



Tonui & 3 others (Suing as the administrator/personal representatives of the Estate of William Kiptonui Birir alias Kiptonui Arap Birir) v Misoï (Sued as the Executor of the Estate of Samuel Martin Kipsang Arap Maseri) & 4 others (Environment & Land Case E022 of 2021) [2024] KEELC 4795 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4795 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E022 OF 2021**

LA OMOLLO, J

JUNE 13, 2024

BETWEEN

**RONNY TONUI 1ST PLAINTIFF
BETTY CHEPKEMOI BIRIR 2ND PLAINTIFF
DAVID TONUI 3RD PLAINTIFF
MARY CHEBET 4TH PLAINTIFF
SUING AS THE ADMINISTRATOR/PERSONAL REPRESENTATIVES OF THE
ESTATE OF WILLIAM KIPTONUI BIRIR ALIAS KIPTONUI ARAP BIRIR)**

AND

**JASON KIBET MISOI (SUED AS THE EXECUTOR OF THE ESTATE OF
SAMUEL MARTIN KIPSANG ARAP MASERI) 1ST DEFENDANT
JASON KIBET MISOI 2ND DEFENDANT
LAND REGISTRAR, BOMET DISTRICT 3RD DEFENDANT
HON ATTORNEY GENERAL 4TH DEFENDANT
TULO GENERAL CONSTRUCTION LIMITED 5TH DEFENDANT**

RULING

1. This ruling is in respect of the 1st and 2nd Defendants Notice of Preliminary Objection dated 28th September, 2023 which is on the following grounds;



- a. That the entire suit is time barred having been brought outside the statutory limitation of (12) years prescribed under the provisions of Section 7 of the *Limitation of Actions* (Cap) 22 Laws of Kenya.
- b. That the entire suit is brought in bad faith, frivolous and an abuse of the court process hence a good candidate for striking out.

Factual Background.

2. The Plaintiffs commenced the present proceedings vide a Plaint dated 10th August, 2021. The said plaint was amended on 16th December, 2022. The Plaintiff prays for judgement against the Defendants for;
 - a. A declaration that the 1st and or 2nd Defendant or any other 3rd parties are holding land title number Kericho/Cheptalal/359 in trust for the estate of Late William Kiptanui Birir.
 - b. A declaration that the estate of the Late William Kiptanui Birir alias Kiptonui Birir is the legal, lawful, bona fide and absolute proprietor of land title No. Kericho/Cheptalal/359.
 - c. A declaration that the agreement for sale dated 5th August, 2021 between 1st and or 2nd Defendant and the 5th Defendant is null and void ab initio.
 - d. An order of injunction compelling the 1st and or 2nd Defendants jointly and or severally by themselves, their agents and/or any other person to surrender the original copy of the title issued in his name on 4th May, 2021 or any other date thereof to the 3rd Defendant.
 - e. An order directing the 3rd Defendant to revoke and cancel the title to Kericho/Cheptalal/350 issued to the 1st and or 2nd Defendant and rectify the register of the suit land.
 - f. An order of injunction restraining the Defendants jointly and or severally by themselves, their agents and or any other person claiming through them from dealing, selling, leasing, charging and/or in any other way interfering with Land Reference No. Kericho/Cheptalal/359.
 - g. An order directing the 1st and or 2nd Defendant to provide the Plaintiffs herein with all the necessary completion documents to facilitate the transfer of land title Kericho/Cheptalal/359 to the Plaintiffs within fourteen (14) days.
 - h. In default of the above, the Deputy Registrar be authorized to execute a transfer of Land title Kericho/Cheptalal/359 in favour of the Plaintiffs
and
 - i. Costs of the suit.
3. On 4th November, 2021 the 1st and 2nd Defendants filed a Statement of Defence and Counterclaim. In the Counterclaim the 1st and 2nd Defendants state as follows;
 - a. The Defendant repeats and reiterates the contents of paragraphs 1 to 14 of the defence and avers that since the surrender of the lease on the 3rd May, 1985 the Plaintiff has failed to pay his annual rent of Kshs. 5,000/= for the 50 acres of the suit property and the same has accumulated to a sum of kshs. 9,000,000/= and the 1st & 2nd Defendant counterclaims the said amount from the Plaintiffs jointly and severally with interest thereon at court rates until the handing over of the suit property comprising of approximately (50) acres to the executor of the estate of Samuel Martin Kipsang Arap Maseri.



