



Harvest Centre Fellowship Church v Kabaata & 2 others (Environment and Land Appeal E069 of 2021) [2023] KEELC 20198 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20198 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E069 OF 2021
JG KEMEI, J
SEPTEMBER 27, 2023**

BETWEEN

HARVEST CENTRE FELLOWSHIP CHURCH APPELLANT

AND

JOSEPH KAMAU KABAATA 1ST RESPONDENT

PETER NDUNGU KAMAU 2ND RESPONDENT

EQUITY BANK KENYA LIMITED 3RD RESPONDENT

*(Being an appeal from the Ruling of the Hon C K Kisiangani
(SRM) delivered on the 26/8/21 in RMCC NO 23 OF 2021- Ruiru)*

RULING

1. The subject of this appeal is the Preliminary objection filed by the 3rd Respondent on the 10/5/2021 on the grounds as set out below;
 - a. That the Plaintiff is not a legal entity and lacks locus standi to institute and prosecute the instant suit and cannot sue or be sued on its own
 - b. The suit is time barred.
2. Upon hearing the Preliminary Objection the Court delivered its considered Ruling on the 26/8/2021 allowing the objection and striking out the suit in its entirety.
3. This Ruling therefore provoked the appeal which is based on the following grounds;
 - a. The learned trial magistrate erred in law by failing to afford the Plaintiff an opportunity to be heard on merit in response to the 3rd Defendant's Preliminary Objection dated 30th April 2021 and further declined to grant leave to the Plaintiff to file submissions thereto.



- b. The learned trial magistrate erred in fact by finding that the Preliminary Objection dated 30th April 2021 was not opposed by the Plaintiff.
 - c. The learned trial magistrate erred in fact by finding that the Plaintiff was given several opportunities to file a response to the Preliminary Objection dated 3rd April 2021 but failed to do so.
 - d. The learned trial magistrate erred in law by failing to afford the 1st and 2nd Defendants an opportunity to be heard by declining the 1st and 2nd Defendant opportunity to be served with the 3rd Defendant's notice of Preliminary Objection and documents.
 - e. The learned trial magistrate erred in law and in fact by failing to appreciate the import of Section 26 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya which requires extension of limitation period in cases of fraud whereas the Plaintiff's case was predicated on impeachment of title on the basis of fraud by the Defendants.
 - f. The learned trial magistrate erred in law by draconianly striking out the Plaintiff's suit without purposing to sustain the same whereas the suit plainly and obviously discloses reasonable cause of action based on fraud.
 - g. The learned trial magistrate erred in law and fact in arbitrarily striking out the Plaintiff's suit without appreciating and assessing the full facts before court, consequently acting in darkness, whereas the suit was not beyond redemption but curable through amendment and or substitution.
 - h. The learned trial magistrate erred in fact and law by in failing to find that no prejudice was suffered by the Respondents in filing the suit as was and consequently failed to order an amendment and or substitution.
 - i. The learned trial magistrate failed to appreciate that the right to be heard and consequently a fair trial is in one of the fundamental rights and freedoms in *the constitution* which must not be limited whatsoever.
4. The appeal was canvassed by way of written submissions which I have read and considered.
 5. As to whether the Appellant was given the opportunity to be heard on merit in response to the Preliminary Objection dated the 30/4/21 the Appellant submitted in the negative. That the Appellant failed to file its response to the Preliminary Objection on account of lack of service of the same by the objector. That when the matter came up for mention on the 15/6/21 the Appellants Counsel informed the Court that it had not been served with the Preliminary Objection. That no affidavit of service was placed before the Court to rebut the Appellants claim of non-service. The Appellant further submitted that the Court erred in not giving them a chance to file its response to the Preliminary Objection therefore driving them away from the seat of justice.
 6. Secondly the Appellant submitted that the Court erred in holding that the suit is statute barred. That the Appellant's suit is based on fraud as set out in the Plaint filed by the Respondents. It was its submissions that in accordance with the provisions of Section 26 of the *Limitation of Actions Act* the period of limitation begun to run once the Plaintiff discovered the fraud and relying on the decision of the Court in *Justus Tureti Obara Vs. Peter Koipeitai* (2014) eKLR the Appellant submitted that the period of discovery is a matter of evidence to be ascertained at the trial.



7. The Appellant decried the striking of the suit by the Court arguing that the same was draconian and that the Court ought to have sustained the suit and allow for amendments seeing that the Appellant has a cause of action with raised triable issues.
8. In conclusion the Court was urged to allow the appeal.
9. The 1st and 2nd Respondents submitted that the trial Court did not err in holding that the Appellant is not a legal person capable of suing and being sued on its name. That though the Appellant failed to submit on the issue, it suffered no prejudice as whichever way the matter was determined by the Court as a matter of law. Relying on the case of *Living Water International Vs City Council of Nairobi* (2008)eKLR where the Court held that a religious society has no legal capacity to sue, they submitted that the Plaintiff is a Church and is registered under the *Societies Act* and the Hon. Learned Magistrate cannot be faulted in holding as she did in the Ruling.
10. On the issue of time bar, they submitted that the Appellants relied on an agreement of 2005 and the transaction having been contractual the suit ought to have been filed by 2017 and filing it in 2021 made it statutory barred. They urged the Court not to disturb the decision of the trial Court.
11. The 3rd Respondent failed to file written submissions despite directions of the Court to so file.
12. There are 3 key issues for determination; whether the Preliminary Objection was served upon the Appellant; whether the Appellant has locus to file suit; whether the suit is time barred.
13. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as thus:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”

14. A Preliminary Objection was described in the *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.”

Further Sir Charles Nebbold, JA stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. 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 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 not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”



15. The above being the description of a Preliminary Objection, it is not in doubt that a Preliminary Objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any of the facts have to be ascertained from elsewhere or if the Court is called upon to exercise judicial discretion.
16. The next issue will focus on whether or not the objection is a pure point of law. To start with I shall deal with the issue of service of the Preliminary Objection upon the Appellant. The Appellant has argued that the Preliminary Objection was not served on it and the same was brought to the attention of the Court. The 3rd Respondent has not filed any submissions to rebut the claim of the Appellant as to service. The 3rd Respondent having initiated the objection had a duty to serve the same on all the parties. This is critical in an adversarial system like ours which loathes surprises in litigation.
17. On the 15/6/21 when the matter came up for mention, the 3rd Respondent's Counsel informed the Court that it had filed a Preliminary Objection dated the 30/4/21 and that the same should be heard first before pretrial hearing. In response the Appellants lawyer informed the Court that he did not have the file with him and was therefore unsure if his client had been served. He sought 14 days to file a response thereto. The Court granted the Appellants' Counsel 14 days to file a response to the Preliminary Objection and also gave directions on the filing of the submissions on the same. Come the 26/8/21 the Appellants Counsel informed the Court that he had not filed any submissions because he was unaware of the directions given by the Court. He did not raise that issue of service of the Preliminary Objection. The Court in its Ruling rightly stated that the Appellants had been accommodated but failed to file their submissions and response and proceeded to deliver its Ruling the very day on the 26/8/21.
18. The Court has reflected on the issue and notes that though there is no evidence of service that was placed before the Court, the Counsel for the Appellant was aware that a Preliminary Objection had been placed before the Court and that parties had by their representations on the 15/6/21 (including the Appellant who was duly represented by Counsel) agreed to prosecute the Preliminary Objection by way of written submissions. The Appellant therefore is estopped from raising the defence of non-service when it never raised it before the Court. The appeal fails on this ground.
19. The Court holds that the Appellant was aware of the Preliminary Objection and failed to file response nor file written submissions despite being accommodated by the Court.
20. It is the suit time barred? The 3rd party has argued that the suit is time barred on account that the sale agreement was entered into in 2005 and any suit ought to have been filed by 2017. The Appellant in response argues that in accordance with Section 26 of the Limitation of Actions Act, the limitation period of 12 years begun to run from 2016 when the 2nd Respondents Counsel in a demand letter brought to the attention of the Appellant that the suit land was registered in the name of the 2nd Respondent. That 2016 is the time that the Appellant discovered the fraud perpetrated by the Defendants on the suit land and therefore filing of the suit in 2021 was well within time. In other words that the suit is not time barred.
21. The Court ascribes to the decision of the Court in Justus Tureti Obara Vs. Peter Koipeitai (2014) eKLR that the mere fact that the Court is being called upon to look into the timelines as to when the fraud occurred *visa vis* when it was discovered by the Appellant, in itself calls upon the Court to consider facts which in the very nature ousts the Preliminary Objection from being a pure point of law. The Court so finds. The appeal fails on this ground.



22. On the issue of locus of an unincorporated entity to file suit, I am guided by the decision of the case in *Kipisiwo SelfHelp Group Vs. Attorney General & 6 Others* (2013)eKLR where the Court held that;

“I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because *the Constitution* allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

23. The issue of jurisdiction is a Preliminary Objection properly raised as it can dispose off a suit preliminarily and does not require the ascertainment of facts. Equally the question of whether the Plaintiffs have locus standi to file this suit goes to the jurisdiction of this Court. Without locus, a suit cannot stand and therefore the Court also finds and holds that the same is a properly raised Preliminary Objection. See the case of *Law Society of Kenya Vs. Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, where the Court held that ;-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of Alfred Njau and Others ...Vs... City Council of Nairobi (1982) KAR 229, the Court also held that;-

“The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

24. It is evident that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means ‘a place of standing’. Therefore, if a party is found to have no locus standi, then it means he/she cannot be heard even if he has a case worth listening to.

25. In this case the Appellant is a Church registered under the *Societies Act*. In accordance with the decision in Kipsiwo case, the Society must commence a suit through its officials.

26. Clearly the Appellant in filing suit in its name makes the suit incompetent and a non-starter and therefore the Court has no jurisdiction to hear it. There was no competent suit before the Court. The trial Court made the correct finding in holding that the Appellant lacks locus. The appeal fails on this ground.

27. In the upshot the Court finds that the appeal is not merited. The Ruling of the trial Court is upheld.

28. Costs shall be payable by the Appellant.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.



J G KEMEI

JUDGE

Delivered online in the presence of;

Ali Ahmed for Appellant

Njonjo for 1st and 2nd Respondents

3rd Respondent – Absent

