



Kipyegon & another v Mary Mugo Mathai (sued as the Legal Representative of the Estate of Jackson Mugo Mathai (Deceased) & 3 others (Environment & Land Case 66 of 2015) [2022] KEELC 12624 (KLR) (22 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 66 OF 2015
LA OMOLLO, J
SEPTEMBER 22, 2022**

BETWEEN

DANIEL KIPTUM KIPYEGON 1ST PLAINTIFF

ROSEBELLA JEPKEMOI KIPTUM 2ND PLAINTIFF

AND

MARY MUGO MATHAI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JACKSON MUGO MATHAI (DECEASED)) 1ST DEFENDANT

JOHN MUGO MATHAI 2ND DEFENDANT

MUIGAI COMMERCIAL AGENCIES 3RD DEFENDANT

HARON CHEPLENIN KIPLALOH 4TH DEFENDANT

RULING

Introduction

1. This ruling is in respect to the 1st and 2nd Defendants' Notice of Preliminary Objection dated 15th May, 2015 and the 3rd Defendant/Applicant's Notice of Motion application dated 2nd February, 2022.
2. The Notice of Preliminary Objection is based on the following grounds:
 - a. The suit is time-barred under the *Limitation of Actions Act*.
 - b. The suit is bad in law, fatally incompetent and unsustainable for want of a written and duly executed contract between the parties, and for want of privity of contract between the parties.
 - c. The suit is bad in law and unsustainable for want of the mandatory consent of the Land Control Board for the alleged sale transaction on the suit land.



- d. The suit does not disclose any triable cause of action against the 1st and 2nd Defendants.
3. The 3rd Defendant's Notice of Motion application dated 2nd February, 2022 is expressed to be brought under Order 1 Rule 10(2) and Order 2 Rule 15 1(a) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.
4. The application seeks the following orders:
 - i. That the 3rd Defendant be struck out from the suit having being wrongly enjoined.
 - ii. That the suit is time barred as it offends the provisions of the Statute of Limitations Act.
 - iii. That the cost of this application be borne by the Plaintiffs/Respondents.
5. The application is based on the grounds on its face and supported by the affidavit sworn on 2nd February, 2022 by the 3rd Defendant's Director one Margaret Njeri Muigai.

Factual Background.

6. The Plaintiffs/Respondents commenced this suit *vide* a Plaint dated 31st January, 2015. The Plaint was amended on 28th October, 2021 and filed on the same date. In the Amended Plaint the Plaintiffs/Respondents pray for judgment against the Defendants for:
 - a. A declaration that he Plaintiffs are the rightful owners of land Parcel No. 99 out of Kampi Ya Moto/Kampi Ya Moto Block 3/23 now known as Title No. Kampi Ya Moto Block 3/122.
 - b. Cancellation of title deed over the suit land issued to the 4th Defendant.
 - c. An order compelling the 1st Defendant to transfer the suit land to the Plaintiffs with immediate effect and without requirement of any further charges and in Default the County Land Registrar be directed to issue the same to the Plaintiffs.
 - d. An order of injunction against the 4th Defendant from trespassing, entering, remaining charging, selling, transferring or in any other way interfering with the Plaintiff's peaceful enjoyment of the suit land.
 - e. In the alternative an order to issue against the Defendants to refund the Plaintiffs value of the dispute property at the current make rate plus the value of developments therein.
 - f. Costs of this suit with interest.
7. The 1st and 2nd Defendants filed their statement of Defence dated 15th May, 2015. The 1st and 2nd Defendants also filed a Notice of Preliminary Objection dated 15th May, 2015.
8. The 3rd Defendant filed its statement of Defence dated 29th March, 2017.
9. The 4th Defendant also filed his Statement of Defence dated 7th February, 2018.
10. The matter first came up in court on 9th November, 2021 when counsel for the 1st and 2nd defendants proposed that their Preliminary Objection dated 15th May 2015 be heard first.
11. The Court gave directions that the Preliminary Objection be served on the 3rd Defendant and the Plaintiff and that they file their responses within 21 days.
12. The matter came up again on 18th January, 2021 and the court gave directions that the preliminary Objection be heard on 3rd February, 2022.



