



Siboko & 2 others v Nabibia & 5 others (Environment and Land Judicial Review Case E002 of 2024) [2024] KEELC 13951 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13951 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2024
FO NYAGAKA, J
DECEMBER 10, 2024**

BETWEEN

**FREDRICK BARASA SIBOKO 1ST PLAINTIFF
BENARD SIBOKO 2ND PLAINTIFF
ROBERT SIBOKO 3RD PLAINTIFF**

AND

**FRANCIA NABIBIA 1ST DEFENDANT
PATRICK WAMALWA 2ND DEFENDANT
ALFRED MAKOKHA 3RD DEFENDANT
JAMES KARIUKI GITONYO 4TH DEFENDANT
CLEOPHAS WANJALA 5TH DEFENDANT
PAMELA KWAMBUKU 6TH DEFENDANT**

RULING

1. The plaintiffs filed this suit on 08/05/2024 vide a Complaint dated 07/05/2024 and verified by an Affidavit sworn by the second and third plaintiffs on the same date. It was their claim that they were the rightful owners of land parcel number Kimondo/ Kimondo Block 5 (Basale)/ 158 measuring approximately 1.1116 hectares. Further, the defendants, without any colour of right or consent from the Plaintiffs, in 1993 trespassed onto the subject parcel of land and for 31 years, used and ploughed it to date. They averred that the defendants' actions were unlawful. The plaintiffs sought a declaration that they were the rightful owners of the suit land in question. They prayed for an order of eviction to issue against the defendants from the suit land and a permanent injunction against the said defendants or any persons



- claiming title through them. They also prayed for interest (sic) for ploughing the land for 31 years and the costs of the application.
2. The defendants instructed learned counsel who filed a Notice of Appointment of Advocates dated 20/05/2024. Together with it, they filed a Notice Preliminary Objection dated the same date, which contained four grounds. The first one was that the suit was time barred, having been brought outside of the statutory limitation period of 12 years thus contravening Section 7 of the *Limitation of Actions Act*. The second one was, the 1st Plaintiff herein died in the year 2007 and the second and third defendants (sic) had no locus standi to bring this suit in the company of a deceased person. Third, the application dated 07/05/2024 was fatally defective, having been signed by Frederick Barasa Siboko (deceased) and supported by an affidavit sworn by a stranger, Rose Nasimiyu Mayeku. Fourth, the applicants (sic) and the entire suit were incompetent, bad in law, lacked merit were and fatally defective as the same is scandalous frivolous and an abuse of the process of the court and out (sic) to be dismissed with costs.
 3. The Preliminary Objection was canvassed by written submissions. Rather than the plaintiffs filing written submissions, they filed a document which was called the Further Amended Notice of Motion.

Issue, Analysis And Determination

4. I have considered the preliminary objection and the submissions, together with the law. The only issue before me for determination is twofold. Whether the Preliminary Objection was melted, two who to bear the costs of the preliminary objection, and suit if, the preliminary objection succeeds.
5. A preliminary objection is a point of law that is raised in respect of pleadings to challenge their validity vis-à-vis the law. It therefore goes without saying that once raised, a preliminary objection should take precedence over every other step that was to be taken in a matter. Secondly, the Court should not look beyond pleadings and the law in order to determine the success or otherwise of the objection. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold defined a Preliminary objection by putting it aptly as follows:-

“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... 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.”

6. Also, in *Bashir Haji Abdullahi v Adan Mohammed Noor & 3 Others* [2004] eKLR, the same Court held that:

“We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary points should be sufficiently particularized and detailed to enable the other side and indeed the court to know exactly the nature of the preliminary points of law to be raised. To state that “the application is bad in law” without saying more does not assist the other parties to neither the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush.”



7. Similarly, in *Susan Wairimu Ndiangui v Pauline W. Thuo & Another* [2005] eKLR, Musinga J. as he then was held as follows:-

“ a preliminary objection should not be drawn in a manner that is vague and non-disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect.”

8. Flowing from the above, it is clear that the second point of the objection which is to the effect that the first plaintiff died in the year 2007 the Plaintiffs lacked locus standi to bring this suit on behalf of the deceased hence. These are matter of fact which require the Court to be furnished with evidence of the demise. Such can only be raised by way of an Application supported by an Affidavit to support the deposition or claim. It calls for giving of evidence about the death of the said individual, for the Court to appreciate the fact.

