



**Grieve v Attorney General & 3 others (Civil Suit 115 of 2010)  
[2024] KEHC 13254 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13254 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL SUIT 115 OF 2010  
MW MUIGAI, J  
OCTOBER 25, 2024**

**BETWEEN**

**FREDRICK MUROKI GRIEVE ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**ELIZABETH NZISA NTHENGE ..... 2<sup>ND</sup> DEFENDANT**

**MARYANNE MUENI DENES ..... 3<sup>RD</sup> DEFENDANT**

**ALICE MULEKYO NZIOKA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Notice of Preliminary Objection**

1. The 1<sup>st</sup> Defendant filed a notice of Preliminary objection dated 14.11.2023 on the grounds that;
  - a. The suit is statute barred by limitation of time contrary to Section 3(1) of the *Public Authorities Limitation Act*, Cap 39 Laws of Kenya
  - b. This suit and proceedings thereto contravenes the mandatory provisions of order 5 rule 1, 5 and 6 of the Civil Procedure Rules, 2010 and that the suit herein abated long time ago
  - c. The suit herein is improperly before this Court.
  - d. In the circumstances, this Court lacks jurisdiction to hear and determine the matter herein.

**Submissions**

2. The Plaintiff filed submissions dated 22.06.2024 wherein it was submitted that the notice of preliminary objection was an abuse of the court process as it had been filed after the Plaintiff, the 2<sup>nd</sup>



and 3<sup>rd</sup> Defendants had closed their cases. Secondly, while relying on the case of Mburu Kinyua vs Gachini Tuti [1978] KLR that the same was res judicata as a similar application had been made by the 1<sup>st</sup> Defendant and was overruled. Thirdly, it was contended that claims of violation of a person's rights are not covered by the *public authorities limitation act* and in support relied on the cases of Dominic Arony Aroyo vs the Attorney general, High Court Misc. application no 494 o 2003, Kiluwa Limited & Another vs Commission of lands and 3 others [2015] eKLR, Peter Kariuki vs Attorney General [2014]e KLR, Kamlesh Mansuklal Damji Patel & Another vs Republic [2013] e KLR and James Kanyiita Nderitu vs Attorney General & Another [2019] eKLR.

3. The Plaintiff submitted that the objection had been raised 10 years since the trial began and 14 years since the suit was filed yet it should have been served as soon as they were served with the Plaintiff and entered appearance and even filed a statement of defence. It was contended that the notice of preliminary objection was barred by the doctrine of laches. Reliance was placed on the cases of Benjoh Amalgamated Limited and Another vs Kenya Commercial Bank [2-14] eKLR, Lindsay Petroleum Co vs Hurd [1874] L.R. 5 P.C.221 and Nabro Properties Limited vs Sky Structures Limited [2002] eKLR. The Court was urged to award the Plaintiff costs while dismissing the notice of Preliminary objection.
4. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not file submissions.
5. The 1<sup>st</sup> Defendant filed submissions on 1.08.2024 and submitted that the cause of action arose on 25.05.2009 and the suit herein was filed on 18.06.2010, more than 12 months after thus statutorily time barred. While supporting the preliminary objection, reliance was placed on the cases of Jacob Juma & Another vs Commissioner of Police & Another [2013]eKLR, Willis Onditi Odhiambo vs Gateway Insurance Co. Limited [2014] eKLR, Mary Ofundwa vs Nzoia Sugar Company Limited Kisumu, CACA no 244 of 2009 and Kennedy Mureithi & Another vs Peterson Karimi Gacewa [2016] eKLR.
6. It was also submitted that the Court lacked jurisdiction to determine the suit and that the declaratory orders sought by way of a Plaintiff could only be sought by way of a petition as prescribed in rule 4 as read together with rule 10 of *the Constitution* of Kenya (protection of rights and fundamental freedoms) practice and procedure rules since the suit was amended in 2018 post promulgation of *the Constitution* of Kenya, 2010. To support this position, reliance was placed on the cases of Brian Ongero vs Royal Media Services [2015] eKLR, Owners of the Motor Vessel Lilian S vs Caltex Oil (Kenya) Limited, Mombasa CA No. 50 of 1989 1 KLR, Joseph Kibwen Chemjor vs William C. Kisera [2013].
7. The 1<sup>st</sup> Defendant also prayed for costs while asking the Court to dismiss the suit.
8. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not file submissions.

### **Determination**

9. I have considered the Notice of Preliminary objection and the submissions on record and find that the issues for determination are as follows;
  - a. Whether the objection by the Defendant meets the threshold of a Preliminary Objection,
  - b. Whether the Notice of Preliminary objection is time barred,
  - c. Whether the Court has jurisdiction to determine the suit,
  - d. Whom should the costs be awarded to.



10. It is important to determine what a preliminary objection is, The Black's Law Dictionary, 11<sup>th</sup> Edition defines it as;

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

11. The Court in the case of *Oraro v Mbaja* [2005] eKLR observed that:

“A preliminary objection 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. Any assertion which claims to be a preliminary objection and yet it bears 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. Where a court needs to investigate facts, a matter cannot be raised as a preliminary objection anything that purports to be a preliminary objection must not deal with disputed facts and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

12. In *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696, Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law, he stated that;

“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 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 in 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”

13. Thus the three point test as per the above decision are;

- a. The Preliminary Objection raises a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- b. The Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion;
- c. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

14. I am also persuaded by the observation of the court in the case of *Biosystems Consultants v Nyali Links Arcade (Civil Appeal E185 of 2023)* [2023] KEHC 21068 (KLR) where the court stated that;

“It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.”



15. I note that this Court has dealt with the issue of the suit in Ruling of 13<sup>th</sup> December 2022 wherein the issue was raised and this rendered itself as follows;

“Thirdly, with regard to filing suit out of time the issue was cured by amendment of pleadings/plaint as the Plaintiff/Applicant was granted leave to amend the Plaint wherein the amendment included violation of fundamental rights. After the amendment of the plaint filed on 17/12/2019, none of the Defendants filed amended Defenses/pleadings. There is no time frame prescribed for filing and determination of violation of fundamental rights.”

16. I see no need to further delabour on this issue. In the premises the Preliminary Objection is dismissed and the costs are awarded to the Plaintiff.

It is so ordered.

**RULING DELIVERED, SIGNED & DATED IN OPEN COURT ON 25<sup>TH</sup> OCTOBER, 2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

**In the Presence of:**

Mr. Mwendwa H/B Mr. Kamau Kuria SC - For the Plaintiff

No appearance for the defendants

Patrick – Court Assistant

