IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KIAGE, JJ.A.)

CIVIL APPEAL NO 109 OF 2018

BETWEEN

KIGWOR COMPANY LIMITED.....APPELLANT

VERSUS

SAMEDY TRADING COMPANY LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and Orders of the Environment & Land Court at Nairobi (K. Bor, J.) delivered on 14th December 2017

in

E.L.C. No. 295 of 2017)

****

JUDGMENT OF THE COURT

1. This is an appeal against the Ruling and Order of the Environment and Land Court (ELC) at Nairobi, dated and delivered on 14th December, 2017 (K. Bor J.) whereby the learned Judge dismissed the Preliminary Objection filed by the appellant.

2. The genesis of this appeal is that **Samedy Trading Company Limited (the respondent)** moved the court on 28th April, 2017 vide an undated plaint in which it claimed several orders as against **Kigwor Company Limited (the appellant)**. Contemporaneously, it filed an application under certificate of urgency seeking a declaration that Land Parcel **L.R No. 4144** (the suit land) belongs to it; a permanent injunction restraining the appellant from interfering with the suit land and damages for trespass, and mesne profits.

3. According to the respondent, its predecessor (Samedy Trading Company) applied and was allocated L.R No. 4144 by the Commissioner of Lands. They paid the requisite charges and were issued with a Title Deed on 31st December, 2012. The respondent averred that they immediately took possession and fenced the property and in 2014 applied for sub-division which was approved and two new titles issued; L.R No. 4144/1 and 4144/2.

4. The respondent contended that on 30th December, 2014 a group of people invaded the suit property and upon inquiry they became hostile. The respondent, through its director decided to report the matter at Spring Valley police station vide O.B Number 34/30/12/2014 after which the invaders were locked up and released upon pleading for forgiveness and leniency from the respondent.

5. The respondent was advised to report the matter to Criminal Investigations Department Headquarters along Kiambu road, which it did and also surrendered all documents pertaining to the suit land.

6. The respondent averred that in May 2015, it was summoned by the DCI headquarters and was informed that the appellant was claiming ownership of the suit land and on 17th February, 2017 it learnt that the appellant had through its agents invaded the suit land and cut trees, uprooted nappier grass and removed a previous “NOT FOR SALE” sign erected by the respondent.

7. The appellant opposed the application through grounds of opposition dated 25th May, 2017. The grounds relied on were that the matter was statute barred as it was filed 21 years after the appellant’s title deed was issued.

8. According to the appellant, it was the bona fide registered owner of the suit land having been issued with the Title deed to the suit land on 27th May, 1996. That it had enjoyed quiet possession for 21 years and had always paid rates to the relevant authority.

9. The appellant averred that both the suit and application were premised on documents which the Directorate of Criminal Investigations had apparently subjected to investigations and confirmed to be forgeries. This had culminated to criminal proceedings brought against the director of the respondent in Criminal Case No. 2070 of 2015 over the acquisition of the suit land.

10. The appellant added that the Nairobi County Government (formerly Nairobi City Council) recognized it as the owner of the suit property as it had instituted a civil suit against Nairobi County for recovery of rates in Civil Suit No. 5 of 2011. There had also been various suits over payment of rates on the suit land, in all of which the respondent did not feature.

11. In its replying affidavit to the application, the appellant repeated the narration in the grounds of opposition adding that the letter of allotment relied on by the respondent, dated 6th July, 1993 stipulated that payments were to be made within 30 days failure to which the offer would lapse, hence payment having been made on 29th March, 1994 (9 months later) the offer had lapsed and there was nothing to be accepted.

12. The appellant contended that the respondent was issued with a title, 16 years after it had received its own title and that the suit was statute barred having been filed 21 years without leave of the court after the appellant received its title documents.

13. The appellant averred that in December 2014, the respondent's agents forcefully entered the suit land and were repulsed by the appellant's agents and upon inquiry, the appellant discovered that the respondent was laying a claim on the suit land using a forged certificate of incorporation. It contended that the Director of Survey had since cancelled the sub-divisions of the suit land vide a letter dated 17th May, 2017 initiated by the respondent.

