



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 870 of 2003

M.O.OSEKO1ST PLAINTIFF

J.O. OSEKO2ND PLAINTIFF

VERSUS

DAVID AWORI.....1ST DEFENDANT

MARIA LILIAN ODONGO OUYA.....2ND DEFENDANT

JUDITH MUHINA.....3RD DEFENDANT

RULING

The background information to this preliminary objection are that there is one subject matter common to three suits namely LR.NO.122/9/3 and 12219/4. The suits in question are 2905/1993, 870/03 and 877/03. It is necessary to set out the causes of action and defences in each file in order to understand the nature, extend and purport of the preliminary objection.

The plaintiffs in HCCC NO. 2905/93 were M.O.OSEKO and J.O. OSEKO. They filed suit against defendants LERO LUNO ENTERPRISES LTD AND NICHOLAS WANDIA RABALLA. The salient features of the plaint relevant to this Preliminary Objection are that there were negotiations between the Plaintiffs and the second defendant as regards the sale of two plots LR.12219/3 and 4 at an agreed price. Part payment of the purchase price was made. The balance was to be paid upon transfer of the property into the names of the plaintiffs. The transfer was not effected partly due to the fact that the second defendant revealed that the property was registered in the name of the second defendant company, the first defendant. Another factor was that approval could not be obtained from the relevant approving authority because certain conditions had to be met first. Despite this, the Plaintiffs had taken possession of the suit property, fenced off the property, and brought material ready for construction when the second defendant later changed his mind and destroyed the plaintiffs fencing and construction material on site. This prompted them to come to court seeking an order of specific performance of the contract between the plaintiffs and the defendant for the sale of property LR. NO.12219/3 and 4, damages for breach of the said contract, an injunction restraining the first and the second defendants, their servants, workmen and or agents from damaging and or interfering with the plaintiffs developments on the property LR. No. 12219/3 and 4 or interfering with the plaintiffs occupation of the said property in any way whatsoever as to prevent the Plaintiffs from its use and enjoyment, damages against the defendants for trespass, special damages, interest on (b) (d) (e) further or other relief.

The plaint had been accompanied by a chamber summons seeking restraint orders in respect of the said property. The same was heard inter parties and dismissed with costs on 29th November 1993. Since the

said order no further proceedings have taken place in the matter. A perusal of the record shows that summons to enter appearance have not been taken out and served. In essence the determination of the plaintiffs rights in this suit are still pending.

In HCCC 870/2003 the Plaintiffs herein are the same plaintiffs as in HCCC 2905/93. The defendants are however different namely one David Awori, Maria Lilian Odongo Ouya and Judith Mhina. The Key averments relevant to this Preliminary objection are that in 1996 Nicholas Wandia Raballa who was a second Director in Lero Luno Enterprises died and no arrangements were made by the surviving Director to regularize that position before entering into transactions involving the company. While the above state of affairs were still prevailing on 29th March 1998 LERO LUNO Enterprises Ltd the first defendant in 2905/1993 sold the suit property subject of the proceedings in HCCC NO.2905/93 to the 3rd Defendant Judith Mhina. On 29th October 2002 the 3rd defendant transferred LR 12219/3 to the 1st defendant and 12219/4 to the 2nd defendant. On 11th and 15th August 2003 the first and second defendants laid claim over the said property and attempted to evict the plaintiffs employees and caretakers which property the plaintiffs had been in possession and done some developments for the last 10 years to the date the 1st and second defendant appeared on the scene and claimed ownership. On this account the plaintiffs pleaded a desire to consolidate this case with 2905/93. In consequence thereof the plaintiffs seek a restraint order against the first and second defendant to prevent them from transferring the suit property to any other person or interfering with the plaintiffs enjoyment of the same, a declaration that the first and 2nd defendants are not entitled to enter, use or occupy the suit properties or move any materials into the said suit properties or at all, a declaration that the transfer of the suit property by LERO LUNO Enterprises to 3rd defendant and the subsequent transfer of the same property by the 3rd defendant to the first and 2nd defendant was illegal, fraudulent; null and void, damages against the defendants for trespass, special damages, interest on d,e and further or other relief.

The first and 2nd defendants filed a defence to the suit. The key averments relevant to this ruling are that they hold absolute and indefeasible titles being the registered owners of the suit property. In the alternative that mere possession cannot be construed to confer ownership and or title. That they rightfully have a claim or interest over the suit property the same culminating from the absolute and indefeasible titles to the suit properties. They made no admission of the other allegations in the plaint save to put the plaintiffs to strict proof.

