



Mwaura & 2 others v Mwangi (Suing as the administrator of the Estate of Samuel Mwangi Thumi (Deceased) (Environment & Land Case E032 of 2021) [2023] KEELC 15662 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E032 OF 2021**

JG KEMEL, J

FEBRUARY 16, 2023

BETWEEN

PATRICIA WANJIKU MWAURA 1ST DEFENDANT

PAUL MWAURA 2ND DEFENDANT

BRANDINA KABURA 3RD DEFENDANT

AND

VS JECINTA NYAMBURA MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL MWANGI THUMI (DECEASED) PLAINTIFF

JUDGMENT

1. The Appellants who were the Defendants in the lower Court filed an appeal on the 12/4/2022 against the decision of Hon. H. M. Nganga, PM delivered on 16/2/2022 in ELC NO 44 of 2021. The grounds of appeal are framed as follows;
 - a. That the learned trial Magistrate erred in fact and in law by failing to appreciate that the gravamen of the Appellants' Preliminary Objection dated 26th November, 2021 was Section 7 of the *Limitation Act* and NOT a claim of adverse possession.
 - b. That the learned trial Magistrate erred in fact and in law by failing to appreciate that a Preliminary Objection is argued on the assumption that all facts as pleaded by the other side – the Respondent herein – are correct.
 - c. That the learned trial Magistrate erred in fact and in law by pronouncing himself on issues that were never before him, to wit, adverse possession by the Appellants and a non-existent challenge over the Respondent's *locus standi*.



- d. That the learned trial Magistrate erred in law by dismissing the Appellant’s Preliminary Objection.
 - e. That in the totality of the circumstances, the findings of the learned trial Magistrate are unsupportable in law.
2. The gist of the Ruling the subject of appeal was premised on the Preliminary Objection dated the 26/11/2021 raised by the Appellants on grounds that;
- a. The Plaintiff’s Cause of Action is predicated on a complaint for “Recovery of Land.” To wit, Prayer A of her suit seeks “an Order for removal of all illegal structures built on the encroached portion of Plot No. 106 Gatundu Market.”
 - b. The Plaintiff draws her standing in the suit by virtue of her position as an Administrator of the Estate of the now-deceased registered proprietor of the suit property who passed away on 13th July, 1994.
 - c. The Defendants’ structure which is alleged to have been built on part of the Plaintiff’s property was erected on or about January, 1999.
 - d. The Defendants have been in continuous, open and uninterrupted possession of what is alleged to be suit land and thereon sits a single storey building housing several commercial shops.
 - e. The open and continuous occupation has not been broken since 1999 or even earlier – a period in excess of twelve (12) years.
 - f. The Plaintiff’s suit therefore has been filed hopelessly out of time and the Defendants would be highly prejudiced if the Plaintiff is allowed to maintain this suit.
 - g. Further and other grounds to be canvassed at the hearing.
3. The Learned Hon Magistrate determined the objection and found it unmerited. Aggrieved by the said decision of the Hon Court, the Appellants have preferred an appeal as set out in para 1 above.
4. On the 15/6/2022 parties elected to canvass the appeal by way of written submissions. The Appellants complied through the law firm of Wawira Ogode & Owino Advocates while the Respondent failed to file any written submissions.
5. Relying on the provisions of Section 7 of the *Limitation of Actions Act*, It was submitted on behalf of the Appellants that the Respondent’s suit was filed out time, more than 28 years after the registered owner’s death. That the Hon Learned Magistrate misapprehended the principle of adverse possession, (which was not pleaded) and the statutory limitation principles as set out in Section 7 of the *Limitation of Actions Act*.
6. The Appellants submitted that the right of action for the recovery of the suit land accrued at the time of the death of the registered owner. To buttress the point further, reliance was placed on Section 9(2) of the *Limitation of Actions Act* which states as follows;

“Accrual of right of action in case of present interest in land

- (2) Where a person brings an action to recover land of a deceased person, whether under a will or an intestacy, and the deceased person was on the date of his



death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the death.”

