



Nyakiti & another ((Suing as the Legal Administrator/ Beneficiaries of the Estate of Johanes Awiti Ayieko (Deceased)) v Amolo & 2 others (Land Case E007 of 2024) [2024] KEELC 4893 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4893 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
LAND CASE E007 OF 2024
E ASATI, J
JUNE 20, 2024

BETWEEN

SIPROSA AUMA NYAKITI AND BENTER ATIENO AGAI AGAI PLAINTIFF
(SUING AS THE LEGAL ADMINISTRATOR/ BENEFICIARIES OF THE
ESTATE OF JOHANES AWITI AYIEKO (DECEASED))

AND

ANDREA GILA AMOLO 1ST DEFENDANT
JOHN KEYA GWENDO 2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This ruling is in respect of the preliminary objection raised by the 2nd Defendant vide the Notice of Preliminary Objection dated 11th March, 2024 and the Notice of Motion application filed by the Plaintiff dated 26th February, 2024 brought pursuant to the provisions of article 23 of the Constitution of Kenya 2010, Order 51 Rule 1 Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act.

The Preliminary Objection

2. As part of his response to the Plaintiff's Claim, the 2nd Defendant filed a Notice of Preliminary Objection dated 11th March 2024 on the grounds that:
 - i. The 1st Respondent died on 11th August, 2018 while the suit was filed on 26th February, 2024. That the suit was therefore incompetent, bad in law, null and void and should be struck out for having been filed against a deceased person.



- ii. That the suit is time barred having been brought outside the statutory Limitation period of 12 years in view of Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya. That the Defendants were issued with titles being challenged in the suit in 2006 and 2007 which is more than 17 years ago. That this is outside the statutory period.
 - iii. That the petition and the motion do not raise any justifiable issues and they are therefore frivolous, vexatious and raise no valid grounds for adjudication by this honourable court.
 - iv. The petition and the motion have been filed for an improper purpose which is not sanctioned by law.
3. The 2nd Respondent prayed that the petition and the motion be dismissed with costs to the Respondent.
 4. The Preliminary Objection was argued by way of written submissions. Counsel for the 2nd Defendant submitted that the suit should be struck out for having been filed against a dead person. Counsel relied on decided cases to support the submission. He relied on the case of *Viktar Maina Ngunjiri & 4 Others -vs- Attorney General & 6 Others* [2018]eKLR where the court cited the Indian Case of *Pratab Chand Mehta -vs- Chrisma Devi Mehta* ALT 1988 Delhi 267 where it was held *inter alia* that;

“if a suit is filed against a dead person, then it is a nullity”
 5. Counsel submitted further that the suit is time barred having been brought outside the statutory limitation of 12 years in view of section 7 of the *Limitation of Actions Act* for the reasons that the Respondent have good title to the suit land namely; Kisumu/Nyahera/2303 and Kisumu/Nyahera/2304 (Original East Kisumu/Nyahera/158 having been issued with the titles in 2006 and 2007 after legal sale transaction and consequent transfer. That the Plaintiff cannot challenge the sale transaction and transfer more than 17 years later. That the Defendant have been in continuous and uninterrupted occupation of the suit parcels of land for more than 17 years. Counsel relied on the provisions of section 7 of the *Limitation of Actions Act* and the case of *Mehta -vs- Shah* (1965)EA 321 where it was held that the object of any limitation enactment is to prevent a Plaintiff from prosecution of stale claims on the one hand and on the other hand shield the Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. That the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.
 6. On behalf of the Plaintiff, it was submitted by that a preliminary objection by its nature raises a pure point of law. That it cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion. That death of the 1st Defendant is a matter of fact which must be proved by adducing a certificate of death and that this has not been done.

Counsel relied on the case of *Pontrilas Investment Limited -vs- Central Bank of Kenya & Another* (Reference No.8 of 2017) East African Court of Justice)eKLR to support the submission.

That in the instant case, there are more than one Defendant, hence the case will only be abated against the deceased Defendant.

Counsel also relied on the case of *D.T. Dobie & Company Limited -vs- Joseph Mbaria Muchina & Another* (1980)eKLR where it was held that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action. Counsel submitted further that the Plaintiffs' claims against the 2nd and 3rd Defendants are extremely strong and there exists a cause of action against the Defendants.