In HCCC NO.877/03 the Plaintiffs are MARIA LILIAN ODONGO OUYA AND DAVID AWORI who are the first and 2nd defendant in HCCC NO.870/03. They have sued Mathew O. Oseko and J.O. Oseko who are the Plaintiffs in HCCC 870/2003. The Plaint is dated 20th August, 2003 and filed on 22nd August 2003. The Plaint in HCCC 870/2003 is dated 20th August, 2003 and filed on 20th August 2003. The key averments in the suit HCCC. 877/2003 are that one Judith Mhina was the registered proprietor of leasehold property which is the subject of the proceedings, for 99 years from 1.5.1997. The plaintiffs executed respective sale agreements with the said Judith Mhina on 12th August 2002 and paid the full purchase price. On 29th October, 2002 they became the respective registered owners of the suit property. Upon being registered as owners they made financial arrangements, obtained necessary building plans from the relevant authorities and then embarked on development, of the said plots, upon depositing building materials on the site is when the defendants came on to the scene, harassed their employees and had them arrested and has threatened eviction. In consequence thereof they sought restraint orders against the defendants, their servants and or agents from entering, evicting harassing and in any other way interfering with the quiet possession of the suit property, damages, an order declaring the 1st and 2nd plaintiffs the rightful registered proprietors of LR NO.12219/3 and LR.12219/4, costs of the suit, interest on B above and any other further relief that this honourable court may deem fit to grant paragraph 5 of the plaint and 4 of the verifying affidavits contain averments that there is no other proceedings between the parties. This averment is no doubt in ignorance of the fact that the defendants herein had filed a suit on the same date the plaintiffs in 877/03 were dating theirs. A perusal of the record reveals that summons have not been taken out in this matter to be served on to the defendants to file their defence. There is however an order by Hayanga J. as he then was on 28.8.2003 consolidating this file with HCC No.870/03. There is indication that orders for consolidation are contained in HCCC NO.870/03 made by

consent on 28.8.2003. At a later date on 29.9.2003 Hayanga J. as he then was made an order by consent consolidated 2905/93 with HCCC 870/03 and HCCC No.877/03 with HCCC 870/03 being chosen as the pilot file.

It is against the foregoing background information that counsel for the plaintiffs in HCCC No.2905/93 has filed this preliminary objection on a point of law. It is dated 16th June 2005 and filed the same date. It raises two points of law.

(1) That the purported transfer by the 1st Defendant LERO LUNO Enterprises Ltd of LR. No.s 12219/3 and 12219/4 to Judith Mhina and the subsequent purported transfers of the said two (2) titles by Judith Mhina to David Awori and Mary Lilian Odongo Ouya whilst the suit HCCC No.2905/93 between the Plaintiffs and the said 1st defendant, LERO LUNO, Enterprises was still pending before the Honourable Court was illegal, null and void and the suit in HCCC No. 877 of 2003 is bad in law *abinitio* and should be struck out and dismissed with costs to the Plaintiffs.

(2) That the claim of the plaintiffs in HCCC NO.877 OF 2003 being based on a title derived from an illegal transfer which was done while there was a suit pending before this Honourable Court HCCC No.2905 of 1993 is a nullity and an abuse of the process of court and should be struck out and dismissed with costs.

The agreed facts on record are as outlined earlier herein save that the 3rd defendant in HCCC No.870/03 is linked to HCCC 877/03 by virtue of her having been the transferor of the said property from herself to the plaintiffs in HCCC 877/03 and first and second defendant's in HCCC 870/03. She is linked to HCCC No.2905/93 by virtue of her having been the transferee of the suit properties therein during the pendance of the said suit. It should be noted however that summons intended to be served on her in HCCC 870/03 are still intact on the record. They have not been served. Although she is a vital link between the plaintiffs and defendants in both HCCC NO.877/03 and HCCC NO.870/03 she is not a party in HCCC NO. 2905/93 and HCCC NO.877/03.

The grounds relied upon by Counsel for the Plaintiffs in HCCC 2905/93 in support of the preliminary objection are:-

(1) That HCCC No.877/03 is an illegality under the law and it should not have been filed, because a transferee of land cannot get title over a property which is a subject of a litigation, pending litigation, in a court of law prior to the transfer in question.

