



REPUBLIC OF KENYA



Otsyula (Suing as the Administrator of the Estate of Martha Kavesa Busu) & another v Masizah (Civil Appeal 53 of 2018) [2022] KECA 1146 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1146 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 53 OF 2018
PO KIAGE, M NGUGI & F TUIYOTT, JJA
OCTOBER 21, 2022**

BETWEEN

MARY V B OTSYULA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF MARTHA KAVESA BUSU) 1ST APPELLANT

BENISA KAZIGA BUSU 2ND APPELLANT

AND

ZIPPY BUSU MASIZAH RESPONDENT

(An appeal from the Ruling of the Environment and Land Court of Kenya at Kakamega (Matheka, J) dated 23rd November, 2017 in ELC Case No 21 of 2015)

JUDGMENT

JUDGMENT OF KIAGE,JA

1. By a ruling delivered on November 23, 2017, Matheka, J struck out the appellants' suit on a preliminary objection on the basis that the suit was for recovery of land and having been instituted 12 years after the cause of action, it was time barred pursuant to section 7 of the *Limitation of Actions Act*, chapter 22 of the laws of Kenya.
2. The appellants had filed a suit at the Environment and Land Court against the respondent seeking orders; nullifying the registration of title in favour of the defendant and directing the Land Registrar, Vihiga County, to register all that parcel of land known as N/Maragoli/Kisatiru/858 in the name of the estate of the late Martha Kaveza Busu (the parties' mother).
3. It is to that suit that the respondent raised a preliminary objection asserting that the appellants' claim was statutorily time barred, bad in law, incompetent, a gross abuse of the due process of the court and should be dismissed with costs. The respondent contended that the claim was statute barred because



it was instituted after 19 years yet, being a suit for recovery of land, it ought to have been lodged within 12 years.

4. The appellants resisted the preliminary objection, submitting that their claim was based on customary trust which was not statute barred. Further, there was fraud involved and it could only be established once discovered.
5. As afore-stated, Matheka, J allowed the preliminary objection. That decision aggrieved the appellants who by their memorandum of appeal complain that the learned judge erred by;
 - a. Referring to the plaint whereas there was an amended plaint on record, thereby arriving at a wrong decision.
 - b. Finding that the suit was one for recovery of land whereas it was one for the rights arising out of customary trust.
 - c. Failing to consider that the defendant did not have occupation on the suit land.
 - d. Failing to appreciate the fact that the 2nd plaintiff had enjoyed occupation for a period exceeding 12 years.
 - e. Failing to consider the provisions of section 27 of the Land Registration Act No 3 of 2012.
6. In the end, the appellants beseech this court to set aside the decision of the learned judge and reinstate the suit for trial.
7. During the hearing of the appeal, learned counsel Mr Martim appeared for the appellants while Ms Shimoli appeared for the respondent. Both parties had filed written submissions which they relied on.
8. Mr Martim highlighted two salient features of his submissions viz; the primary suit was dismissed on a preliminary objection which was not merited, and the court failed to pay regard to the amended plaint which introduced the concept of customary trust. Counsel briefly drew our attention to the origin of the dispute, asserting that customary trust is not statute barred. In this respect, he cited section 28 of the Land Registration Act, No 3 of 2012 and section 20 of the Limitation of Actions Act. Section 28 of the Land Registration Act provides;

"28. Overriding interests."

9. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register: -

- a. ...
- b. trusts including customary trusts;
[...]"

10. Section 20 of the Limitation of Actions Act states;

"20. Actions concerning trust property

- (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action—



- a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.
- (2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:
- Provided that the right of action does not accrue to a beneficiary entitled to a future interest in the trust property, until the interest falls into possession.
- (3) A beneficiary against whom there would be a good defence under this Act may not derive a greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence”.