13. On 3rd February, 2022, the hearing of the preliminary objection was adjourned to 24th February, 2022 and the said date, the court was notified of the application dated 2nd February, 2022 that had been filed by the 3rd Defendant. The court directed that the application dated 2nd February, 2022 and the Preliminary Objection dated 15th May, 2015 be heard together.
14. This background is set out so as to put into prospective the nature of this suit and in turn appreciate the orders sought in the current application and grounds for the preliminary objection.
15. The Plaintiff/Respondent was served with the Preliminary Objection and the Notice of Motion application but did not file any response.
16. The 3rd Defendant did not file any response to the preliminary objection.
17. The 1st, 2nd and 4th Defendants did not file any response to the application.

3rd Defendant/applicant's contention.

18. The 3rd Defendant/Applicant contends that it was given authority to sell land parcel No. Kampi Ya Moto/Kampi Ya Moto 3/23 by Jackson Mugo Mathai via the authority to sell dated 15th September, 1999 and another one dated 7th August, 2000.
19. It is its contention that it engaged in the selling of the various portions of land out of the larger parcel of land and one of the parcels under that arrangement was plot No. 99 now known as Kampi Ya Moto Block 3/122.
20. The 3rd Defendant/Applicant further contends that plot No. 99 was sold by Jackson Mugo Mathai to Simon Wachira who subsequently sold the same to the Plaintiffs/Respondents herein *vide* the sale agreements dated 30th June, 2001 and 26th July, 2002.
21. The 3rd Defendant/Applicant also contends that it is clear that the 3rd Defendant was acting for and on behalf of Jackson Mugo Mathai for sale of the entire parcel of land that he owned.
22. It is the 3rd Defendant/Applicant's contention that the Plaintiffs/Respondents have admitted in paragraph 7 of the Amended Plaint that the Defendant was just an agent of Jackson Mugo Mathai.
23. The 3rd Defendant/Applicant contends that the principal in this case is disclosed and that the 3rd Defendant was merely to facilitate the disposal of land and had no proprietary rights of the land and therefore could not issue a title to the Plaintiffs.
24. It is the 3rd Defendant/Applicant's contention that after the death of Jackson Mugo Mathai, the Plaintiffs started communicating and engaging the 2nd Defendant who is a son of the deceased and gave him Ksh 70,000/= to process the title for them. That this clearly shows that the Plaintiff/Respondent knew or ought to have known that the 3rd Defendant had no capacity to issue a title to them and was acting as a mere agent.
25. The 3rd Defendant/Applicant also contends that that being the case, its advocates on record have advised it that it has been wrongly joined in this suit as the principal and owner of the land is disclosed.
26. The 3rd Defendant/Applicant further contends that it has been wrongly joined in this suit as the issues of the disputed parcel of land is between the Plaintiffs/Respondents and the 1st and 2nd Defendants/ Respondents. That the 3rd Defendant therefore ought to be struck out from these proceedings.



27. It is the 3rd Defendant/Applicant's contention that the Plaintiffs/Respondents are relying on sale agreements executed in the year 2001 and 2002 while this suit was filed in 2015 which was fourteen years after the sale.
28. The 3rd Defendant/Applicant contends that it is advised by its advocates on record which advise it believes to be true that under the Limitations of Actions Act one ought to bring a suit within six years from the date a contract was signed.
29. The 3rd Defendant/Applicant ends its deposition by stating that the suit is therefore statute bared and ought to be dismissed summarily.

Issues for Determination.