(2) LERO LUNO enterprises Ltd which was the registered owner of these properties was under the law prohibited from transferring these properties in the year 1998. Likewise Judith Mhina should not have transferred these properties to David Awori and Maria Lilian Odongo Ouya in 2002.

(3) By the year 1998 and 2000 the suit filed by the Plaintiffs in 2905/1993 was pending for trial. It is the transfer of 2002 which gave the plaintiffs in 877/03 a purported right to sue the plaintiffs in HCCC 2905/1993.

(4) To support his assertion counsel relied on Section 52 of the 1882 Indian Transfer of Property Act applicable to Kenya

(ii) Commentary on Section 52 of the transfer of property Act 3rd Edition Chapter XXXVI.

(iii) Mulla on the Transfer of Property Act 1882 pages 367, 370 and 400.

5. This principle of law is meant to protect the authority of the Court.

(ii) it is a principle of public policy and so it must be enforced.

(iii) It prevents the Plaintiffs in HCCC No.877/03 from pleading to be purchasers for value without notice. This principle binds them whether they had notice of the suit or not. All that needs to be established is whether there was a suit or not.

6). Relied on the case of BELLAMY VERSUS SABINE. The English reports Vol.XLIV 842 and nearer home relied on the case of METHI AND SWANI FARMERS COOPERATIVE SOCIETY LTD VERSUS THE CO-OP. BANK OF KENYA

ND MAKUNDI BANK LTD HCCC NO.2603 OF 1995 (unreported). Also SNEIL VERSUS UNITY FINANCE LTD (1963) 3 A E.R.50.

On the basis of the foregoing submissions and legal authorities Counsel for the plaintiffs in HCCC NO. 2905/93 urged the Court to dismiss HCCC NO. 877/03 for being an illegality.

Counsel for the Plaintiffs in HCCC 870/2003 who are the same Plaintiffs in HCCC NO. 2905/93 associated himself with the submissions of the objectors counsel and requested the same prayer that HCCC 877/03 be struck out.

Counsel for the 3rd Defendant opposed the preliminary objection on the following grounds:-

(1) That in addition to the three named suits there was another case HCCC 3367/94 in which Lero Luno enterprises Ltd and Nicholas Wandia Raballa were plaintiffs suing Mathew Oseko and Julia Oseko which was dismissed on 22.6.01 due to want of prosecution by either side.

(2) That HCCC 2905/93 which was commenced by way of a plaint was accompanied by a chamber application seeking restraint orders against LERO LUNO Enterprises and Nicholas Wandia Raballa for the preservation of the suit properties therein but that application was dismissed by Bosire J. as he then was on 29.11.93.

(3) That summons to enter appearance have never been served in HCCC 2903/93 which summons have a life time of only 12 months which expired long time ago. And under order 5 rule (1) (7) of the Civil Procedure Rules where no application has been made to extend the summons the suit stands dismissed. So in law suit No. 2905/93 does not exist and no orders can be made in that suit that are enforceable. It is spent and the Court will be acting in vain if it were to make any orders touching on that suit.

In reply to the 3rd defendants counsel's submissions counsel for the Plaintiffs in HCCC 2905/93 submitted that in the absence of a cross preliminary objection to HCCC 2905/93 the points he is raising as regards that preliminary objection cannot hold.

(2) The objection raised is based on facts and so it cannot pass the test of being raised as a preliminary objection.

(4) That the suit is still alive and it is capable of receiving the orders of this Court especially orders dismissing HCCC 877/03 based on an illegal transfer. It is their stand that as long as suit No.2905/93 has not been disposed off by the court it is still alive.

On the courts assessment of the facts herein upon hearing Counsels appearing for the parties herein, in this courts opinion and wisdom the preliminary objection can be disposed off on five fronts namely:-

(1) Whether the preliminary objection qualifies to be a preliminary objection as laid down by the guiding principles regarding the same.

(2) Whether HCCC No.2905/93 is in capable of receiving the orders subject of this ruling.

(3) Whether counsel appearing for the plaintiffs in HCCC No.2905/93 has locus standi to attack the proceedings in HCCC NO.877/03 and if so what is the basis for this locus standi.

(4) Whether the preliminary objection is to be sustained or not in view of the findings of the court on respect of No. 1-3 above.

(5) Whether the preliminary objection is sustained or not sustained which is the way forward in this matter.

