



REPUBLIC OF KENYA



ACK St Mathews Church Ndunduri v Ephantus & 9 others (Environment & Land Case E009 of 2022) [2022] KEELC 15107 (KLR) (11 October 2022) (Ruling)

Neutral citation: [2022] KEELC 15107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E009 OF 2022
A KANIARU, J
OCTOBER 11, 2022**

BETWEEN

ACK ST MATHEWS CHURCH NDUNDURI PLAINTIFF

AND

JULIA NJURA EPHANTUS 1ST DEFENDANT
ABIUD JASON MUCANGI 2ND DEFENDANT
JANE NJOKI MATI 3RD DEFENDANT
DENIS NYAGA NJIRU 4TH DEFENDANT
PATRICK MUGENDI MBOGO 5TH DEFENDANT
EVANSON NJERU 6TH DEFENDANT
PETER NDWIGA IKONGORO 7TH DEFENDANT
ANGELO MAINA CINDANO 8TH DEFENDANT
NELSON MURIITHI KARIUKI 9TH DEFENDANT
LAND REGISTRAR- EMBU COUNTY 10TH DEFENDANT

RULING

1. What is for determination before the court is a preliminary objection dated April 14, 2022 filed in court on even date. The objection has been filed by the 10th defendant and targets the suit as filed. It is premised on two (2) grounds which are as follows:-
 - i. This suit offends express provisions of section 4(2) [cap 22](#) laws of Kenya.
 - ii. This suit offends express provisions of section 3(1) [cap 39](#) laws of Kenya.



2. In the suit, it was pleaded that one Ephantus Kariuki M'Mbui (deceased) was the registered owner of land parcel Ngandori/Ngovio/433, which land was said to have been subject of Succession Cause No 307 of 2008. That the beneficiaries to that estate were the plaintiff, the 1st, 2nd, 5th, 6th and 10th defendants and one Julius Nyaga Mugo who is not a party to the suit. It was averred that the 1st defendant who was the administrator to the estate had disregarded the mode of distribution and in the year 2014, illegally gave out land to the 4th, 7th and 8th defendants who were not beneficiaries to the estate while depriving the plaintiff and Julius Nyaga Mugo of their entitlement yet they were persons who were beneficiaries of the estate.
3. The 1st to 9th defendants were accused of colluding with the 10th defendant to fraudulently subdivide the land and register it into their respective names. Accusations of fraud were equally levelled against the respective defendants. The plaintiff's claim was for a declaration that a portion of 0.15Ha which they averred was granted to them in Succession Cause No 307 of 2008 was their land. They also sought for a declaration to the effect that the subdivisions to the suit parcel of land Ngandori/Ngovio/433 were fraudulent and as such sought cancellation of all titles emanating from the said subdivision. They sought for an order directing the 1st defendant to partition the suit parcel Ngandori/Ngovio/433 in accordance with the confirmation of grant issued on 29.3.2012, damages for loss of user and finally costs and interest of the suit.
4. The 1st defendant opposed the suit by way of defence dated April 14, 2022 and filed on April 27, 2022. He denied the allegation in the plaint but acknowledged being the administrator in Embu Succession Cause No 307 of 2008. He averred that his duties, among others, entailed subdividing of land parcel Ngandori/Ngovio/433 and therefore the allegations of fraud were unsubstantiated. He averred that the allegation that he had pointed out to the plaintiff a parcel of land in the contested suit parcel was not supported by a sale agreement or land control board consent. He alleged that the plaintiff had failed to disclose to the court that they had raised similar issues in the Embu succession matter which was struck out by the court. For that reason the suit was said to be res judicata and that the same should be dismissed with costs.
5. The 4th defendant equally filed a defence which was substantially similar to the one filed by the 1st defendant. With regard to land parcel LR Ngandori/Ngovio/5239 which is registered in his name he averred that he had bought the said land and it was rightfully his property by virtue of section 24(a) and 25(1) of the *Land Registration Act*. He also stated that transmission of the land had been done after the grant was issued, hence the 1st defendant had acted accordingly in undertaking the said subdivisions. He denied the allegation of fraud and also termed the suit as res judicata in view of an alleged similar claim filed in Embu Succession Cause No 307 of 2008.
6. The 3rd defendant filed her defence on 13.04.2022. She pleaded that the role of distributing or transmitting the estate to the beneficiaries was solely the duty of the 1st defendant alone. The assertion that she was involved in any wrong doing was said to be misconceived in the circumstances. The 3rd defendant was said to have been aware of the perpetrators of the fraud, which according to her were the 1st and 4th defendants. She was of the view that those were the parties that the plaintiff ought to have sued and sought redress against. With respect to the distribution of the suit parcel of land, Ngandori/ Ngovio/433, the 3rd defendant stated that the portion had been divided into seven portions and the 1st defendant had transferred his share to the 7th and 8th defendant. It was however alleged that the plaintiff's portion had been transferred to the 4th defendant and that this had been facilitated by the 10th defendant. The 3rd defendant averred to be a bonafide purchaser for value having purchased her property from the 2nd defendant. She sought for her name to be struck out of the suit together with those of other *bona fide* beneficiaries.



