



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 1324 OF 2014

GITAHI MINUA..... 1ST PLAINTIFF

CHRISTOPHER NJOROGE BORO.....2ND PLAINTIFF

KEZIA WANJIRU NJUGUNA..... 3RD PLAINTIFF

HEZRON MAINA KARATU..... 4TH PLAINTIFF

JANE WAMBAIRE MWANGI..... 5TH PLAINTIFF

FOR THEIR OWN BEHALF AND ON BEHALF OF 40 OTHERS

VERSUS

PETER MBURU MWAURA.....1ST DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

Coming up before me for determination is the Preliminary Objection dated 4th February 2015 raised by the 1st Defendant to the effect that the Plaintiffs lack *locus standi* to bring this suit and that the suit is statute barred under the **Limitation of Actions Act**.

In their written submissions, the 1st Defendant stated that the Plaintiffs had admitted that the suit properties being Tigoni/Karamba-ini Block 1/41 and 44 belong to the 1st Defendant but also stated that the suit properties are public utility plots. They submitted that the Plaintiffs have no legal authority to bring this suit for the recovery of public land. Further, they submitted that the suit properties were transferred by the 2nd Defendant to one Mbugua Muiga on 3rd May 1995 and that if any fraud was committed, it was committed on that date leading to their assertion that this suit should have been filed within 12 years from that date so the suit is time barred.

The Plaintiffs filed their written submissions wherein they stated that they have a right to protect their individual and collective interests in public land. They submitted that the gist of their suit is that the suit properties were reserved as public utility plots in the year 1995 as a condition for the subdivision of the

parent parcel of land known as Tigoni/Karamba-ini Block 1. They further stated that the same was not available for private alienation. On the issue of this suit being statute barred, they submitted that they do not seek to enforce the rights that accrued in 1995 as at that time the suit land was vacant and used by the public until December 2014 when the 1st Defendant put up a fence and started to develop the suit properties. They clarified that this suit is based on the encroachment in December 2014.

I have considered the Preliminary Objection and the submissions filed by the 1st Defendant and the Plaintiffs. The test of whether an application is a proper preliminary objection has been stated in the case of **Equity Bank Limited –vs- Bryan Yongo & another [2014] eKLR** where the court held that,

“Any true Preliminary Objection should not be entangled with factual issues.”

In the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributor Ltd [1969] E.A 696**, Law JA stated that,

“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.”

In **Oraro –vs- Mbajja [2005] eKLR** J.B Ojwang as he then was stated that,

“I think the principle is abundantly clear. A “preliminary objection” correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be 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. I am in agreement ... that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary point.’”

Turning to this matter, the issue whether the suit properties are public or private land and *the locus standi* of the Plaintiffs in relation thereto remains to be established at the trial. It is an issue that will require the court to consider tested evidence in order to arrive at a finding. Accordingly, this is not a matter that should be raised as a preliminary objection going by the precedents cited above. Further, the question of when the cause of action arose is also one that requires factual evidence to determine. In the circumstances of this suit, this is also not an issue that may be raised as a preliminary objection.

Accordingly, the Preliminary Objection is hereby dismissed. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE