



**Makelele v Kenya Railways Corporation & 3 others (Environment and Land Appeal 15 of 2023)
[2024] KEELC 13464 (KLR) (Environment and Land) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL 15 OF 2023
EK WABWOTO, J
NOVEMBER 22, 2024**

BETWEEN

BENSON JONATHAN MAKELELE APPELLANT

AND

KENYA RAILWAYS CORPORATION 1ST RESPONDENT

STANELY W MWAWASI 2ND RESPONDENT

HANNAH W MWAWANDU 3RD RESPONDENT

COMMISSIONER OF LANDS 4TH RESPONDENT

*(Appeal from the Ruling of Hon. A.M. Obura (Mrs) CM delivered on
21st July 2022 at Voi Magistrate Court ELC Case No, E007 of 2022)*

JUDGMENT

1. The salient and singular issue before this Court sitting on appeal is whether the Appellant’s suit filed before the lower court was time barred.
2. The Learned Magistrate upon considering the 1st Respondent’s preliminary objection dated 28th April 2022 which sought for the striking out of the suit filed by the Appellant pronounced herself as follows;

“...I have looked at the pleadings, the provisions of Section 4 (1) (a) of the *Limitation of Actions Act*, 2007 and the authorities cited by the 1st Defendant. There is no dispute that the cause of action arose on 27. 06. 2002. The sale agreement was entered into on 27.06.2002. Clearly this is a stale claim having been brought over 20 years long after the cause of action occurred. The objection has also not been contested. I find merit in the preliminary



objection and do hereby allow it with costs. The result is that the suit is struck out with costs.”

3. Dissatisfied with the outcome, the Appellant filed this appeal through a Memorandum of Appeal dated 27th July 2022. The following are the grounds of Appeal as listed on the face of the Memorandum of Appeal;
 1. That the Learned trial magistrate erred in law and in fact by holding that the suit was time barred.
 2. That the Learned Magistrate erred in law and in fact by failing to appreciate the 1st Defendant’s preliminary objection raised issues/facts that could only be determined through viva voce hearing.
 3. That the Learned Magistrate erred in law and in fact by failure to thoroughly examine the evidence before her and especially the particulars of fraud and illegality pleaded against the 2nd to 4th Defendants.
 4. That the Learned Magistrate erred in law and in fact by holding the suit was dismissed in favour of all Defendants yet the preliminary objection was raised by the 1st Defendant.
 5. That the Learned Magistrate erred in law and in fact by holding the suit was dismissed in favour of all Defendants yet there is no time period for filing suit against the 2nd to 4th Defendants.
 6. That the Learned Magistrate erred in law and in fact by failing to consider other sections of law which allow filing of suit out of time.
 7. That the Learned Magistrate erred in law and in fact in denying the Appellant the right to defend a case against him as stipulated in our Constitution.
 8. That the Learned Magistrate erred in law and in fact in awarding costs of the preliminary objection to the Respondents.
4. On the basis of those grounds, the Appellants sought the following reliefs: -
 - a. The ruling delivered on the 21st July 2022 by Hon. A. M. Obura (Mrs) in Voi MC ELC Case No. E007 be set aside.
 - b. The Court be pleased to issue any orders it may deem necessary.
 - c. Costs of the Appeal be awarded to the Appellant.
5. The Appeal was canvassed by way of written submissions. The Appellant filed 6th August 2024, the 1st Respondent in contesting the Appeal filed written submissions dated 14th October 2024 while the 2nd and 3rd Respondents in contesting the Appeal filed written submissions dated 9th October 2024.
6. The Appellant submitted on the following issues:-
 - i. Whether the Learned Magistrate erred in holding that the preliminary objection was unopposed.
 - ii. Whether the Learned Magistrate erred in holding that the suit was unopposed.
 - iii. Whether the Learned Magistrate erred in failure to consider the allegations of fraud and illegality levelled against the 2nd to 4th Defendants.



