



**Karia v Keshe (Environment and Land Appeal 6 of 2023)  
[2024] KEELC 4930 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4930 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL 6 OF 2023**

**CG MBOGO, J  
JUNE 24, 2024**

**BETWEEN**

**NTETO OLE KARIA ..... APPELLANT**

**AND**

**MUSUA OLE KESHE ..... RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrates Court at Narok delivered by Hon. S. Mungai on 6th September, 2023 in Narok CMELC No. E043 of 2023)*

**RULING**

1. The appellant herein, being aggrieved by the ruling of hon S. Mungai delivered on 6<sup>th</sup> September, 2023, in CMELC No E043 of 2023, has appealed against the ruling vide the memorandum of appeal dated 4<sup>th</sup> October, 2023 on the following grounds: -
  - i. That the learned trial magistrate erred in law and in fact in dismissing the preliminary objection raised by the defendant/applicant while he has not made a determination whether the suit is time barred or not.
  - ii. That the learned trial magistrate erred in law and in fact in finding that the court has jurisdiction on the matter that is statutorily time barred.
  - iii. That the learned magistrate erred in law by introducing principles that were never pleaded by parties.
2. The appellant therefore prays: -
  - a. The appeal be allowed.
  - b. The ruling delivered on 7<sup>th</sup> September 2023 be hereby set aside, varied and or reviewed.



- c. This honourable court makes a determination on the PO dated 4<sup>th</sup> May, 2023.
  - d. The appellant be awarded the costs of this appeal.
3. The appeal was canvassed by way of written submissions. The appellant filed his written submissions dated 20<sup>th</sup> June, 2024 where he raised three issues for determination as listed below: -
- i. Whether the PO raises pure points of law.
  - ii. Whether the appellants PO was determined.
  - iii. Whether the learned magistrate introduced new principles not pleaded by the parties.
4. On the first issue, the appellant submitted that after being served with the pleadings, the appellant filed a notice of preliminary objection which raised pure points of law that the suit is time barred, since the respondent was bringing an action for the recovery of land after expiry of 21 years. He submitted that the respondent slept on his rights, and that he has been lethargic seeing that the subject matter of the suit was registered on 10<sup>th</sup> May, 2006.
5. On the second issue, the appellant submitted that from the pleadings before the trial court, the cause of action which is purchase of land took place on 25<sup>th</sup> August, 2002 and that the suit was filed on 17<sup>th</sup> April, 2023 which is more than 20 years later. He submitted that this is what formed the basis of the preliminary objection under Section 7 of the *Limitations of Actions Act*. The appellant submitted that the trial court erred by failing to compute the time frame within which the suit was filed in court. To support this position, the appellant relied on the cases of *Gathoni v Kenya Co-operative Creameries Limited* [1982] KLR 104, *Monata Matiko Chonchorio v John Marwa Chabaro* [2021] eKLR, and *Bosire Ogero v Royal Media Services* [2015] eKLR. The appellant submitted that the preliminary objection was not determined.
6. On the third issue, the appellant submitted that whether the doctrine of res judicata in the ruling was done by genuine mistake or with malice remains in the purview of the trial court, the trial magistrate did not marry or show a nexus between the facts of the case and the said doctrine in arriving at his conclusion.
7. The respondent filed his written submissions dated 20<sup>th</sup> June, 2024 where he raised two issues for determination: -
1. Whether the learned magistrate erred in law and fact in dismissing the preliminary objection.
  2. Whether the honourable magistrate erred in law and fact in holding the court has jurisdiction to entertain the suit.
8. On the first issue, the respondent submitted that the appellant has misconstrued Section 7 of the *Limitations of Actions Act* as the appellant has not been in continuous and uninterrupted possession of the parcel of land for 12 years, that he has not lived quietly and peacefully and that he has never been in actual and physical possession of the property since the year 2002. He submitted that the trial court was right in dismissing the objection as it had to probe evidence which calls for ascertainment of facts. Further, the respondent submitted that the trial court exercised its discretion by hearing and determining the preliminary objection which was well founded. The respondent relied on the cases of *Child Welfare Society of Kenya v Republic, Ex-parte Child in Focus Kenya & AG & others* [2017] eKLR and *Delilah Ondari v Francis Ondieki Atandi* [2022] eKLR.
9. The respondent further submitted that the submissions by the appellant require probing of evidence, and ascertainment of facts with regard to the manner of the sale and purchase of the suit property.



