



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

Civil Case 172 of 2008

WILLIAM LAWRENCE WACHIRA

**APPLICANT
VERSUS**

SEWANI OLE NTANI MOINAMIRESPONDENT

RULING

1. The Preliminary Objection dated 8.7.2009 by the Defendant has two limbs;
 - i. that the suit herein is time-barred.
 - ii. that the land, subject of the suit is agricultural land and is governed by the provisions of the Land Control Act, Cap 302 and there being no consent under section 8(1) of that Act, the transaction between the parties is null and void.
2. In the end, the Defendant seeks orders that the suit herein be struck off with costs.
3. I note that the Plaintiff, who has always acted in person, filed this suit on 6.8.2007 and it is his contention that by ***“an agreement made between(sic) the Plaintiff and the Defendant on 17th March, 1989 and by a further agreement... on 10th July 1991, the Defendant agreed to sell to the Plaintiff a portion of his land known as Kajiado/Ololoitokoshi/Kitengela/46 which in turn forms a portion of Kajiado/Ololoitokoshi/Kitengela/1847 measuring 16.194 hectares (40 acres)”***. He then claims that by a further agreement made on 12.5.1992, the Defendant agreed to purchase a further 4.048 hectares (*10 acres or thereabouts*) from the Plaintiff making in total 50 acres to be sold to him by the Defendant. That the necessary Land Control Board Consent was thereafter obtained and L.R.No. Kajiado/Kitengela/16500 measuring 20.63 hectares was created but the Defendant refused to transfer the said parcel of land to him. The orders sought in the suit include inter-alia orders of specific performance of the contract, mesne profits and costs.
4. In his Statement of Defence filed on 2.4.2009, the Defendant denies that he entered into any Sale Agreements with the Plaintiff on the dates alleged; denies that he received any monies in purchase of any land by the Plaintiff and denies that any consent was obtained by the parties to enable transfer of the land to the Plaintiff. That in Kajiado Land Disputes Tribunal Case No. 394/2007 touching on the suit property, the Plaintiff was ordered to remove the caution he had placed on the land.
5. There it is then, what is before me is a Preliminary Objection and as I understand the decision in Mukisa Biscuits vs Westend Distribution Ltd [1969] E.A. 696 a Preliminary Objection should only succeed if the facts in issue are uncontested and the objection is raised on a pure of point which if upheld, would bring an end to the dispute. In this case, the facts pleaded by the Plaintiff are wholly contested by the Defendant i.e existence or otherwise of the Sale Agreements; payment or otherwise of the consideration, and existence or otherwise of the Land Control Board consent. These are the issues to be determined at the trial and they cannot be determined by way of an Objection such as the present one. Had the Defendant admitted all the above facts, and he has not, then I would have been ready to be inclined to consider the objection. Without doing so the objection is doomed.

6. I will quickly overrule the Preliminary Objecting with costs to the Plaintiff.
7. Orders accordingly.

ISAAC LENAOLA

JUDGE

Countersigned and delivered at **Machakos** this **19th** day of **March 2010**.

H.P.G. WAWERU

JUDGE