



REPUBLIC OF KENYA



**Mulwa v Benard Muteti Mung'ata t/a B M Mung'ata & Co Advocates & 2 others (Environment & Land Case E044 of 2021) [2023] KEELC 15733 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15733 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E044 OF 2021  
TW MURIGI, J  
FEBRUARY 15, 2023**

**BETWEEN**

**JOSHUA KIOKO MULWA ..... PLAINTIFF**

**AND**

**BENARD MUTETI MUNG'ATA T/A B M MUNG'ATA & CO  
ADVOCATES ..... 1<sup>ST</sup> DEFENDANT**

**LAZARUS MULOI KITONGA ..... 2<sup>ND</sup> DEFENDANT**

**KONZA ICT PARK ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By a plaint dated December 1, 2021, the plaintiff sought the following reliefs against the defendants:-
  1. For the sum of Kshs 1,400,000/- (one million four hundred thousand) together with commercial interest.
  2. Cost of this suit together with interest at court rates.
  3. Any other or further relief this honourable court may deem fit and just to grant.
2. The 1<sup>st</sup> defendant denied the plaintiff's claim vide his statement of defence dated December 21, 2021.
3. Together with the defence, the 1<sup>st</sup> defendant filed a notice of preliminary objection on the following grounds:-
  1. The suit is time barred under section 26 of the *Limitation of Actions Act* cap 22.
  2. The court lacks jurisdiction to hear and determine a time barred suit.
4. The preliminary objection was canvassed by way of written submissions.



## **The 1<sup>st</sup> Defendant's Submissions**

5. The 1<sup>st</sup> defendant's submissions were filed in court on August 29, 2022.
6. Counsel for the 1<sup>st</sup> defendant submitted that the issue for determination is whether the plaintiff's suit is time barred. Counsel submitted that the plaintiff in his amended plaint dated February 7, 2022, stated that he is the beneficial owner of agricultural plot no 2146 Malili Ranch. He further stated that the 2<sup>nd</sup> defendant impersonated him and sold his land to the 1<sup>st</sup> defendant.
7. The plaintiff averred that the firm of E K Mutua informed him that they paid compensation for plot no 2146 Malili Ranch to the 1<sup>st</sup> defendant. Counsel argued that it is evident from the pleadings that the plaintiff discovered the alleged fraud on February 21, 2011 when he was informed that the money was paid to the 1<sup>st</sup> defendant. Counsel contended that the statutory period to file the present suit ended on February 21, 2014 and thus the suit was filed beyond the statutory period of three years.
8. Finally, counsel submitted that the court lacks jurisdiction to hear and determine this suit on account of it being statute barred.

## **The Plaintiff's Submissions**

9. The plaintiff's submissions were filed in court on October 13, 2022.
10. Counsel for the plaintiff submitted that the issue that arises for determination is whether the plaintiff's suit is time barred. Counsel submitted that the plaintiff's claim against the defendants is for a sum of KShs 1.4 million which was fraudulently acquired from the sale of his property. Counsel went on to submit that the plaintiff discovered the fraud after the firm of E K Mutua vide the letter dated 21<sup>st</sup> of February, 2011 confirmed that they had paid for the agricultural plot to the 1<sup>st</sup> defendant's law firm.
11. Counsel went on to submit that the plaintiff made reports to several institutions including the police, the Advocates Complaints Commission on 26<sup>th</sup> of October, 2016 and to Kituo Cha Sheria on 7<sup>th</sup> of November, 2014 and that eventually, the 1<sup>st</sup> defendant was charged before the Machakos law courts in Criminal Case No 168 of 2011.
12. Counsel submitted that it would defeat the tenets of sections 1A and 1B of the *Civil Procedure Act* if the suit is not heard and determined on merit. Finally, counsel argued that the preliminary objection has no merit since there are facts which are contested.

## **Analysis And Determination**

13. The law on preliminary objection is well settled. A preliminary objection must be on a pure point of law.
14. The principles as to what constitutes a preliminary objection were laid down by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, where Law JA stated as follows:-

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”



15. Further on Sir Charles Newbold JA stated:-

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

16. In *Oraro v Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows:-

“I think the principle is abundantly clear. “A preliminary objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a preliminary objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”

17. Having considered the pleadings, the preliminary objection and the rival submissions, I find that the following issues arise for determination:-

1. Whether the present suit is time barred.
2. Whether the court has jurisdiction to hear and determine this suit.

18. The defendant’s preliminary objection is based on the grounds that the court has no jurisdiction to hear and determine the instant suit as it is statute barred. The issue of jurisdiction and whether a suit is time barred is a pure point of law which can determine the matter without having to consider the merits of the case. This was the holding in the case of *Bosire Ongero v Royal Media Services* [2015] eKLR. The preliminary objection is on a point of law and the court is satisfied that it has been properly and validly taken.

19. The question whether or not the plaintiff’s suit is time barred by statute on account of limitation goes to the jurisdiction to entertain this suit. If the suit is statute barred on account of limitation, then the court lacks jurisdiction to entertain the same.

20. Section 4 of the *Limitation of Actions Act* cap 22 Laws of Kenya prescribes the limitation period for the institution of suits in regard to various causes of actions. In regard to actions founded on tort the limitation period is three years.

