



**Rotich (Suing on their Behalf and on Behalf of Kabarbet Community Dispensary Self Help Group) v Management Committee, Kabarbet Primary School & another; County Government of Baringo (Interested Party) (Environment & Land Case 004 of 2023) [2024] KEELC 1459 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1459 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KABARNET  
ENVIRONMENT & LAND CASE 004 OF 2023**

**L WAITHAKA, J**

**MARCH 12, 2024**

**BETWEEN**

**GIDEON CHEBII JONATHAN ROTICH (SUING ON THEIR BEHALF AND ON BEHALF OF KABARBET COMMUNITY DISPENSARY SELF HELP GROUP) ..... PLAINTIFF**

**AND**

**THE MANAGEMENT COMMITTEE, KABARBET PRIMARY SCHOOL ..... 1<sup>ST</sup> DEFENDANT**

**THE MANAGEMENT COMMITTEE KABARBET NURSERY SCHOOL ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE COUNTY GOVERNMENT OF BARINGO ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of the notice of preliminary objection filed by the defendants on 27<sup>th</sup> November 2023 seeking to strike out and/or dismiss the plaintiffs’ suit with costs on the grounds:-
  - i. That the plaintiffs’ claim is statute barred;
  - ii. That this court lacks jurisdiction to hear and determine the issues raised in the suit. In particular, it is contended that the suit raises issues of historical injustices that fall within the remit of the National Land Commission;
  - iii. The suit offends the mandatory provisions of order 4 rule 1(3) of the CPR, 2010.



2. Pursuant to directions given on 28<sup>th</sup> November, 2023 that the preliminary objection be disposed off by written submissions, parties filed submissions which I have read and considered.

### Submissions

3. From the grounds taken up in support of the preliminary objection and the submissions, the issues for the court's determination are:-
  - i. Whether the plaintiffs' suit is statute barred;
  - ii. Whether this court has jurisdiction to hear and determine the issues raised in the suit; and
  - iii. Whether the plaintiffs' suit is bad in law.
4. On whether the plaintiffs' suit is statute barred, the defendants have made reference to Section 7 of the Limitation of Actions Act (LAA), Cap 22 Laws of Kenya, a number of legal authorities on the effect of time bar on suits and some facts appearing in the plaintiffs' suit suggesting that the plaintiffs had an agreement with the Government which agreement was effected in 1991 and submitted that based on Section 7 of LAA, the plaintiffs' ought to have brought their claim for recovery of the suit property based on that agreement or arrangement within 12 years as provided under the LAA.
5. It is the defendants case that the plaintiffs' failure to bring action for recovery of the two acres of land they are claiming within the time provided by law, in particular Section 7 of the LAA made the remedies sought incapable of being issued in their favour.
6. On their part, the plaintiffs have submitted that the suit property is not time barred as their claim is based on pleaded trust and that the cause of action arose either in 2012 and/or 2017 or thereabout when the defendants failed to cede the two acres out of the suit property which they claim for the projects they wanted to be undertaken on the suit property. It is the plaintiff's case that the cause of action arose in 2017 when as beneficiaries of the suit property, they requested the trustee to terminate the trust in 2017.
7. I have carefully read and considered the pleadings filed by the parties and the law applicable. The pleadings show that the plaintiffs' claim is based on the allegation that the suit property to wit Baringo/ Pemwai/250 which is registered in the name of the interested party as a trustee, is subject of a trust in their favour to the extent of 2 acres.
8. The question as to whether the suit property is subject of a trust in favour of the plaintiffs or the self help group which the plaintiffs' allegedly represent is in contention and is a question of fact. As such, it requires evidence to determine. In that regard see the case of Kazungu Fondo Shutu & Another v Japhet Noti Charo & Another [2021] eKLR, where it was stated;-

“ As earlier stated, the existence of a trust is a question of evidence .....”
9. Since a preliminary objection cannot be taken up based on disputed or contentious questions of fact, I find the claim that the plaintiffs' suit is statute barred to be unsustainable as it raised a question of fact for which evidence is required to prove or disprove hence not a proper candidate of preliminary objection.
10. On whether this court has jurisdiction to hear and determine the issues raised in the suit, the defendants further argue/contend that the plaintiffs' suit is premised on alleged historical injustices which this court lacks jurisdiction to hear and determine in the first instance. According to the defendants, the alleged historical injustice in allocation of the suit property ought to have been raised with the National



Land Commission which has both constitutional and legal mandate to hear and determine issues relating to historical injustices.