7. It was the position of the Appellants that the Respondent’s husband having passed away in 1993, the right of action accrued to the Respondent upon his death. Put differently, the Appellants relying on the case of *Sobanlaldurgadass Rajput & Anor Vs Divisional Integrated Development Programmes Co Limited* (2021) eKLR submitted that the Respondent’s right of action accrued from 1993 within which time she could have filed suit to recover the land on or before the 29/5/2005, a period of 12 years. It was submitted that the pleadings of the Respondent is evident that the encroachment of the suit land took place before the demise of her husband in 1993. According to the Plaintiff she averred that despite the council declining her the approval, the Appellants predecessor in title Annabel Wambui went ahead to construct illegal structures on the Respondent’s land. That the Respondent slept on her rights and took no action to recover the land even after the death of her husband.
8. Quoting the case of *Owners of Motor Vessel Lillian Ns Vs Caltex Oil Kenya* (1989) eKLR, the Appellants stated that the question of jurisdiction is a point of law which must be raised by a party or the Court on its own motion and must be decided forthwith on the evidence before the Court.
9. Having read the pleadings the objection and its grounds together with the written submissions, the issue is whether the Hon. Learned Magistrate fell in error in holding that the Objection is unmerited.
10. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of a Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“ 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.”
11. At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”
12. The gist of the objection is that the suit is time barred for having been filed about 28 years later after the cause of action arose. Going by the definition of what constitutes a Preliminary Objection, one of them is a plea of time bar. In the case of *Owners of Motor Vessel Lillian S. Vs. Caltex Oil Kenya Limited* [1989] eKLR, the appellate Court as it was then held that jurisdiction is everything. Without it a Court has no power to make one more move. If the Court finds that it has no jurisdiction to hear and determine the matter then it must down its tools. I therefore find that this is a pure point of law for which if determined in the positive should dispose of the suit in finality.
13. Having found that the objection is a pure point of law, I shall now determine whether the objection is merited.



14. Section 7 *Limitation of Actions Act* which provides;
- “7.Actions to recover land
- 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.”
15. In the case of *IGA –Vs- Makerere University* [1972] E.A 65 where Mustafa, J.A held as follows: -
- “ A Plaintiff which is barred by limitation is a Plaintiff “barred by law”. Reading these provisions together it seems clear to me that unless the Appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the Court “shall reject” his claim. The Appellant was clearly out of time, and despite the opportunity afforded him by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the Court cannot grant the remedy or relief sought.”
16. Law, Ag. V. P in the same case inter alia stated thus: -
- “...The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaintiff, the Plaintiff must be rejected.”
17. In the case of *Gathoni –Vs- Kenya Co-operative Creameries Ltd*, [1982] KLR 104 the Court of Appeal while dismissing an Appeal arising from an application for extension of time to bring a suit after the period of limitation had expired which the High Court had rejected Potter, J. A stated thus: -
- “...The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the Applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”
18. Further in the case of *Mehta –vs- Shab* [1965] E.A 321, Grabbie J.A in his Judgment stated as follows: -
- “The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”
19. According to the Plaintiff on record the Respondent’s case is that she is the wife and legal administrator of the estate of the late Samuel Mwangi Thumi, deceased. That the deceased owned plot No 106 Gatundu Market while plot No 52 belonged to the family of the Appellants (Annabel Wambui deceased). That sometime in 1979 the said Annabel approached the County Council for permission to extend the buildings on her plot but the same was declined *vide* minutes dated the 15/8/1979 and 4/9/1979. Notwithstanding the decline, the said Annabel proceeded to encroach onto the Respondent’s land and constructed the structures. That the Respondent’s claim therefore is for the removal of all the



illegal structures built on the portion of plot No 106 as well as permanent order of injunction restraining the Appellants.

20. The Appellants aver that they are the beneficial owners of plot No 52, Gatundu Market. They denied encroachment of plot No 106 and contend that any alleged works on plot 106 were carried out with the approval and authority of the county and so trespass does not lie. That they are in lawful occupation of their plot and have never interfered with the Respondent's property.
21. My reading of the above pleadings is that the Appellants have admitted that they have encroached onto the Respondent's land but with authority of the council. In the main, the parties therefore commonly agree that there is encroachment on the Respondent's plot.
22. The next step is to determine when the cause of action arose. According to para 14 of the Plea there is indication that the encroachment took place in 1979 during the lifetime of the Respondent's husband. In light of Section 9 (2) of the *Limitation of Actions Act* the cause of action accrued in 1993 upon the demise of the Respondent's husband. See the grant of letters of administration issued to the Respondent on the 13/7/94. Of importance is the letter written by the Respondent's advocates in 1999 addressed to the Appellants predecessor in title demanding that they vacate the suit land.
23. Given the three scenarios cited above, it goes without saying that a suit filed in 2021 for a cause of action that accrued in the circumstances set out above is long stale beyond redemption.
24. In the end I find the appeal succeeds.
25. Final orders and disposal
 - a. The Ruling delivered on the 16/2/2022 be and is hereby set aside in its entirety.
 - b. The suit filed on the 17/11/2021 be and is hereby deemed time barred. It is hereby dismissed.
 - c. The costs shall be in favour of the Appellants.
26. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Owino for 1st, 2nd and 3rd Appellants

Gitari for Respondent

Court Assistants – Esther / Kevin