As regards question number 1. The test to be applied is found in the principles established by the famous case of MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD (1969) E.A. 696. At page 701 paragraph A B Sir Charles New Bold president as he then was had this to say:-

“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 to the exercise of judicial discretion”. When this principle is applied to the objectors argument it is clear that learned counsel based his argument on the basis of law only and not facts. His main stand is that as per the provisions of law relied upon, as long as suit No. HCCC No.2905/93 remains in existence HCCC 877/03 has no right of existence. It is illegal and it should be struck out. The illegality is alleged to have arisen as a result of the first defendant in HCCC.2905/93 allegedly purported to sell the suit property subject of the proceedings in that case to the 3rd defendant in HCCC 870/03 who also allegedly purported to sell and transfer the said property to the plaintiffs in HCCC 877/03, and it is this illegal transfer that allegedly gives rise to the plaintiffs claim of right in HCCC No.877/03. It should be noted that the party allegedly purporting to divest the suit property rights from the plaintiffs in HCCC 2905/93 and vest them into the plaintiffs in HCCC 877/03 is not a party in either of those suits. It should also be noted that the plaintiffs in HCCC 877/03 are not parties to HCCC 2905/93. It should also be noted that with the exception of the consolidation order counsel for the Plaintiffs in HCCC 2905/93 is not appearing for the plaintiffs as defendants in HCCC 877/03. The issue of existence of a nexus or lack of a nexus will be gone into when dealing with the issue of locus standi. For now it is enough to examine the legal points relied upon to support the stand that points raised are purely points of law.

Reliance was placed on Section 52 of the Transfer of Property Act 1882 of India applied to Kenya by orders in Council falling under group 8 of such applied Acts. It states “during the active prosecution in any court having authority in BRITISH INDIA, or established beyond the limits of BRITISH INDIA by the Governor-General in council of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the right of any other party, thereto under any decree or order which may be made therein, except under the authority of the court and in such terms as it may impose”. This provision has been developed into a binding legal doctrine. The first authority for this is MULLA on the transfer of property Act 1882 Ninth Edition LEXIS NEXUS BUTTERWORTHS. At page 366 paragraph 2 there is an explanation to the effect that *“For the purposes of this section the pendency of a suit a proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceedings in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed off by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation preferred for the execution thereof by any law for the time being in force”*

The purport of the doctrine and what it is meant to serve is explained at page 367 of the same text last paragraph where it is stated “It imposes a prohibition on transfer otherwise dealing of any property during the pendency of a suit, provided the conditions laid down in the Section are satisfied “and at page 369 paragraph 3

“it is intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court in which the dispute on rights or interests in immovable property is pending by private dealings that may remove the subject matter of litigation from the ambit of the power of the court to decide a pending dispute or which may frustrate its decree”. At page 371 last paragraph it is stated that “The broad

principle underlying the section is to maintain the status quo un affected by the act of any party to the litigation pending its determination and the expression decree or order". Includes a decree or order made pursuant to the agreed terms or compromise. When a mortgage was effected by one of the parties during the pendency of a suit between the parties in which the claim to the property was the subject matter of the suit, it was held to be bad. At page 382 paragraph 1 it is stated that "the Section expressly provides for all cases of decrees in a suit relating to immovable property whether they involve a mortgage or a charge or recovery of possession. It makes no exception in favour of a bona fide transferee for value without notice. The principle is of public policy and no question of good faith arises". At page 400 the first paragraph it is stated that "They also apply to any collusive decree or compromise by which the title of a party is affected during the pendency of a suit, for the principle underlying the second is that a litigating party is exempted from taking notice of a title acquired during the litigation

This doctrine has been interpreted in a number of legal authorities one of these is BELLAMY VERSUS SABINE THE ENGLISH REPORTS VOL. XLIV, 842. At page 847 at paragraphs 3 the Lord Chancellor made the following observation:-

"The doctrine of Lis pendens affects him not because it amounts to a notice, but because the law does not allow litigant parties to give to others pending the litigation, rights to the property in dispute so as to prejudice the opposite party.

Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties but also on those who derive title under them by alienation made pending the suit, whether such a alienees had or had not notice of the pending proceedings. If this were not so there would be no certainty that the litigation would ever come to an end"

At pg.849 the Lord Justice Turner at line 13 from the bottom had this to say *"The doctrine of lis penden is not as I conceive founded upon any of the peculiar tenets of a court of equity as to implied or constructive notice. It is as I think, a doctrine common to the courts both of law and of equity and rests as I apprehend upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination if alienations pendent lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree and would be drawn to commence his proceedings de novo, subject again to be defeated by the same cause of proceedings"*

After the foregoing observation the court in BELLAMY VERSUS SABINE held *inter alia* that:-

"The doctrine as to the effect of lis pendens on the title of an alienee is not founded on any principles of courts of Equity with regard to notice but on the ground that it is necessary to the administration of justice that the decision of the court in a suit should be binding, not only on the litigant parties but on those who derive title from them pendente lite, whether with notice of the suit or not".