7. The 10th defendant filed a defence as well on 27.4.2022. They denied the averments in the suit and stated that they were not party to the Succession cause alluded in the plaint. They denied the allegation of fraud and collusion and put the plaintiff to strict proof. They pleaded that the plaint had been filed without issuance of the mandatory notice of intention to sue as provided in the [Government Proceedings Act](#). They sought for the suit to be dismissed with costs.
8. Alongside the suit, the plaintiff had also filed an application by way of notice of motion in which they sought orders of injunction, among other orders. The same was responded to by the respective defendant but as the preliminary objection had been filed, then directions were given for disposal of the preliminary objection in priority to the application.
9. The preliminary objection was canvassed by way of submissions. The 10th defendant filed its submissions on May 18, 2022. It identified two issues for determination which are whether the matter has met the threshold of a preliminary objection and whether the suit is time barred. On the first issue it relied on the case of [Nyakundi Okerio & another v Elijah Sokobe Obot & 2 others](#) which cited with approval the case of [Mukhisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd](#) (1969) EA 696 where the court defined a preliminary objection as one that raises a pure point of law. The 10th defendant submitted that the grounds raised in the preliminary objection were points of law as envisaged in the [Mukhisa](#) case (*supra*).
10. The second issue was whether the suit was time barred. The 10th defendant relied on the provisions of section 4(2) of the [Limitation of Actions Act](#) and submitted that the cause of action was founded on fraud, which was a tort whose limitation period was three years and the suit should therefore have been brought within three years from the year 2014 when the cause of action arose. This is when the plaintiff is said to have discovered the fraud. In essence, the claim was therefore said to be time barred having been brought after 6 years contrary to the provisions of section 4(2) of the [Limitation of Actions Act](#). To support this, the 10th defendant placed reliance on the case of [Joseph Mwaniki Muchira v Godfrey Muchangi](#) [2018] eKLR.
11. It was also submitted that section 26 of the [Limitation of Actions Act](#) provided for extension of time in a case of fraud and according to the 10th defendant, the plaintiff could not seek protection from the said section for reason that they had demonstrated to have been aware of the alleged fraud at the time of transfer. Further that the plaintiff never sought leave of court to file the suit out of time. Limitation of time was said to go to the jurisdiction of the court and the court was urged to strike out the suit with costs to the defendants.
12. The plaintiff on its part filed their submissions on May 26, 2022. It too relied on the Mukhisa case and the case of [George Oraro v Barak Eston Mbaja](#) [2005] eKLR to describe what constitutes a preliminary objection. It refuted the claim by the 10th defendant that it had discovered fraud in the year 2014. It instead argued that it had discovered the fraud in 2020 prompting it to file the application dated May 26, 2020 seeking cancellation of the titles. It argued that the discovery of fraud having been in the year 2020 then the suit was within the statutory period as envisaged in section 4(1) of the [Limitation of Actions Act](#).
13. The preliminary objection was said to be based on facts which require a trial of the matter to be conducted in order to establish the time when the plaintiff discovered the fraud. To buttress this, it relied on the case of [Mugo Muruachimba v Moffat Nyaga Kagau & 2 others](#) [2020] eKLR. It also contended that the plaintiff's claim was for recovery of the suit property from the defendants and the limitation period for this was 12 years. This is in accordance with section 7 of the [Limitation of Actions Act](#). The plaintiff relied on the case of [Justus Tureti Obara v Peter Koipeitai](#) [2014] eKLR to reinforce