9. Also, the contention of about the fact of an affidavit having been sworn by Roses Mayeku regarding the deceased first Plaintiff, it is a factual matter that requires proof about the two issues: the signatures and the demise of the 1st Plaintiff. Regarding the argument that the entire suite is bad in law and lacks merit and is scandalous, frivolous and an abuse of the process of court, it also requires factual support to demonstrate all the aspects of the limb. Therefore, all the three grounds this Court has summarized above do not meet the threshold of a preliminary objection. This court will therefore not spend time considering them. They are declined.

10. Be that as it may, in the course of proceedings, particularly on the 03/10/2024, when this matter was mentioned in a hybrid Court session wherein the 2nd and 3rd Plaintiffs were present in court in Chambers and the Defendant's learned counsel online, the second plaintiff informed the court that indeed the 1st Plaintiff was deceased. He stated that then deceased died in the year 2006. He left a widow known as Rose Mayeku. That revelation left the court puzzled. This was because, the pleadings showed a signature purporting to be the 1st plaintiff's. The suit was not filed by a personal representative but in the person of the said Plaintiff. This prompted the court to peruse the Plaint and the Verifying Affidavit thereto to confirm whether, indeed, they was signed by the 1st Plaintiff.

11. The court noted from the document filed as the Plaint dated 07/05/2024, there was a signature by one Fredrick Barasa Siboko, the 1st Plaintiff. But the Verifying Affidavit and the List of Documents were signed by the 2nd and 3rd plaintiffs only. Additionally, the application that accompanied the Plaint was signed by the 2nd and 3rd Plaintiffs while the Supporting Affidavit was signed by the 2nd Plaintiff only.

12. What is clear from the summary of the facts as given in the two immediate preceding paragraphs is that indeed the suit was filed on behalf of a deceased person yet purportedly him as the 1st Plaintiff in person and not through the representative of his Estate or executor of his will. With the admission by the other two Plaintiffs that the 1st one died in the year 2006, it causes the court to marvel at what may have prompted the 2nd and 3rd Plaintiffs to include his name and cause a signature purporting to be his to be placed in documents presented to Court.

13. This Court orders that that party's name be and is hereby struck out immediately from the pleadings herein suo motto.

14. Having been left with the two plaintiffs, the 2nd and the 3rd, and having been left with only one point of law, which is the first ground of the preliminary objection, for the Court to determine, it now proceeds to do so. Using the Issue, Rule, Application and Conclusion (IRAC) method of analysis, this Court proceeds to determine the point of law.



15. The issue before the court, is that the suit was brought outside of the statutory period of 12 years as provided for under Section 7 of the *Limitation of Actions Act*. Section 7 of the *Limitation of Actions Act* provides:

“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.”
16. This Court has carefully analyzed the contents of the Plaint. The Plaintiffs seek to recover land that has been in the possession of the defendants for the last 31 years. They averred that the defendants trespassed on to the land in early 1993 and have since been ploughing it for all that period. Further, the action of Defendants amounted to trespass and was unlawful. They prayed for an order of injunction, eviction and injunction against the defendants. They also claimed interest (sic) (understood by this Court to mean mesne profits). They acknowledged from their own pleadings that the defendants had been on the land for a period of 31 years, which is incomparably longer than the 12 years for which the law provides for one to recover their land in case another one takes possession.
17. As I begin continue with the determination, I point out that the Court failed to understand what the Plaintiffs meant by the relief of “interest” for use of the land for 31 years. In law, a claim for unlawful use of one’s land is known as mesne profits. This Court will not grant the Plaintiffs that which is neither known in law nor proved.
18. Be that as it may, clearly, when the Plaintiffs failed to recover the land within 12 years from the date the defendants took occupation thereof their right to claim the same parcel of land ended. This Court, therefore, agrees with the defendants that the suit is time barred as it is brought in contravention of the provisions of Section 7 of the *Limitation of Actions Act*.
19. The upshot is that the entire suit is barred by Section 7 of the Law of *Limitation of Actions Act*. It is hereby dismissed with costs to the Defendants.
20. Orders accordingly.

RULING DATED SIGNED AND DELIVERED VIA HYBRID SESSION THROUGH THE TEAMS PLATFORM AND IN CHAMBERS THIS 10TH DAY OF DECEMBER, 2024.

HON. DR. IUR F. NYAGAKA

JUDGE, ELC KITALE

In the presence of:

1st Plaintiff - absent (deceased in 2006)

2nd Plaintiff - in Chambers

3rd Plaintiff - in Chambers

Maengwe Advocate for the Defendants (online)

