



Sadera & another (Both suing as the son, next of kin and legal representative of the estate of the late Parsapaet Ole Sadera alias Parasapayet Ole Sadera) v Sankei (Land Case E012 of 2023) [2024] KEELC 6262 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6262 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
LAND CASE E012 OF 2023
CG MBOGO, J
SEPTEMBER 26, 2024

BETWEEN

NOONKUTA SADERA 1ST PLAINTIFF

JOSEPH TIAMPATI SADERA 2ND PLAINTIFF

**BOTH SUING AS THE SON, NEXT OF KIN AND LEGAL REPRESENTATIVE
OF THE ESTATE OF THE LATE PARSAPAET OLE SADERA ALIAS
PARASAPAYET OLE SADERA**

AND

SANJA OLE SANKEI DEFENDANT

RULING

1. Before this court for determination is the notice of preliminary objection dated 14th December, 2023 filed by the defendant challenging the suit on the following grounds: -
 1. That this suit is statute barred contrary to Section 4 (1)(a) of the Limitations of Actions Act, Cap 22, Laws of Kenya as it is based on a contract of sale dated 26th November, 2008.
 2. That this suit is statute barred contrary to Section 7 of the Limitations of Actions Act, Cap 22, Laws of Kenya as the defendant/respondent took possession of the land in the year 2011.
 3. That the instant suit as filed is incompetent, devoid of merit and ought to be dismissed as the same is borne out of misapprehension of the law.
2. The notice of preliminary objection was canvassed by way of written submissions. The defendant filed his written submissions dated 3rd June, 2024 where he raised one issue for determination which is whether the plaintiffs' suit is statutory barred and if it violates the provisions of Section 4 (1) and Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya.



3. On this issue, the defendant submitted that the suit is statute barred contrary to Section 4 (1) (a) of the Limitations of Actions Act since it is based on a contract of sale dated 26th November, 2008 and further that the defendant took possession of the land in the year 2010. While relying on the cases of Mehta versus Shah [1965] EA 321 and Gathoni versus Kenya Cooperative Creameries Limited [1982] eKLR, the defendant submitted that together with the late Parsapaet Ole Sadera, they entered into a written sale agreement for the purchase of the suit land on 26th November, 2008 as annexed in the defendant's replying affidavit, they followed the due process, and that he was subsequently issued with a title deed on 15th September, 2010. Further, he submitted that the plaintiffs herein filed the suit 15 years after the sale agreement was executed contravening the six-years statutory time limit. To further buttress on this submission, the defendant relied on the case of Salim Mohamed Salim Tweshe versus Khalid Salim Naaman & 5 Others [2020] eKLR.
4. The defendant further submitted that the plaintiffs have taken 13 years to institute a suit against him, and that they have sat on their right for so long having knowledge of the sale agreement, and that the deceased relocated his family to the land he bought in Lemek. Further, he submitted that the said actions contravene the provisions of Section 7 of the Limitations of Actions Act. Reliance was placed in the cases of Dickson Ngige Ngugi versus Consolidated Bank Limited [2020] eKLR, Damaris Kondoro versus Gachanja Gitare & Others [2005] eKLR, and Beatrice Wambui Kiarie & 9 Others [2018] eKLR.
5. The plaintiffs filed their written submissions dated 22nd July, 2024. The plaintiffs submitted that the documents relied on by the defendant to transfer the property to himself need to be subjected to proper examination to determine the authenticity of the said documents. The plaintiffs relied on the case of Republic versus Eldoret Water & Sanitation Company Limited Exparte Booker & Onyango & 2 Others [2007] eKLR and submitted that there is no assumption that the facts raised by the plaintiffs are correct, and that the defendant has disputed everything in his replying affidavit sworn on 14th December, 2023.
6. The plaintiffs further submitted that a preliminary objection can only be premised on undisputed facts, and it 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. They relied on the cases of Justus Tureti Obara versus Peter Koipeitai [2014] eKLR, Avtar Singh Bhamra & Another versus Oriental Commercial Bank, HCC No. 53 of 2004 and Daniel Okasisi Olegerea & Another versus Barasa Ekapoloni Auku [2015] eKLR.
7. The plaintiffs further submitted that the dispute is based on ownership as envisaged under Article 40 of *the Constitution*, and whereas Section 7 of the Limitations of Actions Act provides for recovery of land to be filed within 12 years, *the Constitution* provides that limitation of time in instituting a claim was a violation of the constitutional right. Further, they submitted that it is at the point of the search that the alleged fraudulent registration of the suit property in the name of the defendant was ascertained. To buttress on this submission, the plaintiffs relied on the cases of David Gitau Njau & 9 Others versus The Attorney General [2013] eKLR and Ramji Megji Gudka Limited versus Alfred Morfat Omundi Michira & 2 Others [2005] eKLR.
8. I have considered the preliminary objection, the written submissions filed by the parties as well as the authorities cited. I am of the considered view that the issue for determination is whether the notice of preliminary objection has merit.



9. In Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA 696, a preliminary objection was described to mean: -

Per Law, JA

“So far as I am aware, 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”.

Further Sir Charles Newbold, P stated that: -

“ 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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

10. Also, in the case of Quick Enterprises Ltd versus Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

11. The court is persuaded by the findings in the case of Oraro versus Mbaja (2005) 1KLR 141, where it was held that: -

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

12. In considering whether there is merit in the preliminary objection, there is need to ascertain the existence of undisputed facts or issues. The plaintiffs filed the notice of motion dated 16th November, 2023 seeking injunctive orders against the defendant with respect to the parcel of land known as CisMara/Ewaso-Nyiro/396. The defendant herein filed a replying affidavit in opposition to the said application, sworn on 14th December, 2023. In the said reply, the defendant rebutted the claims by the plaintiffs with evidence including a sale agreement. Bearing in mind that a preliminary objection must be raised where facts are not disputed, the same is the opposite in the instant case. The defendant has refuted the claims by the plaintiffs.

13. This would then mean that the parties to this case must be subjected to trial to ascertain the correctness or otherwise of the claims made by either party. In sum, the essence of a preliminary objection is thus defeated since the defendant is asking this court to comb through the evidence i.e. the ‘sale agreement’ to determine that indeed the suit is statute barred by virtue of Sections 4(1)(a) and 7 of the Limitations of Actions Act.



14. Arising from the above, the notice of preliminary objection dated 14th December, 2023 lacks merit and it is hereby dismissed. Costs to be in the cause. Mention on 8th October, 2024, for further directions. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL on this 26TH day of SEPTEMBER, 2024.

HON. MBOGO C.G, JUDGE

26/09/2024.

In the presence of: -

Mr. Meyoki – C.A

