



Mutai (Suing on behalf of Kipnyigei Squatters) v Kipsat & 3 others (Environment & Land Case 19 of 2022) [2023] KEELC 491 (KLR) (31 January 2023) (Ruling)

Neutral citation: [2023] KEELC 491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 19 OF 2022**

**FO NYAGAKA, J
JANUARY 31, 2023**

BETWEEN

DAVID MASIT MUTAI (SUING ON BEHALF OF KIPNYIGEI SQUATTERS) PLAINTIFF

AND

**BETTY KIPSAT 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
THE CHIEF LAND REGISTRAR 3RD RESPONDENT
THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT 4TH RESPONDENT**

RULING

1. By a plaint dated July 18, 2022 and filed on the following date, the plaintiff brought the instant suit against the defendants. Accompanying the plaint was a notice of motion dated the same date. In it the applicant sought to be granted in the interim the same prayers as in the plaint as will be listed below in (a) and (b) and also another one for interim cancellation of any titles issued to members of the applicant.
2. Why a party would pray for ex parte orders or interim grant of final orders before a suit is heard, except for a mandatory injunction and even so in very rare and straightforward cases, is a mystery. Be that as it may the plaintiff prayed that and was for reliefs that:
 - a. An order to the county surveyor Trans Nzoia County to survey and curve 50 acres from LR 19091 measuring 920 acres, being a share to the 1st defendant and the remaining 870 acres to be for the plaintiffs’ members.
 - b. The 2nd defendant to enter into consent with the plaintiff and the 3rd defendant to register and issue title deeds to the plaintiff and the 1st defendant.



- c. The 4th defendant to settle all members of the plaintiff since they are squatters.
- d. Costs of the suit be in the cause.
3. The 1st defendant denied the claim by filing a statement of defence dated September 21, 2022 on September 29, 2022. Among many averments, the defence raised the point that the claim was fatally defective having sought a non-existent parcel of land. Also, she raised an issue that the suit was scandalous, vexatious, a sham, incompetent and disclosed no cause of action against her. She also raised the point that the suit was statute barred and craved the leave of court to raise a preliminary objection to it. Further, she averred that the plaintiff lacked locus standi to institute a representative suit since he did not file any authority to do so. She denied being the registered owner of the land in question as she was only an administratrix of the Estate of the late Stephen Kipsaina. Accompanying the defence was a preliminary objection dated and filed the same date.
4. The preliminary objection was to the effect that the plaintiff's case for recovery of land and based on fraud was statutorily barred by virtue of section 4(2) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, the same having been brought after 3 years for fraud and 12 years for recovery of land. She prayed that the suit be struck out with costs.
5. The preliminary objection was disposed of by way of written submissions. But at the time of taking a date for this ruling, the learned state counsel acting for the 3rd and 4th defendants informed the court that his clients would not participate in the preliminary objection hence left it for the court to determine it based on the other participants' arguments on it. The 1st defendant filed hers on October 27, 2022 while the plaintiff filed his on November 17, 2022.
6. On the one hand, in her submissions in support of the objection, the 1st defendant relied on the locus classicus of *Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors Ltd* [1969] EA 696 in defining what amounts to a preliminary objection. She then argued that the objection she raised was purely on a point of law.
7. The 1st defendant also contended that the plea of limitation goes to the jurisdiction of the court. On this point they relied on the case of *Bosire Ongera v. Royal Media Services* [2015] eKLR where Aburili J stated that:-
- “The law of limitation of actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them. ... the issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same.”
8. She then went on to submit how the plaintiff's claim was time barred. She called on the court to look at paragraphs 8 and 11 of the plaint where the plaintiff averred that the fraud alleged occurred in 1999 when land was grabbed by the 1st defendant and the plaintiff wanted to recover the said land now. She submitted that such a claim lay for three (3) years from that date since it was tortious hence the suit should have been brought by 2002-2003. He relied on section 4(2) of the *Limitation of Actions Act*.
9. Further, the 1st defendant submitted that section 7 of the act fixes the time of limitation for actions to recover land to 12 years from the time an action accrues. He then stated that given that the plaintiff alleged that fraud took place in 1999, the cause of action accrued that year and therefore the suit ought to have been filed before the end of twelve (12) years from then, which should have been not later than



