



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 126 OF 2010**

**DAVID ONJILI OMBELE::::::::::::::::::::::::::1<sup>ST</sup> PLAINTIFF**

**ELZEBA MUIINDE::::::::::::::::::::::::::2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**LILIAN ISIGI MUYESHI::::::::::::::::::::::::::1<sup>ST</sup> DEFENDANT**

**MUGESHI MISHIBA NEBERT::::::::::::::::::::::::::2<sup>ND</sup> DEFENDANT**

**ISAAC ALUDA SONGORE::::::::::::::::::::::::::3<sup>RD</sup> DEFENDANT**

**ELDOLAND PROPERTIES LIMITED::::::::::::::::::::::::::4<sup>TH</sup> DEFENDANT**

**RULING**

Before me is a preliminary objection to the originating summons and chamber summons lodged on 4/10/2010 on the following grounds:-

1. ***That the originating summons and the application are incompetent as no privity of contract exists between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants.***
2. ***That the plaintiffs lack locus standi to invite the court to determine the existence or validity of the sale agreement dated 22<sup>nd</sup> September 2006 as they are not parties to it.***
3. ***That the plaintiffs have pleaded for a refund of the consideration thus no injunctive remedy can be issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants as they have admitted that damages shall be an adequate remedy which is a bar under the authority of Giella -VS- Cassman Brown Ltd.***
4. ***That the court is barred from hearing the suit by virtue of the equitable tenet to the effect that equity gives effect to the first in time.***
5. ***That the action by the plaintiffs is barred by section 8 of the Civil Procedure Act as they have already been enjoined as interested parties at their own instance in Eldoret CMCC NO. 414 of 2010.***
6. ***That it is settled law that the High Court has no jurisdiction to issue an award of damages under an originating summons.***

7. ***That the matters between the parties are complex and contentions which cannot be determined by originating summons under Order XXXVI rule 3 of the Civil Procedure rules.***

The originating summons seeks 8 orders among them the following:

1. ***A declaration that land parcel no Pioneer/Langas Block 1/319 comprising 0.085 of an hectare belongs to the applicants having lawfully and legally purchased the same for value from the 3<sup>rd</sup> and 4<sup>th</sup> respondents and a permanent injunction be issued against the respondents severally and jointly.***
2. ***A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not entitled to the suit land given the fact that they breached the terms of the sale agreement thereof.***
3. ***A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are entitled to the refund of purchase of Kshs. 400,000/- less 20% for damages from the 3<sup>rd</sup> and 4<sup>th</sup> respondents.***
4. ***A declaration that the applicants are entitled to mesue profits from the 1<sup>st</sup> and 2<sup>nd</sup> respondent.***
5. ***In the alternative a declaration that the applicants be refunded the purchase price of the suit land of Kshs. 560,000/- plus interest thereof by the 3<sup>rd</sup> and 4<sup>th</sup> respondents.***
6. ***A permanent injunction restraining the respondents from interfering with the applicant's lawful employment (enjoyment) and quiet possession of the suit land.***

The application against which objection has also been raised seeks an injunction restraining the respondents, among others, from interfering with, occupying, selling and or dealing with the suit land pending hearing and determination of the originating summons.

Canvassing the objection, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents emphasized ground 6 and 7 of the notice of preliminary objection and urged that the objection be upheld. In his response, counsel for the applicants submitted that the matters raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents were outside the purview of a preliminary objection and urged that the preliminary objection be overruled. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents concurred with counsel for the applicants contending that the objection was not a proper preliminary objection.

The locus classicus on what a preliminary objection is must be the case of **Mukisa Biscuit Manufacturing Company Limited -VS- West End Distributors Limited (1969)EA 616**. Law J.A.delivered himself as follows:-

***“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.”***

And Sir Charles Newbold P held as follows:-

***“A preliminary objection is in the nature of what used to be a demurrer. It raised 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 is the exercise of judicial discretion.”***

Applying the above definition to the objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, I ask myself whether indeed the same is a proper preliminary objection. The 1<sup>st</sup> ground of objection is that the originating summons and the application are incompetent as no privity of contract exists between the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants. It is evident that a determination of this ground must involve ascertaining of facts which facts are in any event not agreed.

The second ground of objection is that the applicants lack locus-standi to invite the court to determine the

existence or validity of the sale agreement dated 22/9/2006 as they are not parties to it. How can a determination of this ground be made without a consideration of the said agreement? The existence, or validity of the said sale agreement can only be determined on a consideration of the evidence. Facts therefore have to be ascertained.

The 3<sup>rd</sup> ground of objection is based on the applicant's prayer for refund of consideration which prayer according to the 1<sup>st</sup> and 2<sup>nd</sup> respondents, vitiates the prayer for injunctive relief against them. This ground of objection in my view is clearly misconceived. Firstly the prayer for refund of the consideration in the originating summons is made in the alternative. Secondly whether or not to grant injunctive relief is an exercise in judicial discretion and thirdly the rule in **Giella -VS- Cassman Brown Limited (supra)** is not that an injunction can never issue where damages would adequately compensate the applicant. The condition is not mandatory and is not cast in store.

The 4<sup>th</sup> ground of objection is that the court is barred from hearing the suit by virtue of the equitable tenet to the effect that equity gives effect to the first in time. The equitable tenet alleged has to be demonstrated and so is the allegation of who came first.

The 5<sup>th</sup> ground of objection alleges that the applicants are barred by section 8 of the Civil Procedure Act as they have already been enjoined as interested parties at their own instance in Eldoret CMCC No. 414 of 2010. If the applicants have been barred from instituting any further suit an order to that effect had to be exhibited otherwise the mere existence of Eldoret CMCC No. 414 of 2010 is not a bar to the commencement of further proceedings. In any event if the two suits are parallel suits an application for stay of proceedings would be the appropriate motion to make and not a preliminary objection.

The sixth ground of objection is that the court has no jurisdiction to issue an award of damages under an originating summons. That may very well be the position. But I have perused the originating summons and detect no claim for general damages. In any event there are other reliefs which have been sought to which no objection has been raised.

The final ground of objection is that the matters between the parties are complex and contentions which cannot be determined by originating summons under Order XXXVI rule 3 of the Civil Procedure Rules. The short answer to this objection is found in rule 10 of the same order which gives the court the power to continue with the originating summons as if it were a sit commenced by plaintiff.

In the end and for the foregoing reasons the preliminary objection is not a proper preliminary objection and is dismissed with costs to the applicants.

It is so ordered.

**DATED AND DELIVERED AT ELDORET  
THIS 19<sup>TH</sup> DAY OF JANUARY 2011**

**F. AZANGALALA  
JUDGE**

Read in the presence of:-  
Kiboi H/B for Okoth for the plaintiff and  
Mr. Barasa and Mr. Alwanga for the respondents.

**F. AZANGALALA  
JUDGE**