14. The respondent filed a supplementary affidavit opposing the contents of the replying affidavit and averred that the appellant had not demonstrated by producing an allotment letter that it had been indeed allotted the suit land. It also contended that in the criminal proceedings, the appellant produced documents of acceptance of allotment and approval for registration of Land Parcel Number 130/1/1/1 and not the suit land which is LR No. 4144.

15. According to the respondent, the Directorate of Criminal Investigations did not have power to declare the respondent's documents fraudulent and could only give an opinion. Also, that there was no evidence that the appellant had been in occupation on the suit land for 21 years and it was not true that the respondent was repulsed by the appellant's agents.

16. Lastly, the respondent contended that there was nothing wrong with late payment of the dues set out in the allotment letter as long as the same were accepted and a title issued thereafter.

17. The appellant filed a defence and counter – claim largely reiterating the contents of the replying affidavit and the grounds of opposition. In the counter- claim it set out particulars of fraud and forgery by the respondent which included obtaining a false letter of allotment, fraudulently obtaining title to the suit land, fraudulently sub dividing the suit land, fraudulently registering a parallel company trading in the name of the appellant and fraudulently altering the directorship of the appellant company at the Companies registry.

18. As a result, the appellant was seeking a declaration that it was the *bona fide* owner of the suit land; a declaration that the appellant is entitled to exclusive and unimpeded right of possession and occupation; a declaration that the respondent's purported title and subsequent subdivisions were fraudulent and should be expunged from the Land registry and a permanent injunction restraining the respondent from interfering with the suit land.

19. On 26th July, 2017 the matter was mentioned in court and parties were to take directions for the application dated 27th April, 2017. Counsel for appellant objected and said that there was no suit before the court by dint of the Limitation of Actions Act. He opined that the court first determines whether the suit was time barred. The matter was slated for hearing on 11th October, 2017.

20. On 11th October, 2017 the matter proceeded for hearing of the Preliminary Objection. Counsel for the respondent challenged the court's jurisdiction to hear the matter on the basis that section 7 of the Limitation of Actions Act estopped the court from hearing a claim of land after 21 years of the purported cause of action. He urged the court to dismiss the suit.

21. Counsel submitted that the preliminary objection was misplaced and ought to be dismissed. He said that from the pleadings, the respondent learned in 2015 that the appellant was encroaching on the suit land. Also, that it was the respondent who was in possession. And that from the supplementary affidavit filed by the respondent, it was clear that the suit property was different from the land, the appellant was referring to. That possession was an issue that could only be determined through trial and computation of time should not be from 1996 since the title issued in 1996 is being contested. That time should run from 2014 when the respondent received its title.

22. Counsel for the appellants by way of rebuttal reiterated that the appellant was in possession, that the suit land was the same as the one pleaded by the appellant, that the L.R number is the same but the I.R number is different, that the original title was issued to the respondent in 2012 and that it was the sub-divisions that were done in 2014. He urged the court to strike out the supplementary affidavit as it raised new issues not captured in the plaint.

23. Having heard the parties, the learned Judge on 14th December, 2017 dismissed the preliminary objection with costs to the respondent holding that a preliminary objection should raise 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. She relied on the case of **Mukisa Biscuits Manufacturing Company Ltd V. West End Distributors Ltd (1969) EA 696).**

24. The Judge further held that the facts in the case were not clear and straightforward and more specifically the issues as to who was in possession and whether the appellant and respondent both claimed the same piece of land would have to be determined at the trial.

25. Aggrieved by the above findings, the appellant herein proffered the instant appeal. In its memorandum of appeal dated 10th August, 2018 the appellant raises six (6) grounds claiming, *inter alia*, that the learned Judge erred in law by misdirecting herself on the law relating to preliminary objections and her reasoning and entire ruling was therefore fatally flawed; that the learned Judge erred in law by misdirecting herself on the law relating to limitation period for recovery of land as set out in section 7 of the Limitation of Actions Act and her reasoning and entire ruling was therefore erroneous in law.