21. Section 26 of the *Limitation of Actions Act* on the other hand provides for an extension of the limitation of time in cases of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff. The section 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.”
22. The object of the law of limitation was stated in the case of *Gathoni v Kenya Co-operative Creameries Ltd* (1982) KLR 104 where the Court of Appeal held that:-
- “...The law on limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them.”
23. Similarly in the case of *Rawal v Rawal* [1990] KLR 2 the court held that:-
- “The object of any limitation is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is to extinguish claims.”
24. Further in the case of *Iga v Makerere University* [1972] EA 65, the court held that:-
- “A plaint which is barred by limitation is a plaint barred by law. Reading these Provisions together it seems clear that unless the applicant 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 Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought when a suit is time barred the court cannot grant the remedy or relief sought.”
25. The plaintiff instituted this suit against the defendants on 16<sup>th</sup> of December, 2021.
26. The 1<sup>st</sup> defendant argued that the plaintiff seeks to recover Kshs 1,400,000/- that was paid to the 1<sup>st</sup> defendant as compensation for his agricultural plot no 2146 Malili Ranch. That according to the amended plaint, the plaintiff’s cause of action arose on 21<sup>st</sup> of February, 2011 when he discovered the fraud and thus he ought to have filed this suit on 21<sup>st</sup> of February 2014. The 1<sup>st</sup> defendant contended that the suit was filed after the statutory period of three years had lapsed.
27. The issue that arises for determination is when the cause of action arose in this suit.
28. In the case of *Edward Moonge Lengusuranga v James Laniyara & another* [2019] eKLR the court defined a cause of action as follows:-
- “A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings a suit.”
29. From the amended plaint, it is clear that the plaintiffs’ main cause of action against the defendants is that of fraud. The same is clearly highlighted under paragraph 5 and 6 of the amended plaint. In the said paragraph the Plaintiff avers that the 2<sup>nd</sup> defendant impersonated him using a police abstract of a lost identity card to sell his property namely plot no 2146 Malili Ranch to the 1<sup>st</sup> defendant. That the 3<sup>rd</sup> defendant deliberately paid compensation of Kshs 1,400,000/- to the 1<sup>st</sup> defendant while being aware that Plot No 2146 Malili Ranch belongs to the plaintiff.
30. The plaintiff in paragraph 11 of his amended plaint averred that in response to his letter inquiring on the compensation for his property, the firm of EK Mutua & Co Advocates confirmed to him that



the money was paid to the 1<sup>st</sup> defendant's law firm. That despite several demands, the 1<sup>st</sup> defendant has refused to release to him the money paid as compensation for his plot. The plaintiff in his list of documents annexed the letter by E K Mutua & Co Advocates dated 21<sup>st</sup> of February 2011 which states in part as follows:-

“Our records show that the above plot was among the plots sold to the government for the ICT Park. We paid compensation of Kshs 1,400,000/- to Benard Muteti Mungata.”

31. He went on to state that he had lodged his complaint with the Advocates Complaints Commission, Kituo Cha Sheria and eventually the 1<sup>st</sup> defendant was charged in Machakos criminal Case No 168 of 2011.
32. According to section 26 of the *Limitation of Actions Act* the cause of action accrues when the fraud is discovered. A close examination of the above averments by the plaintiff, clearly shows that the cause of action which I have established to be fraud arose in 2011 when the fraud was discovered. In the present scenario therefore I find that the alleged fraud was discovered on the 21<sup>st</sup> of February, 2011 and a period of three years ended on February 21, 2014.
33. This means that the suit has been filed 10 years after the alleged fraud. It is therefore clear that the plaintiff ought to have instituted a claim against the defendants by 2014 as provided under section 4 (1) of the *Limitation of Actions Act*. These proceedings were filed on the December 15, 2021 which period was beyond the 3 years from the date when the fraud was discovered.
34. The plaintiff has not offered any explanation as to why it took him all that time to initiate the recovery action. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.
35. On the basis of the facts and evidence presented before the court, i find that this suit is time barred by virtue of the provisions of section 4(2) of the *Limitation of Actions Act*.
36. The next issue for determination is whether this court has jurisdiction to hear and determine this suit. Jurisdiction is everything. A court cannot take any step without jurisdiction.
37. The question of limitation is a question that goes to the jurisdiction of this court. The Supreme Court In Re: *The matter of Interim Independent Electoral Commission* [2011] eKLR emphasized on jurisdiction and stated as follows:-

Assumption of jurisdiction is a subject regulated by the Constitution, by statute law and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel Lillian (S) v Caltex Oil (Kenya) Ltd* 1989 KLR 1.

38. Learned counsel for the 1<sup>st</sup> defendant submitted that the court lacks jurisdiction to hear and determine this suit on account of it being statute barred. Learned counsel for the plaintiff argued that sections 1A and 1B of the *Civil Procedure Act* enjoins the court to hear and determine this suit on merit.
39. The *Limitation of Actions Act* being a substantive law, the provisions of section 1A and 1B of the *Civil Procedure Act* cannot be invoked with a view to disregard the mandatory provisions of another Act of Parliament.
40. Having found that this suit is statute barred on account of being filed out of time, I find that this court has no jurisdiction to hear and determine this suit.



41. In the end, the preliminary objection is upheld. Accordingly, the plaintiff's suit against the defendants is struck out on account of being statute barred. Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**IN THE PRESENCE OF: -**

**Court Assistant – Mr. Kwemboi.**

**Ms. Munyao for the Defendant.**

**Mr. Kioko for the Plaintiff.**

