



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 539 of 2007

**STEPHEN KIAMA KIGANO.....1ST
PLAINTIFF**

**PENELOPE WENDY KIGANO.....2ND
PLAINTIFF**

VERSUS

**ZAVERCHAND RAMJI SHAH.....1ST
DEFENDANT**

BEDANS AUCTIONEERS SERVICES.....2ND DEFENDANT

**KISAUNI PROPERTIES.....3RD
DEFENDANT**

**REGISTRAR OF TITLES, LAND REGISTRY NAIROBI.....4TH
DEFENDANT**

R U L I N G

The Plaintiff in this suit filed an application on the 17th of October, 2007 under **Order XXXIX rules 1 and 2** of the **Civil Procedure Rules** seeking injunctive reliefs against the defendants from dealing adversely with the Plaintiffs’ portion of property known as L.R. 4242/3 pending the hearing of the application and of the substantive suit.

When the Defendants were served with that application, the 1st Defendant/Respondent filed a Notice of Preliminary Objection. In the Preliminary Objection, he seeks to have the suit struck out with costs on the following grounds: -

1. The cause of action is statute-barred, does not lie and is an abuse of the court process.
2. The suit and the application offend the mandatory provisions of section (6) of the Civil Procedure Act; Cap (21) Laws of Kenya.
3. The reliefs sought are Res Judicata in view of the previous proceedings and the rulings in HCCC No. 3462 of 1995, in which the Plaintiffs herein are parties.

4. The subject matter of the suit, namely L.R. No. 4242/3 is no longer in existences, having been subdivided into 21 plots and registered as such way back in 1995, a fact that is fully within the Plaintiffs' knowledge.

5. The Plaintiffs are guilty of non disclosure of material facts as enumerated herein above.

Mr. Imanyara for the 1st Defendant in his submissions in support of the preliminary objection gave two grounds upon which he hoped to demonstrate that the suit was time barred.

The first ground was that the entire suit was dependent on the Sale Agreement, which is annexed to **Stephen Kigano's** affidavit as 'AAK1'. He submitted that the Sale Agreement was dated 30th April 1986 and had a completion date of 30th of July 1986. He submitted that under **Section 4(1) (a)** of the **Limitations of Actions Act**, the suit was time barred as no action grounded on contract may be brought six years after the date the cause of action arose.

Section 4(1) (a) of the **Limitation of Actions Act** provides:

“(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.”

The second ground, he argued was that the suit property ceased to exist in 1995 when, as the Plaintiff in the suit admits, the suit property was subdivided into 21 plots and transferred to various parties.

Mr. Imanyara submitted that one of the prayers in the Plaint was for recovery of land, which he submitted was time barred. Learned counsel submitted that as stipulated under **Section 7** of the **Limitation of Actions Act**, no claim for recovery of land may be brought after 12 years from the date the cause of action arose. That, since the suit property was subdivided in 1995, it is now over 12 years since the cause of action arose.

Mr. Owang for the Plaintiffs has opposed the Preliminary Objection. First of all, **Mr. Owang** submitted, no issues of law have been raised in the Preliminary Objection and that therefore, it was incompetent and should be struck out.

In regard to the Sale Agreement, **Mr. Owang** submitted that it was not between the parties to the suit, and that the 3rd Defendant was the vendor in that Sale Agreement and that there was need for him to adduce evidence to show whether the Sale Agreement was consummated or not.

In regard to the issues of claim for recovery of the land, **Mr. Owang** submitted that the 1st Defendant was relying on matters of evidence. It was **Mr. Owang's** submission that the issues of the subdivision of the suit property were issues of evidence which needed to be adduced and documentary proof given to support the same. Counsel submitted therefore that those two points should not be admitted as Preliminary Objections on points of law as they were based on points of facts.

Counsel relies on the case of **Mukisa Biscuits vs. West End Distributors [1969] EA, 696 at page 701** where **Sir Charles Newbold, P.** made the following observation:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 increase costs and, on occasion, confuse the issues. The improper practice should stop.”

Mr. Njenga who appears for the 3rd Defendant, has urged the court to find that even though the Preliminary Objection has raised factual issues, the court should note that all the facts submitted upon have been pleaded by the Plaintiffs and are contained in the annexures to the Plaintiffs' affidavits. Counsel urged the court to uphold the objection and also to find that the suit is time barred.

Mr. Imanyara submitted that the Plaintiffs have admitted that there is another suit, HCCC No. 3462/95, involving the same subject matter and the same parties in which an order of injunction granted in 1995 was vacated on the 16th of April, 2003.