11. In response, the plaintiffs have submitted that their claim is not based on historical injustices but on trust which the defendants have failed to determine upon being requested to do so.
12. Whilst in their pleadings, plaint and response to defence, the plaintiffs' have alluded to historical injustices meted on them by the Colonial Government by forcefully acquiring their land and converting it to a forest, Katimok Forest, it is clear from the totality of the plaintiff's pleaded case that their case is premised on alleged trust created over 2 acres held by the defendants. For that reason, I find and hold that the defendants' claim that the plaintiffs' claim is one for historical injustices that should be addressed by the National Land Commission as opposed to this court has not been substantiated or proven. It cannot, therefore, form a ground for striking out or dismissing the plaintiffs' suit as this court is the one clothed with constitutional and legal mandate to determine whether or not the suit property is subject to any trust in favour of the plaintiffs.
13. As to whether the plaintiffs' suit is bad in law for offending the provisions of Order 4 rule 1(3) of the *Civil Procedure Rules*, it is submitted that there is no evidence tendered before the court and/or in the plaintiffs' pleadings to confirm that the plaintiffs are either members or registered officials of Kabarbet Community Dispensary Self Help Group or that they have been authorized by the said self help group to file the instant suit. Based on the decisions in the cases of *KCB Ltd v Stage Coach Management Ltd* (2014)eKLR; *Kipsiwo Community Self Help Group v Attorney General & 6 others* [2013]eKLR, the court is urged to find that there is no evidence to show that the plaintiffs have the mandate to sue on behalf of Kabarbet Community Dispensary Self Help Group or that the alleged 80 or so members of the self help group are guarantors of the entity or that the plaintiffs are directors or officials of the self help group.
14. In a rejoinder, the plaintiffs have made reference to order 4 rule 1(3) of the Civil Procedure Rules cited by the defendants and submitted that they complied with that provision of the law by attaching the authority of Gideon Chebii to the plaint. Terming the objection on that ground unfounded and an afterthought, the plaintiffs point out that the suit was not filed in the name of Kabarbet Dispensary but through its officials. It is submitted, that even if the suit was filed without the authority of the officials of the self help group, the omission is not fatal as it is a mere technicality that is curable under Article 159(2)(d) of the *Constitution*.
15. It is reiterated that the defendants' preliminary objection does not raise pure points of law but issues of fact that require to be ascertained and/or require exercise of the court's discretion hence not properly raised.
16. The plaintiffs urge the court to dismiss the Preliminary Objection with costs to them.
17. In determining this issue, I begin by pointing out that in his submissions concerning the issue as to whether or not the plaintiffs' suit offends the provisions of Order 4 rule 1(3) of the *Civil Procedure Rules*, the defendants have intimated that evidence is required to prove or disprove the issues they have hinged their preliminary objection on. They argue that the plaintiffs have not demonstrated that they are officials of the self help group and/or whether they have authority from the self help group to sue on its behalf. Clearly, the issues raised by the defendants raise germane questions of law but I agree with the plaintiffs' that since evidence is required to determine those issues, the objection is not properly hinged. Unlike in the cases cited by the defendants where the suits were instituted in the name of self help group, in the instant case, the suit is indicated to have been instituted by the plaintiffs in their own behalf and on behalf of the self help group.



18. Other than mentioning the self help group, there is no indication that the self help group is a party to the suit. The parties in the suit are identifiable; they are Gideon Chebii and Jonathan Chebii.
19. Being of the view that any defect in the suit is curable under Article 159(2)(d) of the *Constitution* and cognizance of the duty of this court to sustain suits, unless they are hopeless and incapable of being curable by amendment, I decline to strike out the suit or dismiss it.
20. Regarding costs of the preliminary objection, I order that they shall abide the outcome of the suit.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH, 2024.**

**L. N. WAITHAKA**

**JUDGE**

**In the presence of:**

Mr. M. K. Chebii for the Plaintiff

Ms. Odeyo for the Defendants

Ms. Koimugul for the Interested Party