30. The 1st, 2nd and 4th Defendants filed their submissions on the Preliminary Objection on 5th May, 2022 while the 3rd Defendant filed its submissions on 9th May, 2022.
31. The 1st, 2nd and 4th Defendants submitted that their preliminary objection has met the threshold set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1969] E.A 696 and sought that it be allowed as prayed and the court to dismiss and strike out the entire suit.
32. The 3rd Defendant in its submissions gave a background of the case, the facts and identified the following issues for determination:
 - a. Whether the 3rd Defendant should be struck out from the suit having been wrongfully enjoined.
 - b. Whether the suit is time barred.
33. After perusal of the Preliminary Objection and the Application, the issues the important questions for determination at this point are:
 - a. Whether this suit is time barred.
 - b. Whether the 3rd Defendant should be struck out from the suit for being wrongly enjoined.
 - c. Who should bear the costs?
34. The first issue is a question of law which has the potential of determining this suit in its entirety. Should I find in the affirmative, it shall obviate the need to address myself on the second question.

Analysis and Determination.

35. I have taken into consideration the affidavit in support of the application, the annexures thereto, the rival submissions of both parties and the judicial decisions referred to.

A. Whether this suit is time barred.

36. One of the grounds on the Preliminary Objection is that the suit is time barred under the Limitation of Actions Act.
37. The purpose of a Preliminary Objection was set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) E.A 696 where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, J.A.:



“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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.”

Newbold, P.:

“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 has 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 nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

38. The Court of Appeal in the case of *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also stated as follows:

“A Preliminary Objection 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

39. The Supreme Court in the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR stated that:

“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.”

40. It is the contention of the 1st and 2nd Defendants that the suit seeks the enforcement of a Contract of Sale dated 26th July, 2002 and that the same is time barred under Section 4 of the [Limitation of Actions Act](#).

41. The 3rd Defendant also contends that the suit is time barred as the parties entered into the land sale agreement on 26th July, 2002.

42. Section 4 of the [Limitation of Actions Act](#) provides as follows;

- (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;
 - (c) actions to enforce an award;
 - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.



43. The 3rd Defendant contends further that Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after lapse of twelve years from the date the right of action accrued. That in that regard the sale agreement was executed on 26th July, 2002 and therefore the limitation period lapsed on 26th July, 2014. In my view, this section does not speak to the circumstances of this case for the reason that this suit is not for recovery of the land, the Plaintiff having pleaded that he is in possession.
44. While it is not in dispute that the Plaintiff mentions a sale agreement dated 26th July, 2002, my considered view is that it is the first chapter of a book by the Plaintiffs on how they came into possession of the suit land. It forms the basis for the last chapter i.e the prayers for judgement against the Defendant in the following terms;
- a. A declaration that they are the rightful owners of the suit parcel.
 - b. That the title deed issued to the 4th Defendant be cancelled.
 - c. That the 1st Defendant be compelled to transfer the suit land to the Plaintiffs.
 - d. An order that the 4th Defendant be restrained from entering, transferring, trespassing etc. or in any other way interfering with the Plaintiff's peaceful enjoyment of the suit land.
 - e. Refund by the Defendants the value of the suit property at current market rates.
45. In the Amended Plaintiff filed on 29th October, 2021 the Plaintiffs/Respondents pleaded that on 26th July, 2002 they purchased parcel Number 99 out of land parcel No. Kampi Ya Moto/Kampi Ya Moto Block 3/23 from Simon Wachira Mwangi who had purchased the same from Jackson Mwangi Mathai and took possession.
46. They also pleaded that the agreement was facilitated by the 3rd Defendant who were the legal agents of Jackson Mugo Mathai. The Plaintiffs/Respondents further pleaded that they were not issued with a title deed due to a dispute between the late Jackson and the 3rd Defendant.
47. The Plaintiffs pleaded that they held discussions with the 2nd Defendant who is the son of the late Jackson and on 1st May, 2014 paid him a further sum of Ksh 70,000/= to process the title deed.
48. The Plaintiffs plead that in March 2005, they found blocks of stones on the suit property and that the 4th Defendant came forward claiming ownership of the land.
49. In their Amended Plaintiff, the Plaintiffs pleaded that they found out that the 4th Defendant had been issued with a title deed over their land which is now known as parcel No. Kampi Ya Moto Block 3/122 and they aver that this issuance is marred with malice and fraud. The 1st and 2nd Plaintiffs in their Plaintiff set out the particulars of fraud on all the Defendants.
50. The 1st and 2nd Defendants plead that in May, 2014, the 2nd Defendant met the 1st Plaintiff who informed him that he had purchased land from the deceased Jackson Mugo Mathai and gave him a sum of Ksh 70,000/= to cover stamp duty and transfer charges.
51. They plead that the 2nd Defendant agreed to assist the Plaintiff in processing the transfer in good faith but after checking their records, they could not find any records that the Plaintiffs had purchased land from the deceased.
52. The 1st and 2nd Defendants plead that they tried to refund the Ksh 70,000/= to the 1st Plaintiff who refused to accept the money. They also plead that in the year 2005, the late Jackson sold the suit land to the 4th Defendant.