Mr. Imanyara submitted that even though the Plaintiffs in the instant suit were merely interested parties in the previous suit, the prayers sought in both suits are substantially the same. **Mr. Imanyara** urged the court to find that the instant suit offends **Section 6** of the **Civil Procedure Act** and either stay the proceedings under that section or strike out the suit for being *res judicata* under **Section 7** of **Civil Procedure Act**

Section 6 and **7** of the **Civil Procedure Act** provides:

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between in the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Mr. Owang did not agree with **Mr. Imanyara's** submission concerning HCCC No. 3462/95. Counsel submitted that the previous suit was actually filed by the Official Receiver and the 3rd Defendant against the 1st Defendant and others. He submitted that in that suit, the Official Receiver and the Defendant were alleging fraud in the manner in which the suit property was transferred to the 1st Defendant. **Mr. Owang** submitted that the Plaintiffs were enjoined in the suit as interested parties, having bought a portion of the suit property. **Mr. Owang** submitted that the 2nd Defendant was not a party in the previous suit and that therefore the two cases were substantially different.

Mr. Owang submitted that contrary to **Section 52** of the **Transfer of Property Act**, which bars litigants of a suit from dealing adversely with property pending before the court, the 1st Defendant moved into the suit premises owned by the Plaintiffs and levied distress by carrying away all movable goods without notice. Counsel submitted that it was that act of carrying away of the Plaintiffs' goods that forms the basis of the instant suit. **Mr. Owang** submitted that in the instant suit the Plaintiffs are saying that they have no landlord tenant relationship with the 1st Defendant and that their goods should be returned. Learned counsel submitted that the said issue is not an issue in the previous suit. In the circumstances, **Mr. Owang** urged the court to find that the two suits are different.

Counsel relies on the case of Nguyai vs. Ngunayu [1985] KLR page 606 at page 607 where **Muli, J.**, held as follows: -

*“The doctrine of **res judicata** could not apply against the plaintiff and the 1st Defendant as the 1st Defendant had not been a party to the previous suit and therefore the issues between him and the plaintiff were neither investigated nor resolved in that suit. The present case was founded on the sale*

agreement between the plaintiff and the 1st defendant, which was distinct from the issue of eviction on which the previous suit was founded.”

In the alternative **Mr. Owang** has urged the court to consider the option of consolidating the two suits under **Order XI Rule 1** of the **Civil Procedure Act**.

Mr. Kingara who appears for the 2nd Defendant supported the Preliminary Objection raised by the 1st Defendant and has urged the court to find that same issues are raised in the instant suit as in the previous suit and that therefore, the instant suit was an abuse of the process of the court and that the Preliminary Objection should be upheld.

As regards the Preliminary Objection, I must first dispose off the issue raised by **Mr. Owang** that the Preliminary Objection was improperly raised as it raised issues of fact and not purely of law as required. The case of **Mukisa Biscuits**, supra, relied on by the Respondent's Advocate tries to demonstrate what a Preliminary Objection is and what it is not. I have already set out herein above the observations of **Sir, Charles Newbold, P.** in that case. An issue can successfully be raised as a Preliminary Objection where it raises pure points of law and argued on the assumption that all the facts pleaded by the other party are correct. It will not be a Preliminary Objection if any fact(s) have to be ascertained or where the party raising the Preliminary Objection seeks the exercise of judicial discretion. The issues to be determined are whether the Preliminary Objection is dependent upon facts which are contested or which need to be ascertained. I will deal with each point raised seriatim.

On the issue of the action being statute barred, the basis of the 1st Defendant' contention to that effect was that the entire suit was dependant on a Sale Agreement which was signed on 30th April 1986 and completed on 30th July 1986 and, being a claim in contract, it was instituted more than six years from the date the cause of action arose, which is the limitation period for such claims.

The issue of the sale agreement is raised at paragraph 6 of the Plaint where the Plaintiffs aver as follows: -

“At all material times, the plaintiffs herein, who are husband and wife, purchased a sub-division of property known as L.R. No. 4242-3 on which is built a house together with all improvements thereon vide a Sale Agreement dated 30th April, 1986 from the Third Defendant for a consideration of Kshs.600,000/- and were thereafter given vacant possession of the suit premises. The Plaintiffs shall rely on the terms of the said Sale Agreement for its full terms and effect.”

That averment goes hand in hand with paragraph 13 of the Plaint and in my view the two should be read together. Paragraph 13 stipulates as follows: -

“The Plaintiffs aver that subsequent to the aforesaid fraudulent transfer of the suit premises, the First Defendant without any colour of right and purporting to represent himself as the owner/Landlord of the suit premises, maliciously instructed the second Defendant on 10th August, 2007 to proceed and levy distress upon the suit premises currently occupied by the Plaintiffs to recover an alleged rent arrears amounting to Kshs.3,085,000/- allegedly owed by the Plaintiffs herein when no such rent was owing.”

