



**Isiepai (Suing as the Legal Representative of the Estate of Alfred Isiepai
Jacob – Deceased) v Situma & another (Environment & Land Case
E015 of 2023) [2024] KEELC 6880 (KLR) (22 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E015 OF 2023
BN OLAO, J
OCTOBER 22, 2024**

BETWEEN

**JAMES MASAI ISIEPAI (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF ALFRED ISIEPAI JACOB – DECEASED) PLAINTIFF**

AND

HENDRICK MUGENI SITUMA 1ST DEFENDANT

DAVID OSIGWAR OKOMOI 2ND DEFENDANT

RULING

1. James Masai Isiepai (the Plaintiff herein and suing as the legal representative of Alfred Isiepai Jacob now deceased and hereinafter Jacob) filed this suit on 30th November 2023. He impleaded Hendrick Mugeni Situma and David Osigwar Okomoi (the 1st and 2nd Defendants respectively) and sought judgment against them with respect to the land parcels No South Teso/Angoromo/7657 and 12967 in the following terms:
 - a. A declaration against the Defendants that the deceased Alfred Isiepai Jacob is the legal owner of the land parcels No South Teso/Angoromo/7657 and 12967 measuring 1.41 Hectares.
 - b. A declaration that the Defendants are unlawfully and fraudulently holding titles to the land parcels No South Teso/Angoromo/7657 and 12967 and order the cancellation of those titles.
 - c. A permanent injunction restraining the Defendants whether by themselves, their agents and/or servants from trespassing on, alienating or otherwise interfering or dealing with the Plaintiff's property and right of occupation, quiet possession and use of all that parcel of land described as title No South Teso/Angoromo/7657 and 12967.
 - d. Costs of this suit.



- e. Any other relief that this Honourable Court deems fit to grant.
2. The basis of the Plaintiff's claim is that he is the Administrator to the Estate of the late Alfred Isiepai Jacob (the deceased) who had purchased a parcel of land from Yohana Wenani (herein Wenani and also now deceased) measuring 1.41 Hectares out of the land parcel No South Teso/Angoromo/208. That Jacob and Wenani duly attended the Land Control Board for purposes of sub-division and transfer following their agreement dated 21st September 1977. However, before the transfer could be effected, Wenani died but by then, he had already given Jacob vacant possession of the 1.41 Hectares out of the land parcel No South Teso/Angoromo/208.
 3. Following the demise of Wenani his son George Situma Wenani (also now deceased) transferred the land parcel No South Teso/Angoromo/208 into his name without applying for Letters of Administration. He then sub-divided the said land to create parcels No South Teso/Angoromo/4644 and 4645 which were then registered in his name and that of Samson Akuter respectively. George Situma Wenani thereafter sub-divided the land parcel No South Teso/Angoromo/4644 to create land parcels No South Teso/Angoromo/7656 and 7657 registered in the names of George Situma Wenani and David Osiwar Okomol respectively.
 4. The Plaintiff's family is in occupation of the land parcel No South Teso/Angoromo/7657 although the same is registered in the name of the 2nd Defendant. Upon realizing that George Situma Wenani was sub-dividing the land and selling it to third parties, the late Jacob placed a caution on the land parcel No South Teso/Angoromo/7656 which was however removed by the Land Registrar. Upon the demise of George Situma Wenani, his wife and son and who are the 1st and 2nd Defendants respectively applied for Letters of Administration in respect of his Estate which was confirmed vide Busia High Court Succession Cause NO 396 of 2012 and later sub-divided the land parcel No South Teso/Amagoro/7656 into parcels No South Teso/Amagoro/12958 to 12968. The Plaintiff's family occupies land parcel No South Teso/Amagoro/12967 which is registered in the name of the 1st Defendant. The registration of the land parcel No South Teso/Angoromo/208 into the name of George Situma Wenani and its subsequent sub-division to create the land parcels No South Teso/Angoromo/7657 and 12967 now registered into the names of the Defendants has deprived the Estate of Jacob of their right to the said land.
 5. The record shows that the Plaintiff filed a Notice of Motion dated 29th November 2023 seeking conservatory orders restraining any dealings on the land parcels No South Teso/Angoromo/7657 and 12967 pending the hearing of this suit. And although Cheron J issued directions on 11th December 2023 that the application be canvassed by way of written submissions, that application was withdrawn on 12th March 2024 with the consent of the parties. The record further shows that to date, the Defendants have not filed any defence to the Plaintiff's claim although the firm of Barasa Moses Ouma & Company Advocates entered appearance on behalf of the 1st Defendant on 15th January 2024 while the firm of Omeri & Company Advocates entered appearance on behalf of the 2nd Defendant on 9th January 2024.
 6. The 1st Defendant has now filed a Notice of Preliminary Objection dated 12th March 2024 raising the following issues:
 1. The suit is time barred as it offends the provisions of Rule 7 of the *Limitation of Actions Act*. (It should be actually Section 7 of the Act).
 2. The suit offends the provisions of Section 6 of the *Land Control Act* which requires a party to acquire the consent of the Land Control Board within 6 months of the making of the agreement.