2012. She relied on the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] eKLR.
10. Lastly, she submitted that there was no cause of action disclosed by the plaintiff as against her since fraud was not particularized against her and the cause of action could not have accrued when, as per the plaintiff's own admission in paragraph 7 of the plaint, the group (plaintiff) was formed in 2015 yet at paragraph 8 of the plaint the 1st defendant allegedly grabbed their land in 1999. He urged that the preliminary objection be allowed with costs.
 11. The plaintiff, on the other hand, submitted that section 26 of the *Limitation of Actions Act* afforded him an opportunity to ventilate his case hence by striking it out it would amount to driving him away from the seat of justice. He argued that the plaintiffs discovered the fraud in 2016 when they discovered that the defendants had subdivided the land to their exclusion as squatters. He stated that a complaint letter was written in 2015 and responded to in 2016. They then filed Kitale ELC Judicial Review No 3 of 2018 and in 2019, Kitale ELC No 4 of 2019. Thus, to them time stopped running in 2019 and the instant suit was filed in 2022.
 12. He relied on the case of *Joseph Mwaniki Muchira v Geoffrey Muchangi* [2018] eKLR where the court held that time starts to run when the plaintiff discovers a fraud and it does not run when the plaintiff is unaware of the fraud. He also relied on the Supreme Court of Kenya case of *Kenya Airports Authority v Timberland (K) Ltd* [2017] eKLR which held as much. He then cited the case of *Oraro v Mbaja* (2005) 1 KLR 141 which held that preliminary objections should not entail arguments calling for facts to be proved. Similarly, he relied on the Mukisa Biscuit case above. Further, he relied on the case of *Justus Tureti Obara v Peter Koipeitai* [2014] eKLR wherein Justice Okong'o citing the proviso to section 26 of the *Limitation of Actions Act* pointed out that in respect of suits for recovery of land where fraud is involved, time does not run until the discovery of the fraud. He emphasized that the fraud was discovered in 2016 when the National Land Commission responded to them that the land had been subdivided.

Issues, Analysis & Determination

13. I have considered the preliminary objection. I have considered both case law and the law relied on. I have also analyzed the pleadings herein. Only two issues shall be determined in this objection:
 - a. Whether the preliminary objection is merited.
 - b. Who to bear costs.
14. It was submitted by the plaintiff that if the suit were to be struck out it would amount to driving him from the seat of justice. While such a submission and plea are plausible, and even though indeed striking out of claims or defences is draconian as has been held before, the justice of each case would guide whether the step is taken or not. Not every claim, defence, pleading or other document that finds its way into court merits being there in the first instance for consideration. After all, striking out of pleadings or even matters in case of affidavits and at case conferences for failure to comply with the rules is provided for under order 2 rule 15, order 19 rule 6 and order 11 rule 3(2)(o)(i) respectively of the *Civil Procedure Rules*. Thus, where a party files frivolous and/or vexatious pleadings or those which disclose no cause of action or those designed to embarrass or prejudice fair trial, or fails to comply with the directions of the court in case conferences, he cannot expect the protection of the law along such line of argument. If anything, justice is a two-edged sword: the adverse party or opponent too cries for justice in such cases. That said, I now considers the instant objection.



15. In analyzing the preliminary objection, being raised on a point of law, it is clear that the pleadings are the only pointers as to the merits or otherwise of the objection herein. I state so because objections are based on points of law. Such do not call for considerations of fact otherwise that would mean the court would be looking into the merits of the matter itself. I am guided by the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696. In it the Court defined a preliminary objection as:

“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.”

