



Kuto & another (Suing as the administrator of the Estate of Kipketer Kuto (Deceased)) v Kuto & another (Environment & Land Case 23 of 2020) [2023] KEELC 222 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 23 OF 2020
LA OMOLLO, J
JANUARY 26, 2023**

BETWEEN

**MOKIO KIPKETER KUTO 1ST PLAINTIFF
PATRICK KIPKOECH KETER 2ND PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIPKETER KUTO
(DECEASED)**

AND

**KANDIE KUTO 1ST DEFENDANT
DISTRICT LAND REGISTRAR-KOIBATEK 2ND DEFENDANT**

RULING

Introduction

1. This ruling is in respect of the 1st Defendant's Preliminary Objection dated 26th July, 2022 on the following ground: -
 1. That the Plaintiffs suit is statutorily time barred by dint of the provisions of section 7 of the [Limitation of Actions Act](#) Chapter 22 Laws of Kenya.

Factual Background.

2. This suit was commenced by way of Plaint dated 5th March, 2020 and filed on 12th March, 2020. In the Plaint, the Plaintiffs seeks the following orders:
 - a. A Declaration that the Plaintiffs in their capacity as legal representatives of the Estate of the Late Kipketer Kuto herein are the legal owners of all the parcel of land known as



Lembus/kabimoi/161, Lembus/kabimoi/664 and Lembus/kabimoi/665 (all emanating from the mother title known as LR. NO. Lembus/kabimoi/83)

- b. A Declaration that the subdivision of all that parcel of land known as LR. NO. Lembus/kabimoi/83 into Lembus/kabimoi/161 and Lembus/kabimoi/162 and subsequent transfer of Lembus/kabimoi/162 to the 1st Defendant is and/or was fraudulent and illegal, null and void ab initio.
 - c. A Declaration that the subdivision of land parcel known as Lembus/kabimoi/162 into Lembus/kabimoi/664 and Lembus/kabimoi/665 and the subsequent registration in the name of the 1st Defendant is and/or was fraudulent and illegal and order cancellation of the 1st Defendant's title deeds.
 - d. An order directing the 2nd Defendant to restore the mother title in the name of the Plaintiffs in their capacity as legal representatives of the estate of Late Kipketer Kuto, title number LR. NO. Lembus/kabimoi/83.
 - e. A permanent injunction restraining the 1st Defendant whether by himself, his servants, agents and/or anyone acting under his authority from dealing, constructing, selling, alienating, trespassing, interfering, charging and/or any other way dealing with all the parcel of land known as Plot Nos. Lembus/kabimoi/161, Lembus/kabimoi/664 and Lembus/kabimoi/665 (all emanating from the mother title known as LR. No. Lembus/kabimoi/83).
 - f. Costs of this suit and interest thereon.
3. The 1st Defendant filed his Amended Defence and Counter claim dated 3rd September, 2020 on 8th September, 2020 wherein he denied the allegations of fraud as raised by the Plaintiffs and seeks the following orders:
- a. That the 1st defendant now the plaintiff be declared the owner of Lembus/kabimoi/162 or 20.4 ha in LR. No. Lembus/kabimoi/83 and which he occupies and to which he is entitled to by virtue of adverse possession and which the plaintiffs now the defendants be ordered to transfer the said portion of land to the 1st defendant now the plaintiff.
 - b. That in default of the plaintiffs now the defendants transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the Court to execute all documents necessary to effect the subdivision and transfer of the portion of the aforesaid land to the 1st defendant now the plaintiff.
 - c. Costs of the counterclaim
 - d. Such further and/or other orders be made as the court may deem fit and expedient.
4. The Plaintiff in response to the Preliminary Objection, filed his grounds of opposition on 25th August, 2022. He opposes the preliminary objection on the following grounds:
- a. That the Notice of preliminary objection is devoid of merit and a waste of the court's precious time.
 - b. That a party who files a defence sits back for more than 2 years and when called to give a Defence sways with objections and counter-applications comes of unclean hands.
 - c. That this objection ought to have been brought at the earliest opportunity. This suit was filed in 2020 and a preliminary objection 2 years later.



- d. That by filing a Statement of Defence, the 1st Defendant subscribed to the jurisdiction of this court.
 - e. That this suit is for recovery of land is based on fraud.
 - f. That The calculation of Limitation of time for fraud starts from the date Fraud was discovered and in the present suit, fraud was discovered in 2019 while initiating the process of succession.
 - g. That fraud has no limitation since it is quasi- criminal in nature.
5. The preliminary objection was canvassed by way of written submissions filed by both parties.

ISSUES FOR DETERMINATION.