- Further, he submitted that in an attempt to mislead this court as to the time when the cause of action arose, the respondent submitted that the period on the alleged day is accounted for and the same is evident in the pleadings.
10. On the second issue, the respondent submitted that the trial court was correct in holding that it had jurisdiction as it was firmly anchored in law, and the same cannot be extinguished. He relied on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* [2012] eKLR and *Orange Democratic Movement v Yusuf Ali Mohamed & 5 others* [2018] eKLR. He further submitted that the appellant is one party that is desperately trying to bury his head in the sand, and on a mission to hide solid facts that have bedeviled him since the year 2002. He submitted that this matter calls for evidence and testimonies of parties so as to unravel the protracted land tussle between the parties. To buttress on this submission, the respondent relied on the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.
  11. I have considered the grounds of appeal, the written submissions as well as the authorities cited by both parties. In my view, the issue for determination is whether there is merit in the appeal.
  12. The respondent filed a notice of motion application dated 17<sup>th</sup> April, 2023 seeking injunction orders against the appellant herein amongst other orders. In his application, the respondent contended that he entered into an agreement for the sale of land with the appellant in the year 2002 for the purchase of 5 acres which he paid a consideration of Kshs 100,000/-. That as a result, he took possession of the land under the suit land known as Cis-Mara/Nkoben/ 373 where he has utilized the same. The respondent contended that the appellant has threatened to subdivide the land, and cause transfer of the same to unsuspecting third parties.
  13. The respondent filed a plaint dated 17<sup>th</sup> April, 2023 wherein he is seeking an order of specific performance of the 5 acres out of the parcel of land Cis-Mara/Nkoben/ 373 among other orders. In his plaint, the plaintiff pleaded that vide a duly executed agreement for sale, he purchased 5 acres from the appellant for Kshs 100,000/- which was paid in full. In paragraph 10, he pleaded that despite being granted peaceful and quiet possession since the year 2002, the appellant has deliberately frustrated the efforts in transferring the parcel of land to his name. Further, that the appellant has threatened to subdivide the land and sell to third parties.
  14. The appellant did not file a defence or any response to the application, and instead, he filed a notice of preliminary objection dated 4<sup>th</sup> May, 2023 seeking that the suit be struck out on the following grounds:
    - a. The suit is incompetent, bad in law and that the same should be struck out with cost to the respondent on account of limitation of time.
    - b. The court lacks jurisdiction on account of section 7 of the *Limitations of Actions Act*, Cap 22 Laws of Kenya.
  15. Both parties filed their respective submissions to the preliminary objection. The trial court delivered a ruling on 6<sup>th</sup> September, 2023 that is the subject of this appeal. I have carefully perused the impugned ruling, and I do note that the court indeed may have made a mistake by referring to Section 7 of the *Civil Procedure Act*. This I note was not an issue before it for determination, instead Section 7 of the *Limitations of Actions Act* was the applicable law. In addressing its mind to the application, the trial court noted that the appellant did not file any response to the application to rebut the averments by the respondent. The court noted that it was only after the parties had adduced their evidence, and closed their respective cases that the court would be in a position to determine whether either party's claim



has been proved. The trial court found that the preliminary objection had not been proved to warrant the court to uphold the same.

16. I would agree with the appellant that the trial court may not have determined the preliminary objection to the extent that it did not pronounce itself on the issue of limitation of time pursuant to Section 7 of the *Limitations of Actions Act*.
17. Turning to the preliminary objection, in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, it was held that:  
per Law, JA

“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.”

18. From the above authority, it is clear that a preliminary objection consists of a point of law which has been raised and which if argued may dispose of the suit. The trial court needed to satisfy itself first whether the notice of preliminary objection before it met these requirements.
19. A preliminary objection can therefore, only be premised on undisputed facts, must raise pure points of law and cannot be raised where facts have to be ascertained or where the court is asked to exercise judicial discretion. Also, for a preliminary objection to be maintained, the pure points of law raised must sprout from the pleadings. In the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank* HCC No 53 of 2004, the court stated as follows;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

20. The appellant herein challenged the jurisdiction to hear and determine the suit on the grounds that it was barred by Section 7 of the *Limitations of Actions Act*. In determining whether the suit was time barred, the court needed to restrain itself to the pleadings only and anything outside that would defeat the purpose of the objection. To do so, the trial court would be required to look at the pleadings to determine the facts. Looking at the notice of preliminary objection, I am satisfied that the same raises a pure point of law as it challenges the jurisdiction of the court to hear and determine the suit based on the time limit for an action for recovery of land.
21. Section 7 of the *Limitation of Actions Act* provides as follows;

“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.”



22. The purpose of the Law of Limitation was stated in the case of *Mehtha v Shah* [1965] E.A 321, as follows;

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

23. However, and even as the trial court rightly stated so, the averments by the respondents have not been rebutted by the appellant. Whereas this court would draw inference as to the time the cause of action arose from the pleadings, and bearing in mind the requirements of a preliminary objection which included undisputed facts, this court cannot determine and state that the suit is time barred. The appellant did not file a response and a defence to the application and the plaint either disputing or admitting the sale and purchase of the said 5 acres. It is only from these pleadings that the court would be able to ascertain whether indeed the suit is time barred. The notice of preliminary objection dated 4<sup>th</sup> May, 2023 therefore fails and it is dismissed.

24. Having said the above, I find no merit in the memorandum of appeal dated 4<sup>th</sup> October, 2023, the same is hereby dismissed with costs to the respondent. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 24<sup>TH</sup> DAY OF JUNE, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**24/06/2024.**

