode of distribution of assets proposed by the protestor (who is now the Defendant in this case) came closer to a mode of distribution that is in accordance with the succession laws.
27. The Defendant/Applicant submits that there were no discoveries in 2019 but the Plaintiff was fully aware that the Defendant has been occupying Elburgon/Elburgon Block 9 (Saptet)/20 since 1984 and had been issued with a title deed in 1995. He submits that the Plaintiff's allegations that he discovered about the transfer in 2019 are false because their father Jonathan Kimabwai Arap Cheroigin (deceased) gave his consent in his lifetime and the whole family including the Plaintiff were aware and the officials of Saptet Company Limited were involved in the transfer process.
28. The Defendant/Applicant prays to the Honourable Court that the Plaintiff be compelled to pay costs as a deterrent to his frivolous, vexatious and claims that do not meet the standards set by the law



and or disclose any meaningful cause of action and or cannot be entertained by the courts for lack of jurisdiction owing to limitation by the statutes.

29. The Defendant/Applicant urges the Honourable Court to find that the cause of action arose in 1995 when the Defendant was issued with the title deed and that the suit herein is intended to hoodwink the Honourable Court for orders that are barred by statute.
30. The Defendant/Applicant submits that the Plaintiff is on a hunting spree for what he lost in the succession court and should this suit succeed, it shall open a Pandora box of spurious and fictitious claims wishing to offset status quo on land that has been existent under adverse periods. He prayed that the Preliminary Objection dated 6<sup>th</sup> February, 2022 be allowed and the entire suit be dismissed with costs.
31. The Plaintiff/Respondent filed submissions on 26<sup>th</sup> October, 2023.
32. He submits that the Defendant has filed a Notice of Preliminary Objection before pleadings closed which is before filing his defence or on his part, filing a reply to the Defendant's defence.
33. The Plaintiff/Respondent submits that directions are yet to be taken and it was incumbent upon the Defendant to file a formal application so that the Plaintiff can know what the Defendant is seeking in his preliminary objection. He submits that it is not discernable from the grounds listed in the notice of preliminary objection what the Defendant is seeking. He submits that the Plaintiff is at a loss as to whether the Defendant is seeking for dismissal or striking out of the Plaintiff's suit.
34. He submits that no suit can be dismissed before it is heard and the Defendant's Preliminary Objection is misplaced and ought to be dismissed with costs to the Plaintiff. The Plaintiff/Respondent submits that striking out pleadings is draconian.
35. The Plaintiff/Respondent submits that the suit is in a state where it is not possible for the Defendant to state precisely on the issue of a declaratory suit, Limitations of Actions or even the issue of adverse possession wherein he has not even counterclaimed.
36. He submits that adverse possession does not apply in a case of relatives wherein in this case the parties are siblings. He submits that the Defendant has admitted that their father Jonathan Kimabwai Arap Cheroigin did place him in possession.
37. The Plaintiff/Respondent submits that the laws governing procedure has provisions for amendment of pleadings and he relies on Order 8 of the *Civil Procedure Rules*, 2010. He submits that a suit ought not be dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action.
38. The Plaintiff/Respondent submits that his suit raises triable issues and is praying that he be given his day in court. He further submits that from the issues that have been framed by the Defendant, it is not clear if he wants the Plaintiff's suit dismissed because he has acquired land parcel Elburgon/Elburgon/Block 9 (Saptet)/20 through adverse possession yet he admits to be family land whilst on the flipside it is quite ridiculous to note that he acquired title to the same on 6<sup>th</sup> October, 1995.
39. He submits that he has been caught up with limitations of actions even though the Plaintiff's claim is a case of declaratory suit. He submits that the averment touching on fraud which the Plaintiff has stated to have discovered in the year 2019 and the prayers contained in the plaint can be distinguished.
40. The Plaintiff/Respondent relies on the judicial decision of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA and submits that though the Defendant/Applicant has cited the



Mukisa case in his submission, owing to the reasons cited above, the said authority does not apply in the subject matter.

41. He submits that the Defendant in his Notice of Preliminary Objection is relying on Section 7 of the Law of *Limitation of Actions Act*, Chapter 22 that is adverse possession which does not apply in family land whereas the Plaintiff's suit is on a declaratory suit touching on family land.
42. The Plaintiff/Respondent relies on the judicial authorities of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* Homabay HCCA No E055 of 2021, *Simon Kirima Muguri & Another v Equity Bank (Kenya) Limited & Another* Kajiado HCCC No E004 of 2020 and *Peter Okochi Oloo v Justus Magina Wanyama* Busia ELC No 113 of 2016 (O.S).
43. The Plaintiff/Respondent urges that the Defendant's Preliminary Objection be dismissed with costs to the Plaintiff.

### **Analysis and Determination.**

44. After considering the Defendant's/Applicant's preliminary objection and the submissions by both the Defendant/Applicant and the Plaintiff/Respondent, the only issue that arises for determination is whether the preliminary objection dated 6<sup>th</sup> February, 2023 has merit.
45. As can be read from the submissions by the Defendant, numerous factual issues have been raised. These range from proceedings in a succession cause in Kericho, knowledge of certain facts by family members, date and mode of acquisition of the suit property etc.
46. This court has not had opportunity to hear from persons mentioned by the applicant or opportunity to interrogate documents and peruse the proceedings referred to. A logical and legal determination of this dispute requires a hearing. A hearing takes time and might even be seen as time wasting but there are no shortcuts to justice.
47. In the judicial decision of *Oraro v Mbaja* 2005 1 KLR 141 the court held thus:

“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 process of evidence. Any assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seek 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.” (Emphasis mine)
48. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. Further, a preliminary objection must stem from the proceedings and raise pure points of law and should not deal with disputed facts nor should it derive its foundation from factual information.
49. The Defendant/Applicant in his preliminary objection contends that the entire suit offends Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya since the cause of action herein arose more than twenty-four (24) years ago when the transfer pertaining to and/or concerning the original parcel of land having taken place on the year 1995.



50. Section 7 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya provides:

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.

51. On the question whether an issue of limitation of time can be raised through a preliminary objection, the court in the judicial decision of *Sichuan Huasbi Enterprises Corp. Limited v Micheal Misiko Muhindi* [2019] eKLR at paragraph 13 and 14 stated thus;

The law as I understand it is that the defence of limitation of time is a matter for determination at the trial; it cannot be dealt with in a summary manner or at preliminary stage or as a preliminary objection. The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. (Emphasis Mine) On this see the case of *Oruta & Another v Nyamato* [1998] KLR 590, where the court held that limitation of action:-

”... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial”

See also the case of *Divecon Ltd v Shirinkhanu S. Samani* Civil Appeal No. 142 Of 1997, where the court quoted with approval the words of Gachuhi, JA, the leading judge in the Oruta case (ibid) that:

‘It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the *Limitation of Actions Act*...’(Emphasis is mine)

### **Disposition.**

52. The question of limitation of actions should not be raised by way of a preliminary objection for the reason that it requires interrogation of evidence.

53. Consequently, I find the Defendant’s/Applicant’s preliminary objection dated 6<sup>th</sup> February, 2023 lacks merit and is hereby dismissed with costs.

54. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. A. OMOLLO**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

Court Assistant; Ms. Monica Wanjohi.