Closer home the court was referred to the case of METHI AND SWANI FARMERS CO-OP SOCIETY LTD VERSUS THE CO-OP BANK OF KENYA LTD AND MAKINDI LTD Nairobi HCCC 2603/95. The case basically dealt with an application for an injunction where in the aggrieved party was challenging the banks rights in exercise of its statutory power to realize property charged to it by the aggrieved party. In fact the exercise of that right had been completed and property transferred to a 3rd party joined to the proceedings who pleaded the doctrine of innocent purchaser for value without notice. After due consideration of the facts and the relevant law S.E.O Bosire J. as he then was (now JA) at page 8 paragraph 2 of the ruling had this to say:

"So whether or not to grant injunction S.52 TPA does itself prohibit dealing in property in dispute in civil proceedings. The income from the farm although not directly in dispute must be protected (presented). It needs to be preserved to be paid to the party which will be found to be deserving it The management of LR. No.5991 must continue. The income must be invested to await the outcome of the suit"

Reference was also made to other decisions on non enforceability of contracts tainted with illegality which this court has taken note of though not specifically noted in this ruling.

The court was also referred to legal decisions and treatises as to when such preliminary points of law are to be raised in any proceedings. The first one is the case of REGISTERED TRUSTEES OF CATHOLIC ARCH DIOCESE OF NYERI AND ANOTHER VERSUS STANDARD LTD AND OTHERS (2003) 1 E.A. 257 Juma J. at page 266 paragraph 9 it is stated:-

“The other preliminary issue raised was that the first plaintiff cannot maintain a claim for defamation as it lacks sufficient personality”. Paragraph h – I “secondly the issue of capacity to sue goes to the very root of the case and must be pleaded. The Defendants did not raise the issue in their respective defence. I will however deal with the preliminary issues raised by the Defendants”. In this case it was held inter alia that Preliminary points are to be raised at the beginning of the hearing and not at the end of the hearing. Secondly, the issue of capacity to sue goes the very root of the case and must be pleaded”.

In the case of OMONDI VERSUS NATIONAL BANK OF KENYA LTD AND OTHERS 2001 1 E.A. 177. At page 182 paragraph f – I Ringeria J. made the following observations:

“Bearing that definition in mind, I agree with counsels for the Defendants that both the objection as to the legal competence of the plaintiffs to sue and the plea of res judicata are pure points of law which if determined in their favour would conclude the litigation and they are accordingly well taken as preliminary objections. In fact I must confess I was taken a back by the plaintiffs counsel’s insistence that issues of locus standi and res judica were not proper points for a preliminary objection for in my experience at the bar and on the bench I had not before heard it doubted that they were. And I hasten to add that in determining both points the court is perfectly at liberty to look at the pleadings and other relevant mater in its records”

It was held inter alia that *“The issues of locus standi and res judicata are pure points of law that can properly be raised as preliminary objections. In determining both the points, the court is perfectly entitled to look at the pleadings and other relevant mater on its records”.*

The Court was also referred to the Supreme Court practice 1995 volume 1 part 1 LONDON SWEET AND MAXWELL 1994. Order 14 A rule 1(1) states) *“The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that.*

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein”

In the case of WELAMONDI VERSUS THE CHAIRMAN, ELECTORIAL COMMISSIONER OF KENYA [2002] KLR 1 at page 8 Ringeria J as he then was, quoting with approval Law J.A. at page 700 in MUKISA BISCUITS LTD VERSUS WEST END LTD (1969) E.A. supra on the scope and meaning of preliminary objections at paragraphs 35 had this to say *“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of the pleadings, and which if argued as a preliminary objection may dispose off the suit. Examples are an objection to 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”.*

The foregoing cited legal provisions as well as decisions in decided cases are to be applied to the salient features of the two points of the preliminary objection in order to decide whether these two points can pass the test of being preliminary points of objection. The salient features in point no 1 are: *“The purported transfer was null and void and the suit 877/03 is bad in law abinitio, while those in point 2 are “an illegal transfer ...is a nullity and an abuse of the process of court and should be struck out and be dismissed”* From their framing it is clear that the salient features in point 1 and 2 of the preliminary

objection are nothing but preliminary objections on points of law and so they have passed the first test.