53. I am therefore not convinced that this suit seeks, solely, to enforce a contract entered into in the year 2002. It seeks, as I have set out above, much more.
54. In *Tony Obare Ogolla & another v Jacob Olang Ajero (Suing as the administrator of the Estate of Jeremiah Olang – deceased) & another* [2020] eKLR, the learned Judge cited with approval the decision in *Sichuan Huashi Enterprises Corp. Limited v Micheal Misiko Mubindi* [2019] eKLR, herein in it was held that the defence of limitation of time was a matter for determination at the trial and not to be summarily dealt with as a preliminary objection
55. In the case of *Sichuan Huashi Enterprises Corp Ltd.* (*Supra*) the learned Judge cited with approval the cases of *Oruta & another v Nyamoto* [1998] KLR 590 and *Divecon Ltd v Shirinkhanu S. Samani* Civil Appeal No. 142 of 1997 as follows:
- “The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of *Oruta & another v Nyamoto* [1998] KLR 590, where the court held that limitation of action:-
- “... could only be queried at the trial but not by... a preliminary objection... The Appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial.”
56. In *Divecon Ltd v Shirinkhanu S. Samani* Civil Appeal No. 142 Of 1997, the Learned Judge quoted with approval the words of Gachuhi, J.A., the leading judge in the *Oruta* case (*Supra*) that:
- “It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the Plaintiff to be struck out is not encouraged by the *Limitation of Actions Act...*”
- Gikonyo J. in the same case further held:
- “I should also think that the requirement in Order 2 rule 4 (1) of the *Civil Procedure Rules* that the relevant statute of limitation should be specifically pleaded in the defence underscores the legal necessity to make limitation a matter for determination at the trial. The policy underpinning this position of the law is that a successful defence of limitation makes the claim not maintainable and the Plaintiff is not entitled to a remedy. Doubtless, this is a matter that affects rights of the claimant and therefore substantial, for under *the Constitution* a right cannot be taken away in a summary manner especially where the law requires plenary hearing and determination of the issue.”
57. The other grounds on the notice of preliminary objection are also, in my view, not questions of law. For example, the question of privity of contract, whether the consent of the land control board was obtained or whether the suit does not disclose a cause of action against the 1st and 2nd defendant necessitate further enquiry and cannot be dealt by way of a preliminary objection.
58. Taking into consideration my analysis on the import of the sale agreement as pleaded by the plaintiffs and the judicial decisions cited, I find that the preliminary objection that the suit is time barred under the *limitation of Actions Act* is a matter for trial.



B. Whether the 3rd Defendant should be struck out from the suit.

59. The question that arises for determination is whether the 3rd Defendant/Applicant is a necessary party to this suit and whether any cause of action against it is disclosed.
60. The 3rd Defendant/Applicant contends that the claim by the Plaintiffs/Respondents is premised on the alleged purchase of the suit property from Simon Wachira Mwangi who had bought the same from Jackson Mugo Mathai (deceased) whose estate is administered by the 1st Defendant.
61. The 3rd Defendant/Applicant further contends that there is no basis upon which the Plaintiffs/Respondents could claim interest of the said land from the 3rd Defendant as it was merely an agent of the deceased.
62. It contended that there is no cause of action against it as the Plaintiffs/Respondents interest lies against the vendor and not an innocent third party.
63. The 3rd Defendant/Applicant relied on the cases of Administrator *Oshwal Academy v Beresa Limited* [2014] eKLR, *Green Square Limited v Sheladai Associates & 2 Others* [2017] eKLR, *Elishaba Muthoni Mbae v Nicholas Karani Gichoe and 2 Others* [2014] eKLR, *Laisa Mpyoe & 2 Others v Kajiado Central Milk Project "The Board" and 5 Others* [2012] eKLR and *Afroplast Industries Limited v Sanlam Insurance Co. Ltd and Mvuli Insurance Agency*, Kiambu High Court Civil Suit No. 11 of 2019.
64. The 3rd Defendant/Applicant also contends that the Plaintiffs/Respondents in paragraph 7 of the Amended Plaint admitted that the 3rd Defendant/Applicant was acting as an agent of Jackson Mugo Mathai who was the registered owner of the property and is therefore not a proper party to the suit.
65. The 3rd Defendant/Applicant relied on Order 1 Rule 10(2) of the *Civil Procedure Rules* which provides as follows:
- The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
66. The 3rd Defendant/Applicants have pointed out that the Plaintiffs/Respondents plead that the agreement was facilitated by the 3rd Defendant/Applicant who were the legal agents of Jackson Mugo Mathai (deceased).
67. The 3rd Defendant/Applicant on the other hand, pleads that it entered into an agency agreement with the late Jackson Mugo Mathai to sell land parcel No. Kampi Ya Moto Block 3/23. It also pleaded that it was allowed to subdivide the land into one acre plots to facilitate disposal of the property.
68. The 3rd Defendant further pleads that it sold a portion of the land to Simon Wachira Mwangi who later sold it to the Plaintiffs.
69. They 3rd defendant has also pleaded that the deceased later resold the suit property to a third party while knowing that the same had been sold which the 3rd Defendant states, is in contravention of the agency agreement between it and the deceased.
70. The Plaintiffs/Respondents in their amended Plaint allege fraud on the part of the 3rd Defendant/Applicant.



71. From the foregoing, it is my view that the merits or otherwise of the claim against the 3rd Defendant cannot be summarily dealt as proposed in the application. They call for hearing.
72. In *Humphrey Mbaka Nandi t/a Nyati Distillers Limited v Equity Bank(K) Ltd & 2 others* [2018] eKLR the learned Judge cited with approval the decision in *DT Dobie and Company (K) Ltd v Joseph Mbaria Muchina & another* (1982) KLR 1 the Learned Judge explained that the Appellate court considered several English decisions on the subject of striking out the defendant from a suit and came to the conclusion that that:

The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ *supra*).

As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks is right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under order XIV rule 2. (Per Madan JA at page 9)

73. In order to make a determination whether the name of the 3rd defendant should be struck out of the suit, I will invariably be embarking on a defence trial at an interlocutory stage and without hearing the Plaintiff. This is akin to putting the cart before the horse and is far from desirable and/or just.
74. I am, at this stage, unable to make a determination whether the Plaintiff’s case has failed to disclose a reasonable cause of action against the 3rd Defendant and consequently determine that this is a fit case for having the name of the 3rd Defendant struck out.
75. For the foregoing reasons, I find that the 3rd Defendant’s application lacks merit.

C. Who should bear the costs of this application?

76. The general rule is that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.



Disposition.

77. Consequently, the application dated 15th May, 2015 and the 3rd Defendant/Applicant's Notice of Motion application dated 2nd February, 2022 are dismissed with costs to the Plaintiffs.

78. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER 2022.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Barmao for Gatei for 3rd the Defendant/Applicant.

Mr. Deenambo for Magana for 1st, 2nd and 4th Defendant

No appearance for the Plaintiff/Respondent

Court Assistant; Monicah Wanjohi.

