



**Otim v Gitari & 2 others (Commercial Case E667 of 2021)  
[2024] KEHC 15255 (KLR) (Commercial and Tax) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15255 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E667 OF 2021  
MA OTIENO, J  
NOVEMBER 28, 2024**

**BETWEEN**

**BENNY BEN OTIM ..... PLAINTIFF**

**AND**

**JOSEPH BRADLEY GITARI ..... 1<sup>ST</sup> DEFENDANT**

**KEISHA WANJIRU GITARI ..... 2<sup>ND</sup> DEFENDANT**

**KENNA RANCHING COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Background**

1. The Plaintiff brought this suit against the Defendants vide a plaint dated 24<sup>th</sup> June 2021 which was later amended on 25<sup>th</sup> March 2024 seeking the following orders; -
  - a. A declaration that the plaintiff be and is immediately reinstated as a director in the 3<sup>rd</sup> defendant (Kenna Ranching Company Limited), without loss of his shares.
  - b. An order of this Honourable court permanently stopping the 1<sup>st</sup> defendant from selling, transferring, alienating, mortgaging, leasing, the assets owned by the 3<sup>rd</sup> defendant (Kenna Ranching Company Limited), including the land known as L.R. No. Kajiado/kisaju/7947, unless by Consent of the Plaintiff.
  - c. Costs of the suit together with interest thereon at court rates
  - d. Interest on (c) above at court rates
  - e. Such further orders as may be just and expedient to make in the circumstances of this case.



2. The brief facts of the case are that the plaintiff and the 1<sup>st</sup> Defendant incorporated the 3<sup>rd</sup> Defendant company on 29<sup>th</sup> January 1999. On 25<sup>th</sup> June 2019, the Plaintiff resigned as a director of the 3<sup>rd</sup> defendant. While the plaintiff allege that the 1<sup>st</sup> defendant duped him to resign as a director of the company, the Defendants on the other side assert that the plaintiff's resignation from the company was voluntary and for a consideration of Kshs. 250,000/- which was paid to the plaintiff by the 2<sup>nd</sup> defendant.
3. The plaintiff therefore filed this suit seeking that he be immediately reinstated as a director of the 3<sup>rd</sup> defendant and that the 1<sup>st</sup> defendant be restrained from interfering with the 3<sup>rd</sup> defendant's property known as L.R. No. Kajiado/kisaju/7947.
4. The defendant filed a preliminary objection dated 18<sup>th</sup> June 2024 on a point of law against the plaintiff's suit on the following grounds; -
  - i. That the plaintiff's suit is statutorily time-barred by dint of section 4(1) of the Limitations of Actions Act and therefore this court has no jurisdiction.
  - ii. That this court has no jurisdiction to grant reliefs relating to the ownership and use of land.

### **Submissions**

5. On 24<sup>th</sup> July 2024, the matter came up for directions and it was agreed that the preliminary objection be canvassed by way of written submissions. The Defendants filed their joint submission dated 17<sup>th</sup> July 2024 whilst that of the Plaintiff is dated 20<sup>th</sup> September 2024.

### **Defendant's/Objector's Submissions**

6. The Defendant submitted that the plaintiff's suit is premised on a commercial agreement of 25<sup>th</sup> June 2013, which is contractual, whereby the plaintiff resigned and transferred all his shares to the 2<sup>nd</sup> defendant and executed transfer forms that restrict the period to six years from when the cause of action accrued.
7. The defendants further submitted that the plaintiff, in his suit, also alleged fraud, a cause of action based in tort that is, by law, restricted to three years from when the cause of action arose.
8. Finally, the defendants submitted that this court lacks the jurisdiction to grant the orders concerning the prayers sought in the plaint in relation to L.R. No. KAJIADO/KISAJU/7947, which the defendants submitted, should be within the exclusive jurisdiction of the environment and land court pursuant to Article 162(2) (b) of *the Constitution*.
9. The defendants therefore urged this court to uphold the preliminary objection and find that the court has no jurisdiction to entertain this suit for being time-barred and therefore incompetent.