7. Relying on the provisions of Section 26 of the *Limitation of Actions Act*, the cases of the *Alice Chemutari Too -vs- Nickson Kipkurui Korir & 2 Others* (2015)eKLR and *Zacharia Wambugu Gathimu -vs- David Wangari Maina* ELC Case No.244 of 2017, Counsel submitted that the registered owner of the land died in the year 1989 and could not have been capable of transferring the land in the year 2006 and 2007. That the purported transfers were marred with fraud. That the Plaintiff's dependants just commenced the succession proceedings in 2023 under Kisumu Succession Cause No. E015 of 2023. That the Plaintiffs came to know of the fraud and misrepresentation in July, 2023 when they conducted search for purposes of commencing the succession.
8. I have considered the Preliminary Objection and the submissions filed in support and in opposition thereof. The grounds upon which a Preliminary Objection succeed were outline in the case of *Mukisa Biscuits Manufacturing Company Ltd -vs- West End Distributors Ltd* (1969). For a preliminary objection to succeed it must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained through production of evidence; or if what is sought is the exercise of the court's discretion and must not raise substantive issues from the pleadings which must be determined by the court upon consideration of the evidence.
9. In the present case, I find that the matters raised in the Preliminary Objection are matters which will need production of evidence to prove them: whether or not the 1st Defendant died before the suit was instituted, whether or not fraud is proved, whether or not the Plaintiffs learned of the alleged fraudulent transaction in the transfer of the suit land within or outside the limitation period are all matters of evidence.
10. Striking out of pleadings and suits is a draconian action that ought to be undertaken only as a last resort when the pleading or the suit is so hopelessly defective that it cannot be cured by any amount of amendment. I find that the Preliminary Objection has no merit and hereby disallow it.

The application

11. The substantive prayer sought in the application is for a temporary injunction restraining the Respondents by themselves, their agents, servants and/or employees from using, disposing of, sub-dividing, fencing, interfering with and/or in any way whatsoever dealing with land parcel Kisumu/Nyahera/2303 and Kisumu/Nyahera/2304 pending hearing and determination of the suit.
12. The grounds upon which the application was brought are that the suit lands were originally land parcel No. Kisumu/Nyahera/158 owned by Joanes Awiti Ayieko, deceased. That the applicants were shocked to learn that the suit land had been fraudulently transferred to the 1st Defendant, sub-divided and a portion thereof transferred to the 2nd Defendant.
That the Applicants are apprehensive that the sub-division of the land by 1st Defendant is aimed at selling the suit property to third parties which will further complicate the determination of the suit. That the 1st Defendant is introducing buyers to the suit parcel with the view of selling the land.
13. The application was supported by the averments in the Supporting Affidavit sworn by the Applicants jointly on 28th February, 2024 and the annexures thereto.
14. The 1st Defendant did not respond to the application.
15. The 2nd Respondent in addition to the Notice of Preliminary Objection already determined herein, filed a Replying Affidavit sworn by him on 19th March, 2024. His case is that the suit was defective as it was filed out of time. That he is an innocent purchaser for value and had demonstrated good faith in



the process leading to his ownership of the suit parcels of land. That he exercised due diligence. That he has been in occupation of the suit land since the year 2006. He exhibited a title deed to land parcel No. Kisumu/Nyahera/2304 to demonstrate that he was the registered owner thereof.

16. I have considered the application and the grounds in support thereof. For an application for injunction to succeed, the principles set in *Giella -vs- Casman Brown* must be demonstrated. It has not been demonstrated that the Applicants have a prima facie case with a probability of success or that they will suffer irreparable injury if the order sought is not granted. The Respondents claim that they have had title and occupation of the suit land since 2006 and 2007. *Prima facie*, they are the owners and are entitled to enjoyment thereof until contrary findings. The balance of convenience tilts in favour of the Respondents. The application is therefore declined. Costs to the Respondents.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 20TH DAY OF JUNE, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

Wagumba holding brief for Ojwang for the Plaintiffs/Applicants

No appearance for the Defendants/Respondents.

