



Kubai Investment Limited v Sian Enterprises Limited & 5 others (Environment & Land Case 53 of 2019) [2024] KEELC 4085 (KLR) (22 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 53 OF 2019**

**MAO ODENY, J
MAY 22, 2024**

BETWEEN

KUBAI INVESTMENT LIMITED PLAINTIFF

AND

SIAN ENTERPRISES LIMITED 1ST DEFENDANT

**SUSAN CHERONO RONO, JOYCE CHEPKORIR RONO, CHARLES
KIPKOECH KIRUI & DENIS KIMUTAI KIRUI (SUED AS THE
ADMINISTRATORS OF THE ESTATE OF JOSIAH KIPKURUI ARAP
RONO) 2ND DEFENDANT**

**ANNE NAANYU KILELE, RONALD KIPNGETICH KILELE & BENARD
KIPLAGAT KILELE (SUED AS THE ADMINISTRATORS OF DR. WALTER
KIPRONO KILELE) 3RD DEFENDANT**

COMPLY INDUSTRIES LIMITED 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

THE ATTORNEY GENERAL 6TH DEFENDANT

RULING

1. This ruling is in respect of the 2nd defendant and 4th defendant’s Notice of Preliminary Objections dated 8th August 2019 and 27th April 2023 respectively. The 2nd defendant’s preliminary objection was on the following grounds:
 - a. That the suit against the second defendant is time barred and offends Section 7 of the Limitation of Actions Act which provides that an action to recover land may not be brought after the end of twelve years from the date on which the right of action accrued.



- b. That the suit against the second defendant is time barred and offends section 26(1) of the *Limitation of Actions Act* which provides an action cannot be brought to recover or set aside any transaction affecting any property which in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud. (*sic*)
 - c. That this suit has been brought to this court in clear disregard of provisions of the law and is in the circumstances an abuse of the due process of the court.
2. The 4th defendant's preliminary objection was on the following grounds:
- a. That the suit herein is bad in law, incompetent and in statute barred by virtue of Sections 7 and 9 of the *Limitation of Act Cap 22* Laws of Kenya or otherwise time barred generally. (*sic*)
 - b. That the suit is therefore abuse of the court process. (*sic*)
 - c. That the court therefore has no jurisdiction to enter the suit.

2nd Defendant's Submissions

3. Counsel relied on the cases of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* [2014] eKLR, *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 and submitted that the suit property was registered in the name of Walter Kiprono Kilele on 2nd November 1982.
4. It was counsel's submissions that if at all the plaintiff had a right of action, it ought to have exercised it within twelve years from 2nd November 1982 when the cause of action arose.
5. Counsel submitted that the plaintiff lodged the present suit on 30th May 2019 which was twenty-five years after the lapse of statutory timelines and it is therefore bad in law and cannot be sustained.
6. Counsel relied on the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] eKLR, Section 26 of the *Limitation of Actions Act* and submitted that the plaintiff pleaded fraud in its plaint where it alleged that it discovered in 2016. Counsel submitted that even though the plaintiff pleaded that it discovered fraud in 2016, it filed the present suit in 2019 which was after a period of over three years and relied on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] eKLR.

4th Defendant's Submissions

7. Counsel for the 4th defendant identified four issues for determination namely; whether or not the plaintiff's suit is time barred, whether the suit is an abuse of court process, whether the court has jurisdiction to hear the suit and whether the preliminary objection is proper before the court.
8. On the first issue counsel relied on Sections 4(2), 7 and 9 of the *Limitation of Actions Act*, the case of *Stephen Kareri Mwangi (Suing as the attorney (donee) of Loise Wangima) v Egerton University* [2013] eKLR and submitted that the present suit was commenced thirty-seven years after the cause of action arose and it was therefore statute barred.
9. On the second issue, counsel relied on the cases of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR, *County Council of Nandi v Ezekiel Kibet Rutto & 6 Others* [2013] eKLR and submitted that the plaintiff's suit was an abuse of the judicial process.
10. Counsel relied on Sections 4(2) and 7 of the *Limitation of Actions Act*, the cases of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR and *Stephen Kareri Mwangi (Suing as the Attorney (Donee) of Loice Wangima) v Egerton University* [2013] eKLR, *Mukisa Biscuits*



Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, *JN & 5 Others v Board of Management of St. G School Nairobi and another* [2017] eKLR and submitted that the 4th defendant's preliminary objection is based on the question of Limitation of Actions Act which was a pure point of law.

1st Defendant's Submissions

11. Counsel submitted on whether the plaintiff's suit is time barred by dint of Section 7 and 9 of the *Limitation of Actions Act* and stated that the course of action arose on 11th February 1982 but the plaintiff commenced the present proceedings on 29th May 2019 which was after a period of thirty-seven years.
12. Counsel relied on sections 7 and 9 of the *Limitation of Actions Act* and the cases of *Dickson Ngige Ngugi v Consolidated Bank Limited (Formerly Jimba Credit Corporation Limited) & another* [2020] eKLR and *Public Trustee v Wanduru Ndegwa* [1984] eKLR, *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104, *Oraro v Mbaja* [2005] 1 KLR 141 and sought that the 4th defendant's preliminary objection be allowed as prayed.

Analysis and Determination

13. The issue for determination is whether the plaintiff's suit should be struck out for being statute barred.
14. In the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 the court held that a preliminary objection raises a pure point of law and further stated as follows:

“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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

15. Similarly in the case of *Ushago Diani Investment Limited v Abdulwahab* (Environment & Land Case 12 of 2023) [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling) cited with approval the case of *Oraro v Mbaja* [2005] eKLR 141, where the court held as follows on the nature of preliminary objections:

“A preliminary objection 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 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

16. The preliminary objections filed by both the 2nd and 4th defendant are premised on the ground that the plaintiff's suit is statute barred and was filed contrary to sections 7 and 9 of the *Limitations of Actions*



Act. The 2nd and 4th defendants argue that the course of action arose in 1982 and the suit was filed in 2019 which was thirty-seven years after the cause of action arose.

17. On whether an issue of limitation of time can be raised through a preliminary objection, the court in the case of Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Mubindi [2019] eKLR held as follows:

“ 13. 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.

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 appellants 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”

14. 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, J.A., 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...”

18. It is also noted that there is an issue of fraud, which the defendants have alluded to that the Plaintiff having discovered the fraud in 2016 should have filed the suit immediately and not waiting for three years to file in 2019. This is an issue of fact, which has to be determined at the trial with evidence being adduced by the parties and not at the preliminary stage.

19. As the court held in the above-cited case, issues of limitation of time can only be determined at the trial of the main suit and not at preliminary stage. Consequently, the 2nd and 4th defendant’s preliminary objections dated 8th August 2019 and 27th April 2023 respectively are hereby dismissed with costs to the Plaintiff as they lack merit.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF MAY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure.