- b. The Defendant prays for the aforesaid sum of Kshs. 9,000,000/= plus any accrued rent until the date of determination of the suit together with interest thereon at court rates together with costs of this suit and interest thereon.
 - c. The Plaintiffs are in breach of his (sic) duty to pay rent when it is due and as such the 1st & 2nd Defendant prays for vacant possession of the suit premises.
 - d. That prior to filing of this suit the 1st & 2nd Defendants herein had commenced eviction proceedings for the removal of the 1st Plaintiff from the suit property under Nairobi High Court Succession Cause No. 816 of 1985 in which the 1st Defendant was appointed the executor of the Estate of Samuel Martin Kipsang Arap Maseri and therefore pray for an order of eviction of the 1st Plaintiff from the suit property.
 - e. A prayer of mesne profits of Kshs. 150,000/= per year for 36 years making a total of Kshs. 5,400,000/=.
 - f. A prayer for damages for destruction of indigenous trees covering an area of 5 acres on the suit property valued at a sum of Kshs. 5,000,000/=.
 - g. The Defendant prays that the Plaintiff be ordered to forthwith vacate the suit property or in the alternative the honorable court be pleased to issue an order directing the 1st & 2nd Defendant to forthwith evict the Plaintiff from the suit property.
4. The 5th Defendant filed its statement of defence on 13th January, 2023 wherein it denies the Plaintiffs averments in the Amended Plaint and seeks that the suit be dismissed.
 5. The preliminary objection first came up for directions on 5th December, 2023 when the court directed that it be served upon all the parties.
 6. The matter was mentioned on 22nd January, 2024 and further mentioned on 13th February, 2024 on which date the court directed that the preliminary objection be disposed off by way of written submissions.
 7. On 24th April, 2024 the matter was reserved for ruling.

Plaintiffs' response to the Preliminary Objection.

8. The Plaintiffs filed a Replying Affidavit on 19th January, 2024 sworn by one Mary Chebet Birir (4th Plaintiff). The Replying Affidavit is sworn on 12th January, 2024.
9. She deposes that she is one of the administrators of the estate of the late William Kiptanui Birir and that she has the authority of the other co-administrators to swear the affidavit.
10. She further deposes that the 1st and 2nd Defendants preliminary objection dated 28th September, 2023 is on the grounds that the suit herein is time barred as it has been brought outside the statutory limitation of twelve years as prescribed under Section 7 of the *Limitations of Actions* and that the entire suit is filed in bad faith, is frivolous and an abuse of the court process and therefore should be struck out with costs.
11. She also deposes that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.
12. It is her deposition that the court is required to only look at the averments in the Plaint in considering the merits of the preliminary issues raised in the preliminary objection.