16. Where the court has to grapple with facts while considering a preliminary objection, that would be a vague one and would not amount to one properly so called. The court has to reject it and direct that the matter proceeds to hearing on merits. Am guided by the holding of the Court of Appeal in *Grace Mwenda Munjuri v Trustees of the Agricultural Society of Kenya* [2017] eKLR, where it stated that:

“We agree with counsel for the appellant that grounds of preliminary objection were vague and did not specify the point of law that was in issue We find that the preliminary objection contained contested matters and was vague as far as the point of law was concerned.”

a. Whether the Preliminary Objection is merited

17. From the above analysis I now proceed to determine the merits or otherwise of the objection herein. In his case, the plaintiff pleaded at paragraph 8 of the plaint that the Kipnyigei self help group was registered in 2015. He did not give the exact date of registration. He did not file any copy of the certificate of registration for the court to have the benefit of knowing the exact date of registration. Be that as it may, in the paragraph he averred that the 1st defendant grapped (sic) and/or fraudulently obtained the plaintiff's land known as LR 19091 measuring 920 acres. In paragraph 9 he averred that when they complained to the National Land Commission, the 1st defendant filed three cases in Kitale Environment and Land Court, namely, ELC No 4 of 2019, E13 of 2021 and 3 of 2018 (sic) against the plaintiff and the 2nd defendant, all of which were struck out and/or dismissed with costs to the plaintiff's members.

18. As stated in paragraph (3) above, the 1st defendant filed a statement of defence whose few averments were summed up in the paragraph. It did so upon the 1st defendant filing a memorandum of appearance. It then raised the instant preliminary objection as follows:

“That the plaintiff's case for recovery of and based on fraud is statutorily barred by virtue of sections 4(2) and 7 of the limitations of actions act, Cap (sic) 22 of the Laws of Kenya, the same having been brought after 3 years for fraud and 12 years for recovery of land.”

19. About the preliminary objection, i consider that it is based on two points raised in one. First, is the point that the claim is based on fraud and is brought after three (3) years of the discovery of fraud, second, is that the claim is for recovery of land which is brought after 12 years hence in both limbs the



claim is time barred as per the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. First, the provisions relied on by the 1st defendant are worthy discussing.

20. Section 4(2) of the *Act* provides that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

21. It is plain that where a party claims his right to have breached as a result of fraud especially where such did not occur in the process of a contract between him and another, in essence, he raises an action that is tortious. Except for libel or slander, he is bound to bring an action on it within three (3) years, unless he brings himself within the exceptions for extension of time.

22. Section 7 of the *Act* provides that:

“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”.

23. Regarding the provision, the determining phrase is “the right of action accrued”. In relation to recovery of land, the right of action can accrue on one of many ways. In respect of a registered proprietor, it will accrue when, for instance, another person trespasses onto part or the whole of the land or starts to do acts which are inconsistent with the rights of the owner. It may also accrue where, for instance, another person gets himself registered as owner without the permission of the owner or absent of any lawful permission such as a vesting order of the court. In such cases, the provision would apply with variously as the facts would require.

24. Section 26 of the *Act* provides for extension of time in cases of fraud or mistake. Time stops running until the time the fraud or mistake is discovered or the claimant would have with due diligence discovered it. Thus, the claimant has the burden of proving that the fraud or mistake was discovered at that later date. The section is to the effect that:

“Where, in the case of an action for which a period of limitation is prescribed, either-

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

25. Turning to the first limb that the suit is based on fraud, paragraph 8 of the plaint simply states that the 1st defendant fraudulently got herself registered as owner of the land in 1999. It does not state when the fraud was discovered so that the Court might form an opinion as to whether the instant suit, filed on July 19, 2022, was brought within time or otherwise. In his submissions the Plaintiff tried convince this Court that the fraud was discovered in 2016 when received a response to their letter they wrote in 2015 to the National Land Commission and it was responded to. After that, the 1st defendant instituted Kitale Judicial Review No 3 of 2018 and in 2019 ELC Case No 4 of 2019. They therefore



submitted for these two intervening events, time stopped running hence the suit was brought before the end of time since the fraud was discovered. My finding on this submission is that such an important issue ought to have been pleaded. It was not. And as the law always is, submissions neither amount to pleadings nor evidence, as was held by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR.