### **Plaintiff's submissions**

10. For the plaintiff it was submitted that the preliminary objection as filed does not meet the set threshold for preliminary objections since it does not disclose pure points of law. That it involves contested facts and therefore ought to be dismissed.
11. The Plaintiff asserted that the suit is not time-barred since the cause of action arose on 25<sup>th</sup> June 2018 when the defendants failed to honour the 25<sup>th</sup> June 2013 payment agreement with the Plaintiff where it was agreed that the payment of Kshs. 250,000/- was to be made by the defendants to the plaintiff within five (5) years from 25<sup>th</sup> June 2013 when the plaintiff surrendered the shares.



12. The plaintiff further submitted that fraud as raised in the suit is not the core issue in dispute and therefore the limitation period of 3 years applicable to causes of action in relation to torts is not applicable in the instant case.
13. The plaintiff therefore urged this court to dismiss the defendant's preliminary objection with costs and direct the matter to proceed to full hearing.

### **Analysis and determination**

14. I have carefully considered the Preliminary Objection as well as submissions by both parties and note that the only issue that arises for determination is whether the Preliminary Objection is meritorious.
15. The Notice of Preliminary objection is anchored on *Limitation of Actions Act* Section 4 (1) that the suit is time-barred for being brought after 8 years from when the cause of action arose.
16. The objection is further based on the fact that pursuant to Article 162(2) (b) of *the Constitution* of Kenya 2010, this court has no jurisdiction to issue orders under prayer (b) of the amended plaint of 25<sup>th</sup> March 2024 relating to the occupation and use of land.
17. The Black's Law Dictionary defines a preliminary objection as follows; -

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
18. The above definition has been elaborated and made much clearer in the celebrated case of *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696* to mean: -

“So far as I am aware, 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.”
19. Further in the case of *Oraro v Mbaja [2005] eKLR 141*, on the nature of preliminary objections, the court 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.”
20. From the above, it is evident that a Preliminary Objection must raise pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, a preliminary objection cannot be raised if any facts have to be ascertained from elsewhere, or where the court is called upon to exercise its judicial discretion.



21. In the instant case, the defendants argue that the cause of action arose on 25<sup>th</sup> June 2013 when the plaintiff resigned and transferred all his shares to the 2<sup>nd</sup> defendant. The Plaintiff, on the other hand, argues that the cause of action arose on 25<sup>th</sup> June 2018 when the defendants failed to honour the 25<sup>th</sup> June 2013 agreement where it was agreed that the defendants were to pay to the Appellant a sum of Kshs. 250,000/- in consideration of his resignation from the 3<sup>rd</sup> defendant within 5 years from the date of his resignation.
22. From the above, it is obvious that the facts of the case are contested and that the exact date when the cause of action actually arose is a factual issue that can only be determined at trial.
23. Further I also agree with the plaintiff's argument that the issue of fraud as pleaded in the plaint is really not a cause of action in this matter and therefore the three-year limitation period alluded to by the defendant does not apply in the instant case. A careful review of the pleadings indicates that the cause of action is not based on tort but it is more of a commercial/contractual nature.
24. Regarding the defendant's argument that according to Article 162(2) (b) of *the Constitution* of Kenya 2010, this court has no jurisdiction to issue orders under prayer (b) of the amended plaint of 25<sup>th</sup> March 2024 relating to the occupation and use of land, it is the finding of the court that this does not constitute a preliminary objection since arguing this point alone cannot of itself dispose of the whole suit. It would have been different if it had been argued by the defendants that this court has no jurisdiction to issue all the orders sought in the plaint.
25. The upshot of the foregoing is that the Notice of Preliminary Objection dated 18<sup>th</sup> June 2024 is found without merit and therefore fails.
26. The costs of this objection are hereby awarded to the plaintiff.
27. It is so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024**

**ADO MOSES**

**JUDGE**

In the presence of: -

C/A – Moses

.....for Applicant

.....for Respondent