13. It is also her deposition that the Plaintiffs commenced this suit vide the Plaint dated 10th August, 2021 which was later amended and filed in court on 21st December, 2022 after leave was granted on 13th October, 2022.
14. She deposes that the Plaintiffs claim is founded on a claim of trust arising from the purchase of land parcel No. Kericho/Cheptalal/359 between the late William Kiptanui Birir alias Kiptonui Arap Birir and the late Samuel Martin Kipsang Arap Maseri.
15. She further deposes that the requisite purchase price was paid and they have been in possession of the suit property for over four decades while practicing large scale cash crop farming, legal logging and animal husbandry.
16. She also deposes that the Plaintiffs have raised an issue of fraud against the 1st and 2nd Defendants who obtained a parallel title to the suit property after misrepresenting to the 3rd Defendant that the original title was lost and thereafter transferring it to his name on 4th May, 2021.
17. It is her deposition that the Plaintiffs are challenging the 1st and 2nd Defendants capacity to deal, alienate and/or sell the suit property to the 5th Defendant and the validity of the agreement dated 5th August, 2021.
18. She sets out the prayers sought in their amended Plaint and deposes that the 1st and 2nd Defendants admit that the late William Kiptanui Birir alias Kiptonui Arap Birir purchased the suit property and has been in possession of the same.
19. She also deposes that the 1st and 2nd Defendants admit that the Plaintiffs are holding the suit property in trust for the estate of the late William Kiptanui Birir alias Kiptonui Arap Birir the lawful and absolute proprietor.
20. She further deposes that the 1st and 2nd Defendants admit that they are trustees and that the Plaintiffs are beneficiaries under the trust.
21. It is her deposition that the 1st and 2nd Defendants admit that they are registered as the absolute proprietor of land parcel No. Kericho/Cheptalal/359 subject to the subsisting overriding proprietary and beneficial rights of the estate of the late William Kiptanui Birir alias Kiptonui Arap Birir.
22. She further deposes that the 1st and 2nd Defendants admit that on 4th May, 2021 they fraudulently transferred the suit property to their name.
23. The 4th Plaintiff also deposes that none of the periods prescribed by the *Limitations of Actions* Act apply to an action by a beneficiary under a trust including the present action for the recovery of trust property from a trustee and the alleged fraud arising on 4th May, 2021.
24. She deposes that the Plaintiffs cause of action of fraud accrued on 4th May, 2021 when the 1st and 2nd Defendants obtained title to the suit property. That the said cause of action of fraud also accrued when the 1st and 2nd Defendants entered into the agreement dated 5th August, 2021 for the sale of the suit property.
25. She also deposes that the second ground in the Preliminary Objection is not a pure point of law as it raises matters of fact and is therefore incompetent and should be struck out.
26. She ends her deposition by stating that the 1st and 2nd Defendant's preliminary objection is incompetent and was filed to delay the prosecution of the suit and should therefore be dismissed with costs to the Plaintiffs.



Issues for Determination.

27. The 1st and 2nd Defendants filed their submissions on 15th March, 2024 while the Plaintiffs filed their submissions on 23rd April, 2023.
28. The 1st and 2nd Defendants identify the following issues for determination;
 - a. Whether the 1st and 2nd defendants have met the threshold for a preliminary Objection.
 - b. If the answer to (a) above is in the affirmative, whether the preliminary objection raised is merited.
29. With regard to the first issue, the 1st and 2nd Defendants rely on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Limited* [1969] EA 696 and submit that the Plaintiffs seek to enforce a land sale agreement executed on 22nd February, 1984.
30. The 1st and 2nd Defendants also submit that a period of twelve years has already lapsed since the cause of action arose and therefore the Plaintiffs claim is statute barred.
31. The 1st and 2nd Defendants further submit that the Plaintiffs filed the present matter thirty-seven years after the cause of action arose.
32. The 1st and 2nd Defendants rely on [Edward Moonge Lengusuranga v James Lanaiyara & another](#) [2019] eKLR and submit that their preliminary objection raises a pure point of law and should therefore be allowed.
33. With regard to the second issue, the 1st and 2nd Defendants rely on *Mehta v Shah* [1965] EA 321, [Gathoni v Kenya Co-operative Creameries Ltd](#) [1982] KLR 104, *Iga v Makerere University* [1972] EA, [Dickson Ngige Ngugi v Consolidated Bank Ltd \(Formerly Jimba Credit Corporation Limited\) & another](#) [2020] eKLR among other judicial decisions and Section 7 of the [Limitations of Actions Act](#). They reiterate that since the cause of action arose in 1984, the Plaintiffs claim is statute barred and this court does not have the jurisdiction to hear it.
34. The 1st and 2nd Defendants therefore seek that the Plaintiffs suit be dismissed with costs.
35. The Plaintiffs submit on the following issues;
 - a. Whether the suit is time barred per Section 7 of the [Limitation of Actions Act](#).
 - b. Whether the suit is filed in bad faith, frivolous or an abuse of the court process.
36. With regard to the first issue, the Plaintiffs rely on Section 7 of the [Limitations of Actions Act](#), *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, *Fazlehussein v Yusufally* (5 A.I.R 1955) as was cited in [Korea Nyamai v Neema Parcels Limited](#) [2021] eKLR, [Wasike v Khisa](#) [1993] eKLR, *Brij Kishore vs SMT Mushtari Khatoon* A.I.R 1976 ALL 399 and submit that even though the 1st and 2nd Defendants allege that their suit seeks to enforce the sale agreement dated 22nd February, 1984, a reading of the entirety of the Plaintiffs claim reveals that their claim is founded on a claim of trust.
37. The Plaintiffs rely on the South African judicial decision Case No. 026742-2022 In the matter between *Johanna Hester Alberta Botha and Others vs Zanro Fashion CC and another*, the Supreme Court of India judicial decision of *Bhajaman Behera v Bishnu Charan Pattanaik and D.T Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR in support of their arguments.