that the claim for recovery of land is 12 years and further that the period of limitation on fraud does not begin to run until the plaintiff has discovered the fraud.

14. The plaintiff urged the court to be inclined to do justice in case it finds any lapses in form or procedure as striking out of a suit would be draconian and that the court should be slow in taking such steps pursuant to article 159 of the Constitution. In urging the court not to dismiss the matter the plaintiff relied on the case of DT Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1. Eventually it was said that the preliminary objection did not meet the threshold as envisaged in the Mukhisa Biscuit case and that the court should dismiss it with costs to the plaintiff.
15. I have considered the rival submissions by the plaintiff and the 10th defendant. As I have already pointed out, the preliminary objection raises two issues. On one side, it was stated that the suit herein offends the provisions of section 4(2) of Limitation of actions Act, cap 22 laws of Kenya and on the other side, that the suit offends the provisions of section 3(1) of Public Authorities Limitation Act, cap 39 laws of Kenya. However, it appears that the parties only canvassed the first limb and abandoned the second one. As such I will first deal with the limb of the preliminary objection which the parties submitted on and then proceed to deal with the other limb. I say so having noted that the second limb of the preliminary objection touches on jurisdiction of this court and as it is trite law, jurisdiction is so fundamental and can either raised by the parties themselves or by the court *suo moto*. (See Isaak Aliaza v Samuel Kisiavuki [2021] eKLR).
16. In my view therefore, and considering the above, the main issues for determination is whether the preliminary objections as raised meets the threshold of a preliminary objection on a point of law and whether the preliminary objection is merited.
17. As to whether the preliminary objections meet the threshold of a preliminary objection on a point of law, in either of the objections raised by the 10th defendant the Court of Appeal in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 laid down the principle as to what constitutes a preliminary objection. 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.”

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...”

18. The court held that for a preliminary objection to be valid it must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a preliminary objection would not be sustainable.
19. In my view, the issue raised in the first objection touches on the fact that the suit herein is time barred by virtue of the Limitation of Actions Act. This is a point of law which does not require evidence to prove. It's a point of law that a suit premised on fraud must be instituted within a certain period (three years when it comes to fraud as it is a tort). The question as to whether the suit herein is statute barred by virtue of the Limitation of Actions Act goes to the jurisdiction of the court to entertain the suit. If



the suit is statute barred on account of limitation, then the court lacks the jurisdiction to entertain the same. If the court were to proceed to hear and adjudicate the suit when it lacked the jurisdiction, its decision would be null and have no legal effect.

20. The issue then is whether the suit is statute barred in accordance with section 4(2) of the Limitations of Actions Act. Section 4(2) of the *Limitation of Actions Act* provides as follows

“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.

The said section governs actions on tort and according to the 10th defendant, the plaintiff having founded the suit on fraud, then the action ought to be brought within three years. The plaintiff on the other hand contended

21. that the suit is founded on an action on land and ought to be brought within 12 years as stipulated under the *Limitation of Actions Act*. It is not in dispute that the issue herein is one that involves a land matter. However, the plaintiff having pleaded fraud, then the suit can be said to be founded on a tort. However, the limitation on the issue of fraud under Section 26 of the *Limitation of Actions Act* is that time does not begin to run until the plaintiff has discovered the fraud.