- iv. Whether the Learned Magistrate erred in considering issues that can only be determined through viva voce evidence.
7. The Appellant submitted that he duly filed his written submissions in respect to the preliminary objection through the court's e-filing portal and hence the dismissal of the Appellant's suit on the grounds that the preliminary objection was unopposed was a grave error.
8. The Appellant faulted the trial court for restriction itself to the agreement between the 1st Respondent and the Appellant which occurred on the 27th June 2002 yet it was also averred in the plaint that the suit property was illegally transferred to the 2nd and 3rd Respondents and the time at which the suit land had been transferred was not indicated. It was argued that the plaint contained two causes of action, the first being the agreement between Appellant and the 1st Respondent and the second being the agreement when the 2nd and 3rd Respondent entered into the suit property.
9. It was contended that the 2nd and 3rd Respondents had filed their defence on 3rd June 2022 upon which it was not clear when they took possession of the suit land. The cases of *Kimani Ruchine & Anor vs Swift Rutherford & Co. Ltd and Another* (1980) KLR 10 and *Daniel Otieno Migore vs South Nyanza Sugar Co. Ltd* [2018] eKLR were cited in support.
10. Citing further Section 26 of the *Limitation of Actions Act* and the cases of *Justus Tureti Obara vs Peter Koipeital* [2014] eKLR among other authorities, the Appellant submitted that having pleaded and particularised fraud at paragraph 14 of his plaint the trial court ought to have considered the viva voce evidence and allowed the suit to proceed for full hearing instead of striking it out.
11. The Court was urged to allow the Appeal and grant the reliefs sought.
12. The 1st Respondent submitted that the issue as to whether or not the preliminary objection was unopposed was a new issue not raised in his grounds of appeal and ought to be disregarded. It was also submitted that there was no evidence that the said Appellant's submissions in respect to the preliminary objection before the lower court were filed and or served upon the parties. Reliance was placed in the case of *Amoth & 2 Others vs Duncan & 10 Others* [2024] KEELC 1340 (KLR)
13. On whether the preliminary objection raised issues of fact whose determination required a full hearing it was argued that a cause of action in a claim founded on the sale agreement accrues on the date pleaded as the date entered into the agreement and in the instant case it was an undisputed fact that the sale agreement was executed on 27th June 2002 and the 1st Respondent's defence had sufficiently disclosed that the date the cause of action arose as 27th June 2002 and accordingly the trial court needed not to travel beyond the pleadings in determining the same.
14. On whether the suit was time barred, the 1st Respondent reiterated that the cause of action occurred on 27th June 2002 yet the suit was filed on 1st April 2022 which was about 20 years later and pursuant to Section 4 (1) a of the *Limitation of Actions Act* the same was time barred.
15. In respect to the particulars of fraud it was submitted that the suit as pleaded in the Plaint/Amended Plaint did not disclose any particulars of fraud as against the 1st Respondent and hence Section 26 of the *Limitation of Actions Act* does not apply to the suit as against the 1st Respondent. Reliance was placed on the case of *Sohanaldurgadass Rajput & Another vs Divisional Integrated Development* [2021] eKLR.
16. The Court was urged to uphold the decision of the Learned Magistrate and dismiss the Appeal with costs.



17. The 2nd and 3rd Respondents equally submitted that in respect to the 1st Respondent, the cause of action occurred on 27th June 2002 as the date which full payment of the purchase price was paid and the agreement executed and hence time started running from the said date. In respect to the 2nd and 3rd Respondents it was argued that the 2nd and 3rd Respondent took possession when they were issued with a letter of allotment on the 12th March 2009 and they paid premium on the 17th March 2009 and as such the Appellant took over 13 years before filing the suit which was way beyond the statutory period. The court was equally urged to dismiss the appeal with costs.
18. Having considered the appeal and bearing in mind the salient issue arising for determination as aforementioned at the opening paragraph of this judgment, this court refers to the often-cited case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 which has been the watershed as to what constitutes preliminary objections. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also pellucidly captured the legal principle when it stated as follows:

“...A Preliminary Objection 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...”
19. This statement of the law has been echoed time and again by the courts: see for example, *Oraro –v- Mbaja* [2007] KLR 141.
20. In *Hassan Ali Joho & another -v- Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:-

“.... 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”. [emphasis added]
21. The Supreme Court again reconsidered the position of parties resorting to the use of preliminary objections and pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission –v- Jane Cheperenger & 2 Others* [2015] eKLR.