11. Mr Martim further contended that the principles to be considered in determining preliminary objections as outlined in *Mukisa Biscuit Manufacturing Co Ltd vs West-end Distributors Limited* [1969] EA 696, and *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 others* [2015] eKLR were misapplied by the learned judge.
12. In opposition to the appeal, the firm of Shitsama & Co Advocates proposed 3 issues for our determination namely; whether the learned Judge misdirected herself in making reference to the plaint while there was an amended plaint duly filed, whether she applied the right principles in allowing the preliminary objection, and whether the court properly applied the principles under section 27 of the *Land Registration Act*.
13. Counsel insisted that the learned judge did refer to the amended plaint and more specifically on the issue of customary trust, and she therefore did not misdirect herself in allowing the preliminary objection. As to whether the learned Judge applied the right principles in allowing the preliminary objection, counsel drew our attention to two leading authorities on preliminary objections. In *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696, Law JA and Newbold P (with whom both Duffus V-P agreed), respectively at 700 and 701, opined as follows:

Law, JA:

“So far as I am aware, a preliminary objection consists of a pure 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. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Newbold, P:

“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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

14. More recently, the Supreme Court reiterated the above position in *Hassan Ali Joho & another v Suleiman Said Shabbal & 2 others* [2014] eKLR, stating;

“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 was further argued that since the trial court was called upon to deliberate whether the suit was time barred by dint of section 7 of the *Limitation of Actions Act*, it was not under a duty to delve into the merits of the case. Ironically, soon after counsel made this assertion, he proceeded to argue the case on its merits, contending that the appellants ought to have established that during their mother’s lifetime, she had raised issue with the registration of the suit property in the name of the respondent. Moreover, it was submitted that the appellants’ reliance on section 27 of the *Land Registration Act* does not aid them since the court was not being called upon to inquire into the merits of the suit, but to only consider whether the notice of preliminary objection was capable of disposing of the entire suit. In the end the respondent urged us to dismiss the appeal with costs.
16. I think the single substantive question before us is whether the learned Judge erred by striking out the primary suit in a preliminary objection. The appellants fault the learned judge for failing to consider their amended plaint which raised the issue of a customary trust, thereby arriving at a wrong decision. They urge that had the learned Judge examined the amended plaint, she would have realised that the claim in the suit was premised on customary trust which is not time barred by the Statute of Limitations. On the other hand, the respondent maintains that the learned judge did consider the amended plaint and the issue of customary trust in arriving at her decision, which she deems as proper.
17. A review of the trial court judgment indeed reveals that the learned judge struck out the suit on the one ground of it being time barred under section 7 of the *Limitation of Actions Act*, having concluded that the suit was for recovery of land.
18. With respect, as rightly submitted by the appellants, it is quite obvious from the judgment that the learned Judge did not consider their amended plaint on record. Not only is any reference to the ‘amended plaint’ lacking in the entire judgement, there is also no mention of the claim on customary trust, yet it was pleaded and particularised by the appellants.
19. I agree with the appellants that the preliminary objection was inappropriate in the circumstances and the learned judge erred in allowing it. Besides the fact that claims by a beneficiary to recover trust land from a trustee are not time barred, both parties distinctly laid out the principles to be considered by a court in examining a preliminary objection as cited in various decisions, key among them the holding of the Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Co Ltd (supra)*. A preliminary objection consists of a pure point of law which, if allowed can dispose of the entire suit without parties making their arguments. It is dealt with on the basis of certain facts being agreed on or otherwise settled. This cannot be said to have been the case in the instant matter where there were facts in issue that were contested and yet to be ascertained. In the end, the learned judge’s holding ought not to stand, for being plainly wrong.
20. In the result, I would allow the appeal with costs, set aside the impugned ruling and substitute therefor an order dismissing the preliminary objection. I would order that the suit be set down for hearing before a judge of the Environment and Land Court, other than Matheka, J



21. As Mumbi Ngugi and Tuiyott, JJA agree, it is so ordered.

Judgment of Mumbi Ngugi JA

1. I have had the advantage of reading in draft, the judgment of my brother Kiage, JA with which I am in agreement and have nothing useful to add.

Judgment of Tuiyott, JA

1. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR.