22. There is therefore the issue as to when indeed the time started running. The 10th defendant submitted that the time started running in the year 2014 when the land was allegedly transferred to other persons who were not beneficiaries according to the certificate of confirmation of grant. The plaintiff on the other hand submitted that time started running in the year 2020 when it discovered the fraud on the part of the defendants.

23. As such, though the issue on the limitation of actions is a point of law, in the instant case, evidence will be required to ascertain as to when time started running or when was fraud discovered or even whether with due diligence the plaintiff could have discovered the fraud. Is it in 2014 or in 2020? or could it have been earlier had the plaintiff exercised due diligence? I am of the view that the issue of when time started running can only be ascertained at the trial and not at this stage since the parties will have to demonstrate by way of evidence when such fraud was discovered. In the case of *Justus Tureti Obara v Peter Koipeitai* [2014] eKLR. J Okong’o stated as follows;

“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the Defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the *Limitation of Actions Act*, cap 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, Cap 22, Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial”.

24. It is clear that the issue of when time started running is an issue of fact which cannot therefore be determined by way of preliminary objection. This was the holding in the case of *Mugo Muruachimba v Moffat Nyaga Kagau & 2 others* [2020] eKLR, where it was stated thus: “The court is thus of the opinion that some facts have to be established in relation to when the Plaintiff’s cause of action accrued. For instance, the Plaintiff has pleaded that he discovered the alleged fraud in 2000. This is a question of fact to be established at the trial. The question of whether or not the Plaintiff could, with due diligence, have discovered the fraud earlier is also a question of fact to be established at the trial”.



25. It is clear from the above authorities that a Preliminary Objection cannot be raised if any fact has to be ascertained. In the instant case, the preliminary objection as raised, on whether the suit is statute barred, in the circumstances of the case before the court cannot stand as facts will need to be ascertained as to when the cause of action arose. As such the first objection is unmerited as the same falls short of the threshold set out in *Mukisa Biscuit's* case (supra).
26. In the second objection, it is said that the suit herein offends the provisions of Section 3(1) Cap 39 Laws of Kenya. As I have already stated, it appears that the parties did not canvass this issue but only concentrated on the first objection. However, the same being a jurisdictional issue, I will determine the same suo moto since the court is said to be divest of jurisdiction. That issue is fundamental and cannot be ignored.
27. Section 3(1) of the said Cap 39- *Public Authorities Limitation Act*- provides that;-
- “No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”
28. However, as I have already pointed out, the time when the cause of action arose is not settled and will require evidence to determine whether the same accrued in the year 2014 or 2020. As such, it will still require evidence so as to ascertain when the 12 months started running. Evidence is required to show when the plaintiff discovered fraud in order to confirm when the cause of action arose. That being the case, it therefore means that the issue as to the suit herein being offensive to section 3(1) of the Cap 39 in the circumstances of the facts herein, cannot form basis of preliminary objection on a point of law. The same falls short of the threshold set out in Mukisa's case (supra).
29. The 10th defendant in his statement of defense also raised an issue as to there being no service of the mandatory notice of intention to sue as provided for under section 13A of the *Government Proceedings Act*. This was in response to paragraph 16 of the Plaint where the plaintiff averred as having served the notices upon the defendants. What is clear is that this is an issue which will require evidence to prove and/ or disprove. As such, the same cannot be said to form a preliminary objection on a point of law.
30. In conclusion therefore, the preliminary objection by the 10th defendant herein falls short of meeting the threshold for preliminary objections on a point of law as was set out in Mukisa Biscuit's case. There are facts which needs to be ascertained at the trial. The suit herein is properly before the court and the preliminary objection dated April 14, 2022 cannot stand. It is dismissed with costs to the plaintiff.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF OCTOBER, 2022.

In the presence of Kiongo for 10th defendants and M/s Mwinja for Wairimu R for plaintiff.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