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection —against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” [emphasis added]
22. The 1st Respondents’ Preliminary objection dated 28th April 2022 was to the effect that the suit was filed after 20 years after the cause of action had occurred and hence was time barred in view of Section 4 (1) (a) of the [*Limitation of Actions Act*](#).
23. In the instant case, the court will be required to refer to the said pleadings and examine the same to establish whether the instant suit is time barred. Paragraph 5 of the Amended Plaint dated 10th June 2022 states that the Plaintiff (now Appellant) entered into a sale agreement with the 1st Defendant for sale of Plot Number 1956/283 Mwakingali, Voi Municipality for an agreed purchase price of Ksh



- 300,000/-. It was further stated that he was later shocked to learn that the suit property was registered in the names of the 2nd and 3rd Respondents and went ahead to plead and particularise fraud on the part of the Respondents at paragraph 15 of his Amended Pleint.
24. Section 4 (1) a of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya provides that an action founded on contract being enforced may not be brought to court after 6 years. However, where fraud is pleaded, time does not start to run until when such fraud was discovered as is stated under Section 26 of the Limitation of Actions. Section 26 of the *Limitation of Actions Act* 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.”
25. Going by the above provision, it is trite law that in circumstances where fraud is pleaded, time does not start to run until when such fraud was discovered. See the case *Justus Tureti Obara Vs Peter Kopeitai* (2014) eKLR.
26. In the instant case, the Appellant pleaded particulars of fraud as against the Respondents. He did not plead specific dates upon which the same were discovered. The 1st Respondent filed a defence dated 28th April 2022 and denied any knowledge of the fraudulent transfer stating inter alia that it performed its obligations diligently as per the sale agreement. The 2nd and 3rd Respondents also filed a statement of defence dated 30th May 2022 and denied the allegations of any fraud and averred that they are lawfully in possession of the suit property. None of the parties pleaded and or furnished the court with any dates in respect to the said particulars of the fraud. Having considered the said position, it is evident that considering the uncertainty as to when the alleged fraud occurred, the learned magistrate erred in upholding the 1st Respondent’s preliminary objection and striking out the suit since the said issues ought to have been established through evidence. To this end, the court agrees with the submissions made by the Appellant on that issue and as such the said Preliminary Objection raised by the 1st Respondent was unmerited. As was stated in the *Oraro vs Mbaja Case* (supra), a preliminary objection must not be blurred with factual details liable to be contested. This court is also guided by the cases of *Kenneth Shitsugane versus County Government of Kakamega & Another* [2021] eKLR and *George Kamau Kimani & 4 Others versus County Government of Trans-Nzoia & Another* [2014] eKLR.
27. From the analysis of this court, it is sufficient to state that the Learned Magistrate erred and misdirected herself by striking out the suit considering the draconian nature of the said orders.
28. Section 78(2) of the *Civil Procedure Act* provides that:
- “(2) Subject aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.”
29. The purpose of the above provision is to enable an appellate Court to intervene where there is manifest misdirection by the trial Court either on point of law or fact which if allowed to stand, it can lead to



grave injustice. Flowing from the foregoing discussion and this Court having found that the learned Magistrate erred, the ruling of the trial court delivered herein warrants the interference of this Court.

30. In view of the foregoing, the Appeal succeeds and the ruling of the lower court is set aside in its entirety. For clarity, the following orders are hereby issued;

1. The Ruling of the trial court delivered on 21st July 2022 in respect to Voi Chief Magistrate Court ELC Case No. E007 of 2022 Benson Jonathan Makelele vs Kenya Railways Corporation & Others striking out the suit is hereby set aside in its entirety to allow the suit to be heard on its merit.
2. The lower court file to be returned to the said court for further directions as to the hearing and disposal of the said suit.
3. Each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 22ND DAY OF NOVEMBER 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Wambua for the Appellant.

Mr. Karina for the 1st Respondent.

N/A for the 2nd and 3rd Respondents.

N/A for the 4th Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

Page 4 of 4

ELC APPEAL NO. 15 OF 2023 JUDGMENT