26. Further grounds were that the learned Judged erred in law and misdirected herself in finding that a preliminary objection should raise a pure point of law by failing to determine the preliminary objection thus occasioning a serious miscarriage of justice; that the learned Judge erred in law by misdirecting herself by taking into account extraneous matters and failing to take into account relevant matters and; lastly, that the learned Judge erred in law by misdirecting herself by delving into the facts of the case before determining whether or not the court had jurisdiction to determine the suit in the first instance.

27. The appeal was canvassed through written submissions with oral highlights from learned counsel, Mr. Njuguna appearing for the appellant while Mr. Maina appeared for the respondent. According to Mr. Njuguna, the learned Judge misdirected herself when she pronounced that the issue of the party that was in possession was relevant as the issue was who the actual owner of the suit property was and the land Registrar had confirmed that the title held by the appellant was the one that was genuine.

28. According to the appellant's counsel, the facts not in dispute were that;

a. the appellant is the bona fide registered proprietor of the suit premises having been issued with a title on 27th May, 1996;

b. the appellant has been in quiet possession and enjoyment of the suit property for over 21 years;

29. Mr. Njuguna emphasized that according to the evidence before the ELC, the cause of action arose on 27th May, 1996 when the appellant was issued with title and the suit was filed 21 years after the cause of action arose.

30. Counsel relied on the Supreme Court's decision in **Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others (2015)** where the Supreme Court adopted and reiterated the position in **Mukhisa Biscuit Manufacturing Company Limited**. The Supreme Court further held that, "***thus a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record…"***

31. On the issue of jurisdiction, counsel submitted that the learned Judge did not address that issue and only delved into the principles governing preliminary objection and the question of ownership. The celebrated case of **Owners of the Motor Vessel 'Lilian S vs Caltex Oil (Kenya) Limited** was relied on. He was steadfast that their preliminary objection had met the threshold set by the **Mukhisa Biscuit** case (*supra*). He urged us to allow the appeal and strike out the plaint before the ELC.

32. On his part, Mr. Maina learned counsel for the respondent, submitted that the cause of action is found on paragraph 15 of the plaint where the respondent states that it learnt that the appellant had trespassed onto the suit land. Counsel submitted that nowhere in the pleadings did the respondent admit to knowing of the existence of appellant's title and it was not seeking recovery of the land as per section 7 of the Limitation of Actions Act, but to bar the appellant from interfering with its quiet enjoyment. That the respondent learnt for the first time that the appellant was also claiming title to the suit land when the appellant filed a defense and a counterclaim on 26th May, 2017.

33. Counsel argued that the court indeed had jurisdiction by dint of **Section 13(7)** of the Environment and Land Court Act No. 19 of 2011. That the respondent has not admitted the alleged proprietary interest of the appellant, neither has the appellant admitted that of the respondent and that these were factual issues that cannot be resolved by a preliminary objection.

34. He urged the Court to dismiss the appeal.

35. From a careful perusal of the record of appeal, parties' submissions and the authorities the legal issue arising for determination can be discerned to be: ***When the cause of action arose and whether the grounds set out in the notice of Preliminary Objection are uncontested points of law.***

36. In the Court of Appeal case of **Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR** Justice Waki held that:-

> ***"A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."***

That definition was given by Pearson J. in the case of ***Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616.*** *In an earlier case,* ***Read vs. Brown (1889), 22 QBD 128,*** *Lord Esher, M.R. had defined it as:-*

> ***"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."***

Lord Diplock, for his part in ***Letang vs. Cooper [1964] 2 All ER 929*** *at 934 rendered the following definition:-*

> ***"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy***

against another person."

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ..."

37. The critical question to ask is this: What is a cause of action and when does it arise in a claim for recovery of land? More succinctly put, when did the respondents become entitled to complain or obtain a remedy?