26. Taken as paragraph 8 of the plaint is, that the alleged fraud was committed in 1999, it can be deduced, and the court would agree with the 1st defendant, that the fraud having been committed then as alleged and disclosure thereof having not been pointed out, the cause of action started running from then and period of twenty-three (23) years is such as long time as to institute claim for fraud. However, granted that the fraud was discovered in (February) 2016, then in terms of section 26 of the *Limitation of Actions Act*, time started running in 2016. If the three suits allegedly filed as pleaded were actually instituted, then the period stopped running from the time the first one was filed until when it ended and it was interrupted by the respective subsequent ones. Since the Plaint is unintelligibly pleaded on this issue, the court is not able to determine when the time stopped once more through the striking out of the suits as pleaded. Thus, on issue statutory bar of the suit on account of it being filed after three years, I am unable to find so. The pleadings were unclear on it. Since he who alleged a fact must prove it, in terms of section 107(1) of the *Evidence Act*, the 1st defendant did not prove that limb. Therefore, in regard to it, I hold that this suit was not statute barred on that limb.
27. Regarding the second limb, in order for a claim for recovery of land to be sustained, it must be brought before the expiry of 12 years from the time the cause of action accrued. This is stipulated by section 7 of the *Limitation of Actions Act*. In this matter it is pleaded that the plaintiffs acquired the 920 acres which was registered as LR 19091 which was forest land situate in Trans Nzoia county. It is also averred that the 1st defendant grabbed or fraudulently registered herself as owner of the land in 1999, yet it belonged to the plaintiffs. To put it even clearer, on July 18, 2022, the plaintiff swore an affidavit in on the same issue as follows, “3. that after registering the group, we got land parcel No LR 19091 measuring 920 acres which was forest land. 4. That after getting the said land, the 1st Respondent fraudulently acquired our land. 5. That we lodged a complaint to the National Land Commission...”
28. While the existence of the plaintiff as of 1999 is ruled out completely since the plaintiff pleaded that they were registered or formed in 2015, it appears to me that the plaintiffs imply that they owned the suit land prior to 1999. It is plain that they want to recover land which, according to their allegations, ceased to be owned by them in 1999. Granted that that is the contention and it be true, which to me does not make any sense at all, then from 1999 to July 19, 2022 when this suit was instituted, it is a period of twenty-three (23) years. going by the plaintiff’s pleadings then it means that the 1st defendant having been registered and in occupation as such to the exclusion of the plaintiffs, they cannot recover the land from her. The period is incomparably longer than one of twelve (12) years which the law provides. This is purely on the pleadings herein as between the plaintiff and the 1st defendant. Therefore, I agree with the 1st defendant that the claim is statute-barred in terms of section 7 of the *Limitation of Actions Act*.
29. As I conclude my finding herein, what is more puzzling than anything else is that an entity that is claiming fraud and recovery of land (one of the two aspects of the objection relied on by the 1st defendant), was not in existence as at the time of the alleged fraud (1999) and land was registered in someone else’s name and not theirs. It is that the plaintiffs claim that they were registered in 2015: that is their pleading, as noted hereinbefore. After that, with the intention of being settled, they then looked for land. In their own words (affidavit), they got forest land measuring about 920 acres. It is then that they discovered, from their inquiries with the National Land Commission, the 2nd defendant herein,



which replied to them, that the 1st defendant had allegedly committed a fraud in 1999 by registering herself as owner of the land, No LR 19091.

30. If the claim by the plaintiffs as summarized above is anything to go by, then the 920 acres neither belonged to them nor the 2nd defendant as at 2015 when they came into existence. I find that the plaintiffs never owned the land in issue at any one given time, whether prior to or after 1999. Again, if the alleged land was forest land, as alleged, then the land did not belong to them: any forest land is unalienated public land, as is provided for under article 62(1)(g) of the *Constitution of Kenya*. It cannot by any stretch of imagination, and except after it has been legally procedurally alienated as private land, that it can be the plaintiffs' land. As the pleadings are, at no point in time as the said parcel of land fallen in the realm of proprietorship of the plaintiffs. In any event, it is neither legally nor humanly possible that an entity that came into existence in 2015 could own land in 1999. Ownership of property in land is pin-point regarding the existence of the owner and prospective. It is not and can never be retrospective. This finding alone would lead this court to find that the plaintiffs had not legal basis to urge institute this claim.
31. From the totality of my findings above, the preliminary objection succeeds. This suit is hereby dismissed with costs to the defendants.
32. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 31ST DAY OF JANUARY 2023

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