38. The Plaintiffs reiterate that the said claim of trust arose from the purchase of land parcel No. Kericho/Cheptalal/359 by the late William Kiptanui Birir alias Kiponui Arap Birir from the late Samuel Martin Kipsang Arap Maseri.
39. The Plaintiffs submit that the second claim they have against the 1st and 2nd Defendants is that of fraud. They also submit that when the court is determining an issue of limitation of time, it has to establish when the cause of action arose.
40. The Plaintiffs rely on Archer & another vs Archer & 2 Others (citation not given), *Peter Muiruri Kigera v John Gitau Gathenya & David Mwaura Gathenya* [2019] eKLR and submit that the cause of action arose on 4th May, 2021 when the 1st and 2nd Defendants fraudulently transferred the suit property to his name.
41. The Plaintiffs submit that the period of limitation prescribed under the *Limitation of Actions Act* does not apply to a claim by a beneficiary under a trust which includes action to recover property from trustees. Therefore, the suit is not time barred and the preliminary objection ought to be dismissed.
42. With regard to the second issue, the Plaintiffs rely on Order 2 Rule 15 of the *Civil Procedure Rules*, Oraro vs Mbaja [2005] 1KLR 141 and reiterate that the second ground of the 1st and 2nd Defendants preliminary objection is founded on factual issues and does not therefore meet the threshold for a preliminary objection.
43. The Plaintiffs therefore seek that the 1st and 2nd Defendants preliminary objection be dismissed as it lacks merit.

Analysis and Determination.

44. I have considered the preliminary objection, replying affidavit and the rival submissions filed herein.
45. In my view, the only issue that arises for determination is whether the Plaintiffs suit is statute barred for having been filed more than twelve years after the course of action arose and whether on account of this, it offends the provisions of Section 7 of the *Limitation of Actions Act*.
46. In the judicial decision of *Oraro vs Mbaja* 2005 1 KLR 141 the court said:

“A ‘Preliminary Objection’, correctly understood, 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 seek 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.” (Emphasis mine)
47. A preliminary objection raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts have to be ascertained. In other words, a preliminary objection should not deal with disputed facts nor should it derive its foundation from factual information.
48. The 1st and 2nd Defendant’s objection is that the Plaintiffs seek to enforce the land sale agreement entered into on 22nd February, 1984 thirty-seven years after the cause of action arose and is therefore statute barred.



49. The Plaintiffs on the other hand argue that their claim in the Plaintiff is based on the issues of trust and fraud. They also argue that the cause of action arose on 4th May, 2021 when the 1st and 2nd Defendants registered the suit property in their name and therefore the limitation period is yet to lapse.

50. 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.”

51. In *Sichuan Huasbi Enterprises Corp. Limited v Micheal Misiko Mubindi* [2019] eKLR the court 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. (Emphasis mine)

On this see the case of *Oruta & Another vs. 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 appellant 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” (Emphasis mine)

14. See also the case of *Divecon Ltd vs 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*...” (Emphasis mine)

52. As was held in the above cited judicial decision, the defence of limitation of time can only be determined at the trial and cannot and should not be dealt with as a preliminary objection. The subject matter of this suit is land. Needless to say, we all understand the sensitive nature of land disputes in our country. There is history to it and also the sentimental attachment to land. It would be absurd to dismiss a suit of such nature only on the strength of one party’s assertion that it has been brought too late in the day without delving into the merits of the claim.

Disposition.

53. Consequently, I find that the 1st and 2nd Defendants Preliminary Objection dated 28th September, 2023 lacks merit and is hereby dismissed.

54. The costs of the preliminary objection shall abide the outcome of the suit.

55. It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 13TH DAY OF JUNE, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Muthee for Plaintiff/Respondent

Mr. Miruka for 5th Defendant.

Mr. Munyambu for Khamunwa for 1st and 2nd Defendant.

3rd and 4th Defendant. Absent.

Court Assistant; Mr. Joseph Makori.