38. The appellant submitted that the cause of action arose on 27th May, 1996 when the appellant was issued with title for the suit property while the respondent submits that paragraph 15 of their plaint points to when the cause of action arose, to wit 17th February, 2017 when the respondent learnt that the appellant's agents had entered the suit property and were cutting trees, uprooted nappier grass and removed the "NOT FOR SALE' sign erected by the respondent. There is also a third possible interpretation which can be that the cause of action arose on 30th December, 2014. This was the first time that, according to the respondent, a group of people had invaded the suit property. According to the respondent, prior to this, it had no knowledge of trespass or interference by anyone and thus could not have moved the court.

39. The appellant contended from its grounds of appeal and submissions that the trial court failed to address the issue of jurisdiction in the sense that the court had entertained a matter which according to the appellant was statutory time barred. In our view, in the instant case, the main issue for determination is whether the preliminary objection was sustainable and once this is determined, the obvious question that follows is whether the trial court had jurisdiction or not.

40. In the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR,** the Supreme Court expressed itself as follows**,**

"As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in ***Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors [1969] EA 696****, in the case of* ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR*** *[paragraph 31]:*

"To restate the relevant principle from the precedent-setting case, ***Mukhisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors (1969) EA 696****:*

*'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. Examples are an objection to 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 … 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****.'*

[15] The Joho decision has been subsequently cited by this Court in ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 23 of 2014, [2014] eKLR****; and in* ***Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR****, in which the Court further stated [paragraph 15]:*

"Thus a preliminary objection may only be raised on a 'pure question of law'. ***To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts****. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."*

[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, ***to the intent that its application to undisputed facts, leads to but one conclusion****: that the facts are incompatible with that point of law. (see* ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR****).*

[17] On that basis, two questions emerge for this Court's consideration: ***what pure point of law has the 1st respondent raised in her preliminary objection? Are the facts in issue, settled?***

41. For the above authority to apply to the instant case, the question that begs an answer is whether the facts are indeed undisputed. It is common ground that the facts in the instant case are heavily contested. In the appellant's submissions the appellant categorizes facts not in dispute as being the bona fide registered proprietor of the suit premises having been issued with a title on 27th May, 1996, and that it has been in quiet possession and enjoyment of the suit property for over 21 years.

42. The respondent on the other hand, throughout its pleadings opposes this and submits that it is the bona fide owner having applied for a letter of allotment through its predecessor in 1993 and being issued with a title in 2012. Also on possession, each party claims to be in possession yet this cannot be. The appellant submitted that it had been in possession for 21 years whereas the respondent averred that there was no evidence that the appellant had been in occupation on the suit land for 21 years.

43. The appellant averred in its pleadings that in December 2014, the respondent's agents forcefully entered the suit land and were repulsed by the appellant's agents something which the respondents categorically denied.

44. The respondent contended in its pleadings that in the criminal proceedings, the appellant produced documents of acceptance of allotment

and approval for registration of Land Parcel Number 130/1/1/1 and not the suit land which is LR No. 4144 but the appellant in its response to counter – claim insisted that it was referring to the suit land, LR No. 4144.

45. The instant case is on all fours with the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR,** where the Supreme Court in dismissing the appeal held,

> *"The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection — against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement.* ***It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.***
>
> *In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest."* (Emphasis added).

46. We have discussed above at least three possible times when the cause of action may be said to have accrued, if anything to demonstrate that the question as to when the cause of action accrued is contested and is indeed subject to some facts being proved by adducing evidence. This removes this matter from the ambit of matters that can be determined by way of preliminary objection. The appellant is trying to use the preliminary objection as a sword and not as a shield. We hold the view that from the material placed before the learned Judge, it was clear that the issue of limitation of time was not crystal clear and it was necessary that parties be availed opportunity to call evidence in support of their respective assertions as to when the cause of action had accrued

47. Ultimately, we are not persuaded that the learned Judge misdirected herself in finding that the matter could not be disposed of by way of preliminary objection. We find no merit in this appeal and dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR