



REPUBLIC OF KENYA



**Drumvale Farmers Co-operative Society Limited v Phelseys Enterprises Limited & 2 others
(Environment & Land Case E367 of 2024) [2025] KEELC 1193 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E367 OF 2024
CG MBOGO, J
MARCH 13, 2025**

BETWEEN

DRUMVALE FARMERS CO-OPERATIVE SOCIETY LIMITED PLAINTIFF

AND

PHELSEYS ENTERPRISES LIMITED 1ST DEFENDANT

AFRI-RISE EQUITY LIMITED 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

RULING

1. Before this court for determination is the 1st defendant's notice of preliminary objection dated 14th October, 2024, seeking to strike out the suit on the following grounds: -
 - a. That the plaintiff's claim against the 1st defendant is statute barred as it contravenes the provisions of Section 7 of the Limitations of Actions Act which provides for expiry after 12 years.
 - b. That the court has no jurisdiction to try and determine this claim against the 1st defendant.
2. The preliminary objection was canvassed by way of written submissions. The 1st defendant filed its written submissions dated 6th December, 2024 where it raised three issues for determination as listed below: -
 - a. Whether the preliminary objection meets the threshold of a preliminary objection.
 - b. Whether the suit as contained in the plaint is statute barred.
 - c. Whether the court has jurisdiction to entertain this suit.



3. On the first issue, the 1st defendant submitted that Section 7 of the Limitations of Actions Act is clear that any action brought to recover land must be brought within or before the end of twelve years from the date on which the right of action accrued to him. It was submitted that the plaintiff's cause of action against the 1st defendant arose in the year 1996, and the suit was instituted on 4th September, 2024 making it more than 12 years. To buttress on this submission, the 1st defendant relied on the case of John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment).
4. On the second issue, the 1st defendant submitted that the suit is statute barred pursuant to Section 7 of the Act. The 1st Defendant relied on the case of Githiaka v Nditi (1983) KLR 231. On the third issue, the 1st defendant submitted that this court is not equipped with the requisite jurisdiction to determine this matter and the same ought to be dismissed with costs.
5. The plaintiff filed its written submissions dated 13th December, 2024, and submitted that paragraph 12 of the amended plaint is critical as to when the cause of action arose. Further, it was submitted that if the defendant is of the view that the cause of action arose in the year 1996 because of the purportedly issued title, it is a matter of evidence which cannot be brought out by way of a preliminary objection. Reliance was placed in the cases of Oraro v Mbaja (2005) 1 KLR 141 and ELC Case No. 15 of 2021- Margaret Njeri Gitau v Julius Mburu Gitau & 2 Others [2022] eKLR.
6. The 2nd and 3rd defendants did not participate in these proceedings. Be that as it may, I have considered the preliminary objection and the written submissions filed by the plaintiff and the 1st defendant. The sole issue for determination is whether the preliminary objection has merit.
7. Law, J.A. in Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696 stated as follows: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration...”
8. Also, the case of John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR, it was held that: -

“The position in law is that a preliminary objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the preliminary objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable preliminary objection on a point of law.”
9. Further, Ojwang, J (As he then was) in Oraro -vs- Mbaja (2005) KLR 141 where after quoting the statement of Law, JA. in the Mukisa Biscuits case (supra) went on to state that: -

“A 'preliminary objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by 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, 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 point....

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...”

10. From the above cited authorities, it is clear that for a preliminary objection to succeed, the same must consist of a pure point of law, with the facts not disputed by the opposing party. Also, a preliminary objection should possess the ability to dispose off the issue that is before court without going to trial and lastly, the same ought to stem from pleadings and not outside of them.
11. In this case, the plaintiff filed the plaint dated 4th September, 2024. The plaintiff contains facts which the plaintiff relies on in support of its case. Upon service of the plaint, the 1st defendant filed the instant objection, and later on filed its statement of defence dated 25th October, 2024. Bearing in mind that facts must not be disputed in an objection, the same is not the reflection herein. The 1st defendant rushed to file the objection without admitting or denying the contents of the plaint. Secondly, and even if the 1st defendant had filed its defence prior to the objection, upon perusal of the statement of defence, it is clear that the 1st defendant disputes the contents of the plaint.
12. Where facts are disputed, the purpose of a preliminary objection becomes defeated, and what is left is for the issues to be tested through evidence in a full trial.
13. From the above, the notice of preliminary objection dated 14th October, 2024 is thus rejected and dismissed. Costs to be in the cause.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY ON THIS 13TH DAY OF MARCH, 2025.

HON. MBOGO C.G.

JUDGE

13/03/2025

In the presence of:

Mr. B. Agunga – court assistant

Ms. Lekoye holding brief for Mr. Ochieng for the 1st Defendant

Ms. Koitie for the 2nd Defendant

No appearance for the Plaintiff

