



Salim & 3 others (Suing for and on Behalf of the Beneficiaries of the Wakf of the Late Mohamed Said Abdun Bamkelle) v Wakf Commissioners of Kenya and 69 others (Environment & Land Case 209 of 2014) [2024] KEELC 4633 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4633 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 209 OF 2014
NA MATHEKA, J
JUNE 11, 2024**

BETWEEN

**FAIZ ALI SALIM 1ST PLAINTIFF
MUNIRA MOHAMED AHMED 2ND PLAINTIFF
ABDULHALIM SALIM M. BAGHOZA 3RD PLAINTIFF
HAMID SALIM JUMAAN (SUING FOR AND ON BEHALF OF THE
BENEFICIARIES OF THE WAKF OF THE LATE MOHAMED SAID ABDUN
BAMKELLE) 4TH PLAINTIFF
SUING FOR AND ON BEHALF OF THE BENEFICIARIES OF THE WAKF OF
THE LATE MOHAMED SAID ABDUN BAMKELLE**

AND

THE WAKF COMMISSIONERS OF KENYA AND 69 OTHERS DEFENDANT

RULING

1. The 2nd defendant raised a notice of preliminary objection dated 24/1/2024 for reasons:
 - a. That the suit as against the 2nd defendant is fatally defective and cannot be ventilated as preferred by the plaintiffs as it offends the provisions of Cap 108 of the Laws of Kenya
 - b. That the orders as sought cannot be granted.
2. The 1st defendant also raised a preliminary objection dated 30/1/2024 summarily for reasons that;
 - a. The suit is time barred because the plaintiffs brought the suit after the end of 12 years from the date on which the right of action accrued.



- b. The right of action accrued to the plaintiffs in 1926 when the supreme court at Mombasa vested suit on the predecessor of the 1st defendant.
 - c. The suit is also time barred as the plaintiffs are beneficiaries seeking to recover trust property after the end of 6 years from the date on which the action accrued.
3. The court decided to determine both notices of preliminary objection at the same time as they both oppose the plaintiffs' case. Counsel for the 2nd defendant submitted that the 2nd defendant is registered under the *Societies Act* Cap 108 and therefore does not have *locus standi*. Counsel argued that the 2nd defendant cannot be sued as it is a society and relied on several cases such as *Eritrea Orthodox Church v Warowax General Ltd* (2007) eKLR, *African Orthodox Church of Kenya v Charles Omuroka & another* (2014) eKLR.
 4. Counsel for the 1st defendant argued that the plaintiffs was inert and did not take any action until after 76 years had passed since their rights accrued. Counsel claim that the supreme court at Mombasa vested the 1st defendant with title in 1926 and hence the plaintiffs could not recover the suit property by limitation of section 7 of the *Limitation of Actions Act*. In arguing that point, counsel relied on *Dickson Ngige v Consolidated Bank Ltd & another* (2020) eKLR.
 5. Furthermore, counsel argued that since the plaintiffs are beneficiaries of the Wakf of Mohamed Bin Said Abdun Bamkelle, they cannot recover trust property which they allege the suit property falls under. Counsel relied on *Alex Sande Wafula (suing as the legal representative of the estate of the late Wafula Mulunda John (Deceased) v Jairus Wakhungu Mulunda* (2017) eKLR. Counsel concluded by stating that the suit should be dismissed as the court lacks jurisdiction to sustain actions outside the period of limitation.
 6. Counsel for the 13th defendant reiterated the above arguments that the suit property was vested on the 1st defendant in 1926 by the supreme court at Mombasa. Therefore, no action could be brought at the end of 12 years after the cause of action arose. Similarly, counsel also deemphasized the plaintiffs attempt to recover the suit property as trust property and relied on ELC No. 24 of 2016 *Leonard Okome Onyango v George Ouma Euko* eKLR.
 7. Counsel for the plaintiffs argued that under the principles of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696 there are some facts which still need evidence to be produced. Counsel submitted that they have been receiving rent from 1926 until sometime in 2010 from the 1st defendant which is when the cause of action arose. Counsel also submitted that the legal status of the 2nd defendant has to be established and thus defeats the principles of Mukisa Biscuit case.
 8. I have read both the notices of preliminary objection and all the submissions hereto. The issue for determination is whether both the plaintiffs are time barred by Section 7 and 20 of the *Limitations Act* and whether the 2nd defendant has *locus standi*.
 9. The principles of notice of preliminary objection as have been mentioned ad nauseum by both parties were best described in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969) EA 696. At page 700 Law JA stated;

“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.”



10. In the same case Sir Charles Newbold, P. stated;

“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. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

11. The time limitations raised in Section 7 and 20 of the *Limitations of Actions Act* in this case are subject to determination as to when they started. The plaintiffs claim that the cause of action started in 1926 when a supreme court in Mombasa handed a verdict vesting the 1st defendant with tile while the plaintiffs claim that that the cause of action started in 2010 when the 1st defendant stopped paying rent. The court cannot go into the merits of each case as that would defeat the purpose of a preliminary objection. The above sections are not pure points of law but are claims which have to be proved by fact. Hence the notice of preliminary objection by the 1st defendant fails and is dismissed with costs.

12. The second issue is whether the 2nd defendant has locus to be sued. I reiterate the same facts in the Mukisa Biscuit case above. The 2nd defendant claims that it has been registered as a society which the court has taken judicial notice of under section 60 of the *Evidence Act* Cap 80. However, the plaintiff has cast aspersions on this fact and the court’s hands are tied. Until when evidence of registration of society is produced, the court cannot act by dismissing the suit. Similarly, this is an issue which can be cured under Order 1 Rule 9 of the *Civil Procedure Rules* which states as follows:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

13. Hence, the notice of preliminary objection by the 2nd defendant is also dismissed with costs.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