6. The Plaintiff filed his submissions on 26th August, 2022 while the 1st Defendant filed his submissions on 27th September, 2022.
7. The Plaintiff identified two issues for determination:
 - a. Whether the Preliminary Objection raised is sustainable.
 - b. Whether the Preliminary Objection has merit and should be upheld.
8. On the first issue, he relies on the decision in *Republic Vs Chief Registrar of the Judiciary & 2 Others ex parte Riley Services Limited* [2015] eKLR and submits that the said objection is meant to deviate the court's attention from the real issues and waste the court's limited time. He submits that the Defendant had relaxed, waited for close to two years and starts making objections when the suit is set for hearing. He further submits that the same is an abuse of the court process and this court should not give him audience.
9. On the second issue, the Plaintiff relied on Section 26(a) of the *Limitation of Actions Act* and submits that the preliminary objection is devoid of merit because in bringing up a claim for recovery of land based on fraud, the period of limitation does not begin to run until the Plaintiff discovered fraud.
10. He further submits that the period of limitation does not start running from the year 1989 when the fraud happened but it starts running when the fraud was discovered. He adds that the Plaintiffs discovered fraud in 2019 while initiating the succession process. In support of this, he cited the case of *Justus Tureti Obara V Peter Koipeitai* [2014] eKLR.
11. In conclusion, the Plaintiff urges the court to dismiss the preliminary objection and allow the suit to be heard on merit.
12. The 1st Defendant on the other hand submits that he pleaded the issue of limitation of action in his Amended Defence and Counterclaim and therefore it should not come as a surprise that the preliminary objection has been filed. He relies on the decision in *Mukisa Biscuit Manufacturing Co. Ltd V West End Distributors Ltd* (1969) EA 696 and submits that the preliminary objection is on a pure point of law.
13. He further makes reference to Section 7 of the *Limitation of Actions Act* and the case of *Rawal V Rawal* [1990] KLR 275. He contends that the Plaintiffs instituted the instant suit over 45 years after the 1st Defendant took possession of the suit property. He further contends that the Plaintiffs have offered no reasonable explanation over why it took them all this time to initiate recovery of the suit property.
14. The 1st Defendant argues that the moment the Plaintiffs had realized that the Defendants had transferred the suit property in a manner they thought fraudulent, they should have filed this suit



as soon as possible that is within three years. He relies on the decisions in *Dickson Ngige Ngugi V Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited, Matthew Ndonga Kabau & the Registered Trustees of the Catholic Diocese of Nakuru)* ELC NO. 583 of 2016 and *Edward Moonge Lengusuranga V James Lanaiyara, County Land Registrar, Nyandarua/Samburu Counties.*

15. In conclusion, he submits that this suit is incompetent and urges the court to strike it out with costs.

ANALYSIS AND DETERMINATION.

16. Upon perusal of the Pleadings, Grounds of Opposition and the rival submissions filed in respect of the Preliminary Objection, my considered view is that the main issue for determination is:

- a. Whether this suit is statute barred.
- b. Who shall bear the cost of the preliminary objection

17. Before I delve into the Preliminary Objection raised by the Defendant, I shall first establish if it meets the test laid down in the case of *Mukisa Biscuit Manufacturing Co Ltd V West End Distributors Ltd* 1969 E.A 696 in the said decision it was held thus:

“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.”

18. From the above, it is clear that a Preliminary Objection must only be based on pure points of law and if for any reason facts are involved, the said facts must not be contested.

19. The Preliminary Objection as raised by the 1st Defendant is that the present suit is statute barred. There is no doubt, therefore, that the preliminary objection is based on a pure point of law. I find that the test as laid down in *Mukisa Biscuit Manufacturing Co Ltd (supra)* has been met. I shall now proceed to consider the merits of the Preliminary Objection.

20. The limitation period in regard to an action to recover land under section 7 of the *Limitation of Actions Act* is twelve years. Section 7 of the Act provides as follows: -

“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 first accrued to some persons through whom he claims, to that person.”

21. Section 26 of the *Limitation of Actions Act* further provides as follows;

“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. [Emphasis mine]



22. I have perused the Plaintiff and note that fraud has been pleaded and its particulars specifically stated under paragraph 8. The Plaintiffs allege fraud on the part of the 1st Defendant who has interfered with the suit property by subdividing it.
23. The 1st Defendant contends the Plaintiffs claim is statute barred by the provisions of Section 7 of the Limitation of Actions Act while the Plaintiffs contend that they discovered fraud on October 2019 while they were initiating the process of succession.
24. It is apparent that both the plaintiff and the defendant have divergent views on whether this suit is time barred and when time begins to run.
25. Tony Obare Ogolla & another v Jacob Olang Ajero (Suing as the administrator of the Estate of Jeremiah Olang – deceased) & another [2020] eKLR, the Learned Judge cited with approval the decision in Sichuan Huashi Enterprises Corp. Limited Vs Micheal Misiko Mubindi [2019] eKLR, wherein in it was held that the defence of limitation of time was a matter for determination at the trial and not to be summarily dealt with as a preliminary objection
26. In Sichuan Huashi Ennterprises Corp Ltd. (*Supra*) the learned Judge cited with approval the cases of Oruta & Another vs. Nyamato [1998] KLR 590 and Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997 as follows:

“The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of Oruta & Another vs. Nyamato [1998] KLR 590, where the court held that limitation of action:-

“... could only be queried at the trial but not by... a preliminary objection... The appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial.”

27. In Divecon Ltd Vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997, the Learned Judge quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (*Supra*) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the plaintiff to be struck out is not encouraged by the Limitation of Actions Act...”

Gikonyo J. in the same case further held:

“I should also think that the requirement in Order 2 rule 4 (1) of the Civil Procedure Rules that the relevant statute of limitation should be specifically pleaded in the defence underscores the legal necessity to make limitation a matter for determination at the trial. The policy underpinning this position of the law is that a successful defence of limitation makes the claim not maintainable and the plaintiff is not entitled to a remedy. Doubtless, this is a matter that affects rights of the claimant and therefore substantial, for under the Constitution a right cannot be taken away in a summary manner especially where the law requires plenary hearing and determination of the issue.”



B. Who shall bear the costs of this preliminary objection?

28. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

DISPOSITION.

29. The upshot of the foregoing is that the preliminary objection fails and is hereby dismissed with no order as to costs.

30. Parties are at liberty to lead evidence on the preliminary objection and submit on it after conclusion of the trial.

31. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 26 DAY OF JANUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Karanja Mbugua for the 1st Defendant/Applicant.

Mr. Kibet for the Plaintiffs/Respondent

AG for 2nd Defendant. Absent

Court Assistant; Monica Wanjohi.