Going by the two averments as outlined above, it is quite clear that the Plaintiffs have raised the issue of the Sale Agreement to show how they came into possession of the suit premises. It was only by demonstrating their ownership for the suit property that the Plaintiffs could successfully aver that they could not have been tenants in the suit premises. It is on that basis that I believe the claim for payment for the value of distrained goods under prayer (f), general damages for trespass and detinue under prayer (g) and (h) could arise.

I find and hold that the Plaintiffs' suit is not a claim in contract nor dependent *per se*, on the Sale

Agreement in issue and therefore Section 4(1) of the **Limitation of Actions Act** does not apply.

The second ground argued is that the suit is statute barred, as it was a claim in land, which, as stipulated under **Section 7** of the **Limitations of Actions Act** should have been brought within 12 years. On that point, the Plaintiffs have gone to some length to outline their case against the Defendants. In paragraph 8 of the Plaint, the Plaintiffs aver that a caveat registered in the lands office on 4th December 1986 was extended by the court in **Nairobi HCCC No. 2895 of 1995** and therefore as pleaded in paragraphs 9, 10 and 11, the transfer of the suit property effected by the 4th Defendant in favour of the 1st Defendant after the 3rd Defendant purportedly sold it to him, was fraudulent. The particulars of fraud are also provided.

In the persuasive case of **Ghelani vs. Radia [1968] EA 311** held:

“(iii) by his pleading the plaintiff had not shown any ground upon which he could escape the application of the Limitation Act and his suit was statute-barred.”

The general rule is that no action to recover land may be brought after the end of 12 years. I do not want to delve deeply into the issue of whether the Plaintiffs may escape the application of **Section 7** of the Act from their pleadings. However, it does appear to me that having pleaded fraud, the issue of whether and from which time limitation may run will have to be determined at the trial, if the suit is finally heard.

I also see another issue which may have to be determined. Under **Section 9(1)** of the **Act**, an action to recover land may also accrue on the date of dispossession or discontinued possession of land where the party suing was in possession of the land. Again whether the Plaintiffs' claim to land may fall under **Section 9(1)** of the Act as opposed to **Section 7**, is a matter that will have to await the trial.

Having come to the conclusion I have on the Plaintiffs' claim to recover land, I find and hold that determination of whether the action is statute barred is a matter of fact, which facts are highly contested, and is therefore, not purely a point of law.

The third ground argued was that the matter was *Res Judicata* and that it offends Sections 6 and 7 of **Civil Procedure Act** in view of the previous proceedings in existence, that is, **HCCC No. 3462 of 1995**. I do not think that this issue warrants too much inquiry by this court. The following findings will suffice, that is, it may be true that **prayers (a), (b) and (d)** in the instant suit may be word for word as prayers **(i), (iv) and (vi)** in **HCCC 3462 of 1995**. However, it is important not to lose sight of important facts. The first is that the previous suit was brought by the Official Receiver and Liquidator of Continental Credit Finance Limited and Kisauni Properties Limited against the Defendants and others, for recovery of land far in excess of that claimed by the Plaintiffs herein. The Plaintiffs were joined of necessity, as interested party to the suit since the subject matter of the case was land a portion of which the Plaintiff had interest. In the instant case, the Plaintiffs sued the Defendants among them the 2nd Defendant who is not a party in the previous suit, based on an illegal distress for rent, trespass and detinue. The substantive claim by the Plaintiffs are those related to the distress and detinue.

The Plaintiffs claim in the instant suit is not just for recovery of part of the land involved in the previous suit, but also for recovery of goods illegally distrained, or their equivalent value, a matter not in issue in the previous suit.

Having considered all these issues, it would be a simplistic approach to assert that this suit is so similar with the previous one that it ought to be stayed, consolidated and or dismissed. While certain issues in both cases may be determinable in the same suit, the gist of the Plaintiffs' suit herein needs, of necessity, to be determined separately.

It has been suggested that the Plaintiffs should have anticipated their cause of action and should have pleaded them for determination within the previous suit. I find this argument rather impractical. The Plaintiffs' claim is grounded on distress for rent, which as pleaded, took place on 10th August 2007. I fail to fathom how the Plaintiffs could have enjoined their cause of action in their pleadings in the previous

suit, which suit was filed in 1995.

It was argued by **Mr. Imanyara** that the Applicant had failed to disclose a material fact that the injunction granted in the previous case was discharged. I have perused the file and I have noted that the injunction was not discharged but lapsed due to effluxion of time.

Having come to the conclusion I have, I find and hold that the Preliminary Objection raised under **Section 6** and **Section 7** of **Civil Procedure Act** lacks in merit.

In view of my finding, the Preliminary Objection raised by the 1st Defendant is dismissed with costs to the Plaintiffs.

Orders accordingly.

Dated at Nairobi, this 7th day of March, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Owang for Plaintiffs

Kingara holding brief Mr. Imanyara for 1st Defendant

Mr. Kingara for 2nd Defendant

Mr. Njenga for 3rd Defendant

LESIIT, J.

JUDGE