



Soit (Suing as the Legal Representatives of the Estate of Kimayu ole Soit alias Soit Kimayu) v Ojaka & 3 others (Environment & Land Case E001 of 2024) [2024] KEELC 7138 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT & LAND CASE E001 OF 2024
EM WASHE, J
OCTOBER 23, 2024**

BETWEEN

**SAMUEL LEMUSHEN SOIT PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KIMAYU
OLE SOIT ALIAS SOIT KIMAYU**

AND

**CHARLES DICKENS OLE OJAKA 1ST DEFENDANT
SABASTIAN OMALWA OURIEN 2ND DEFENDANT
JAVINCHI MAHUWA TITIYA 3RD DEFENDANT
SAITOTI OLE MPIRIS KIPINTOI 4TH DEFENDANT**

RULING

1. The 2nd Defendant (hereinafter referred to as the Applicant) filed a Preliminary Objection dated April 23, 2024 (hereinafter referred to as the present PO) against the Plaintiff's (hereinafter referred to as the Respondent's) Plaint dated January 18, 2024 (hereinafter referred to as the present suit) on the following grounds
 - a. That the case filed is time barred.
 - b. That the matter offends the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - c. That the action to recover land is limited to twelve years (12).
 - d. That the 2nd Defendant executed an Agreement with the deceased father of Plaintiff on the 3rd of May 1993 and took possession the same year.



- e. That the 2nd Defendant has stayed in the suit property an interrupted for more than 30 years and continues to stay in the said property.
 - f. That the suit against the 2nd Defendant be dismissed with costs to the Plaintiff.
2. The Applicant therefore sought for this Court to strike out the present suit for being time-barred and one that cannot be entertained in law.
 3. The present PO was duly served on the Respondent who expressed his intention to oppose the same.
 4. The Court directed that the present PO would be canvassed by way of written submissions.
 5. The Applicant duly prepared, filed and served his submissions dated 29.05.2024 while the Respondent filed his submissions dated 18.09.2024.
 6. The Court has duly gone through the present PO and the submissions of the parties and the issues for determination is whether or not the cause of action raised in the present suit is time barred as provided under Section 7 of the *Limitation of Actions Act*, Cap 22.
 7. The Applicant in raising this issue has decided to pursue the method of filing a Preliminary Objection.
 8. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors (1969) EA 696* is notorious on the issue of what constitutes a preliminary objection where their Lordships observed thus:

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 a contract giving rise to the suit to refer the dispute to arbitration.

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.
 9. In another case of *Attorney General And Another Versus Andrew Mwaura Githinji And Another (2016) eKLR*, the Court identified the following salient ingredients of what constitutes a Preliminary Objection-
 - (i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
 10. Turning back to the present PO, this court is first and foremost required to satisfy itself as to whether the facts relied upon in the Preliminary Objection have been admitted and can be assumed to be correct and thereby allowing the Court to decide the proceedings purely on an issue of law.



11. In the event the facts before the Court have not been admitted and/or cannot be assumed to be correct, then a Preliminary Objection can not stand as it would require the Court to make various determinations on issues of facts.
12. It is therefore necessary that this Court reviews the facts placed by the parties through their pleadings to establish whether or not the same have been admitted and/or can be assumed to be correct before proceeding to look at the point of law raised therein.
13. According to the Respondent's Plaint dated 18.01.2024, the property in dispute is one known as Lr.no.transmara/shartuka/856 (hereinafter referred as the suit property).
14. The Respondent further pleaded that the suit property was registered in the name of his late father who took possession since adjudication up to date.
15. However, the 1st Defendant, the 2nd Defendant/Applicant and the 3rd Defendants herein trespassed into the suit property in the years between 2018 and 2022 without the authority and/or consent of the registered owner and/or his legal representatives thereof.
16. The 1st Defendant's, 2nd Defendant's/Applicant's and the 3rd Defendant's occupation on the suit property is therefore illegal, unlawful and without any legal right and therefore should be terminated.
17. The Respondent proceeded to seek for a declaration that the suit property belonged to his deceased father and consequently therefore, the 1st Defendant, 2nd Defendant/Applicant and the 3rd Defendants should be evicted from the suit property.
18. In addition to the above, the Respondent sought a permanent injunction against the 1st Defendant, 2nd Defendant/Applicant and the 3rd Defendants from occupying and/or use of the suit property as well as special damages for their illegal use of the same.
19. The Applicant herein who is the 2nd Defendant in the present suit filed a Statement of Defence and Counter-Claim both dated 05.02.2024.
20. The Applicant admitted that the suit property indeed is registered in the name of the Respondent's father.
21. However, the Applicant pleaded that based on an Agreement For Sale dated 5th March 1993, he acquired a portion of 2 acres from the Respondent's father.
22. The Applicant allege that his occupation on the suit property was from the year 1993 and not the years been 2018 and 2022.
23. In addition to the above, the Applicant in his Counter-Claim sought orders to be declared as a beneficiary of the estate of the late Respondent's father and in particular the suit property.
24. Based on the pleadings by the Respondent and the Applicant, can it be said that the facts before Court are in fact admitted and/or can be assumed to be correct.
25. Unfortunately, this Court is of the considered view that the pleadings by the Respondent and the Applicant have conflicting facts and therefore raise factual issues that require determination by the Court.
26. To begin with, the Respondent through his legal representatives is seeking to enforce their ownership rights against the unlawful occupation of the Defendants including the Applicant.



27. On the other hand, the Applicant pleaded that his occupation on the suit property owned by the Estate of the Respondent is lawful and legitimate based on the Agreement For Sale dated 05.03.1993.
28. Consequently, based on these facts, the legality of the Agreement For Sale dated 05.03.1993 must be determined through a hearing and cannot be determined through a Preliminary Objection.
29. Secondly, the Applicant in his Counter-Claim dated 05.02.2024 is seeking the Court to make a declaration that he should be declared as a person with interest in the Estate of the deceased Respondent.
30. The Court therefore will be required based on the facts pleaded by the parties to decide on whether or not the Applicant is entitled to an order of being a beneficiary of the Estate of the Respondent.
31. Clearly, the above facts and issues require the determination by the Court and the same can not be assumed to be correct and/or admitted to sustain a Preliminary Objection.

Conclusion

10. In conclusion, this court hereby makes the following Orders in determination of the present PO
 - a. The preliminary objection be and is hereby dismissed.
 - b. The applicant is condemned to meet the respondent's costs appertaining to this preliminary objection.

DATED, SIGNED AND DELIVERED Virtually in KILGORIS ELC Court on 23RD OF OCTOBER 2024.

EMMANUEL.M.WASHE

JUDGE

In The Presence Of

Court Assistant Mr. Ngeno

Advocate For The Plaintiff/respondent Ms. Pion

Advocate For The 2Nd Defendant/applicant Mr.

Ochwangi For 3Rd Defendant

Mr. Kilenyet For 2Nd

Defendant/applicant (n/a)