3. The suit does not disclose a cause of action against the 1st Defendant.

When the Preliminary Objection was placed before me on 8th May 2024, it was agreed that the same be canvassed by way of written submissions. The submissions were subsequently filed by Mr. Ouma instructed by the firm of B. M. Ouma & Company Advocates for the 1st Defendant, Mr Omeri instructed by the firm of Omeri & Associates Advocates for the 2nd Defendant and by Ms Nabulindo instructed by the firm of D. K, Nabulindo & Company Advocates for the Plaintiff.

7. I have considered the Preliminary Objection and the submissions of the counsel.
8. In the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* 1969 E.A. 696 Law JA said a Preliminary Objection:

“... Consists of a pure 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.”

In the same case, Sir Charles Newbold P added:

“A Preliminary Objection is in the nature of what used to be a demurer. 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.” Emphasis added.

Ojwang J (as the then was) discussed the same issue in the case of *Oraro v Mbaja* 2005 KLR 411 and said:

“A Preliminary Objection correctly understood, is now well defined as and declared to be a point of law which must not be blurred by 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 yet it bears factual aspects calling for proof or seeks to adduce evidence for it’s authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed. Where the Court needs to investigate facts, a matter cannot be raised as a Preliminary point. Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not itself derive it’s foundation from factual information which stands to be tested by normal rules of evidence ...” Emphasis Added.

The first ground of Preliminary Objection is that the suit offends the provisions of Section 7 of the *Limitation of Actions Act*. That provision reads:

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“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.”



In his submissions on the that issue, counsel for the 1st Defendant has submitted as follows at page 2:

“Your Lordship the Plaintiff’s claim is a claim for the land which he wish to claim from the Defendants and which was bought in the years 1972, 1977, 1980, 1985 and 1986 this is over 40 years ago and the Plaintiff did not bother to get leave of Court to file the suit out of time for the statutory time of 12 years.”

Although the documents filed herein show that the first agreement between Jacob and Wenani was executed on 5th September 1972 for a portion of 3½ acres out of the land parcel No South Teso/Angoromo/208, the Certificate of Official Search for the land parcel No South Teso/Angoromo/7657 shows that it was registered in the names of the 2nd Defendant on 19th April 2013 while the Certificate of Official Search for the land parcel No South Teso/Angoromo/12967 shows that it was registered in the name of the 1st Defendant on 31st May 2018. Those two parcels of land are the subject of this dispute which was filed on 30th November 2023. It is those two titles which the Plaintiff wants cancelled. The view I take of the matter is that time for purposes of the *Limitation of Actions Act* could only start to run in 2013 and 2018 when those parcels of land were created and registered in the names of the Defendants but not before. That is when the right accrued to the Plaintiff. This suit was filed on 30th November 2023 which is well within the limitation period. Prior to that, the parcels of land subject of this suit did not exist. I am not persuaded therefore that the cause of action arose over 40 years ago. Besides, the issue with regards to when the cause of action arose can only be determined by a scrutiny of documents. It cannot be a matter of pure law as to when the sale agreement between Jacob and Wenani was breached.

9. With regard to the objection that this suit offends the provisions of Section 6 of the *Land Control Act* which requires that consent to transfer land be obtained within 6 months of the signing of the agreement, the Court has seen copies of applications of consent filed herein. They may or may not support the Plaintiff’s case. There are also minutes of the Amagoro Land Control Board dated 16th November 1977 and under minute No 313/77 is the approval of the transaction between Jacob and Wenani in respect of the land parcel No South Teso/Angoromo/208. Again whether or not the consent of the Land Control Board was obtained within the time set out in the law cannot be a matter of pure law. It is a matter of fact to be determined by evidence. And as Ojwang J (as he then was) stated in the case of *Oraro v Mbaja* (*supra*).

“Where the Court needs to investigate facts, a matter cannot be raised as a Preliminary Point.”

The final ground of Preliminary Objection is that this suit does not disclose the cause of action against the 1st Defendant. Whether or not a suit does disclose a cause of action is not a matter of pure law. That is an issue blurred in both legal and factual matters that need to be interrogated. It cannot be a proper Preliminary Objection.

10. Most importantly, what the 1st Defendant seeks by invoking the objection that the suit discloses no cause of action is basically asking this Court to strike out the Plaintiff’s suit. The power to do so, as was held by Madan JA in the case of *D.T.Dobie & Company Kenya Ltd v Muchina* 1982 KLR 1, must be exercised “very cautiously”. I am further guided by the decision of Sheridan J in the case of *Sebei District Administration v Gasyali & others* 1968 E.A 300 where the Judge said:

“... it should always be remembered that to deny the subject a hearing should be the last resort of a Court.”



Finally, Article 50 (1) of the Constitution protects the right to be heard. It reads:

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- (1) “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body.”

My evaluation of the Preliminary Objection raised herein is that it does not meet the threshold to deny the Plaintiff the right to prosecute his claim. To uphold it will amount to unfairly throwing the Plaintiff away from the seat of justice on grounds that are not plausible. I must dismiss it.

11. Ultimately therefore, the Preliminary Objection dated 12th March 2024 is devoid of any merit. It is accordingly dismissed with costs to the Plaintiff payable by the 1st Defendant.

BOAZ N. OLAO

JUDGE

22ND OCTOBER 2024

RULING DATED, SIGNED AND DELIVERED ON THIS 22ND DAY OF OCTOBER 2024 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

22ND OCTOBER 2024