As regards the second test, of whether it has been raised at the right stage of the proceedings, the answer is in the affirmative as both HCCC 2905/93 and HCCC 877/03 are at their infancy stage.

HCCC 877/03 which is sought to be determined at its infancy stage does not even have summons to enter appearance taken out or defences filed.

As regards whether if upheld the preliminary objection is likely to bring the procedure to an end or finally determine the matter, the question is also answered in the affirmative because if upheld that will be the end of the proceeding, in HCCC 877/03.

Having made findings that the preliminary objection has passed the test of being a preliminary objection in the first instance, that it was raised at the right stage of the proceedings and that if upheld it will serve the purpose it was intended to serve namely finally determine the proceedings in HCCC 877/03, the court moves on to determine whether HCCC 2905/93 is incapable of receiving this preliminary objection the results of its determination. This arises because of the 3rd defendants counsel's assertion that since summons were never taken out within 12 months after the initiation of the proceedings the suit is dead and cannot receive the results or benefits of the determination of the preliminary objection. Counsel relies on order V Civil Procedure Rules. The provisions relevant to this assertion is order V rule 1 (2) and 1 (7) which state 1(2) "*where a summon has not been served on a defendant the court may extend the validity of the summons from time to time if satisfied it is just to do so.*

1(7) the court may without notice dismiss the suit at the expiry of twenty four months from the issue of the original summons".

These provisions have not been invoked either by the plaintiffs in HCCC 2905/93 or by the court. The court has a discretion under order V rule 1(2) to extend the time for issuance of the summons in this case if satisfied that it is just to do so. Until that situation arises and the court is called upon to exercise its discretion under that sub rule there is nothing to show that the court will certainly decline the extension, thus denying the suit existence. Secondly, since the court has not moved on its own motion under order V rule 1 (7) the suit is still living. This court is also alive to the provisions of order XVI rule 6 Civil Procedure Rules which states "*in any case otherwise not provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed and in such case the Plaintiff may, subject to the law of limitation bring a fresh suit.*" "This provision gives the court a discretion to determine such a suit for want of prosecution. No such a step was taken by the Court herein in respect of HCCC 2905/93 even as at the time of consolidation. A perusal of the record shows that the ruling for the interim application in the suit was delivered on 29.11.93 since then is no action was taken in the matter. The said suit became liable for dismissal by the court "*suo moto*" after 29.11.96. The time for dismissal continued running until it was interrupted by the order of consolidation on 29.9.2003. Three years have to start running afresh from that date. However, since it was consolidated with HCCC No.870/03, the record shows that HCCC No.870/03 has been active and it is still active. The activities in HCCC 870/03 shield HCCC NO.2905/93 and protect it from becoming liable to the provisions of order XVI rule 6. For this reason and the reason that provision of order V rule 1 (2) and (7) have not been invoked operate to shield HCCC 2905/93 from extinction. The court therefore rules that this suit is still alive and it can benefit as well as receive the results of this ruling.

Having ruled that the suit HCCC No.2905/93 is alive and it can benefit from as well as receive the results of this ruling, the court moves to determine whether there is locus standi to bring this preliminary objection. The issue of locus standi arises from the revelation of counsel for the plaintiffs in HCCC NO.2905/93 that the link between the three cases is one Judith Mhina who was purportedly sold the suit premises subject of the proceeding in HCCC 2905/93 by the first defendant therein. She is the one who sold the same subject matter in HCCC 2905/93 to the plaintiffs in HCCC 877/03. She is however a 3rd defendant HCCC 870/03. It is however to be noted that Judith Mhina is not a party in either HCCC 2905/93 or HCCC 877/03. It is also to be noted that the plaintiffs in HCCC No.877/03 are not parties in

HCCC 2905/93. The Plaintiffs in HCCC 2905/93 are however parties in HCCC 877/03 as defendants. As noted earlier. In this ruling in dependens proceedings in HCCC 877/03 were stopped in their infancy by the consolidation order. The only documents that the defendants herein HCCC 877/03 filed is notice of appointment and a replying affidavit to the interim application which had been filed therein. There is no memo of appearance or defence in that suit as consolidation came before these procedural “steps were taken. Counsel prosecuting the preliminary objection has specifically stated on record that he is specifically appearing for the plaintiffs in HCCC NO. 2905/93 and not the defendants in HCCC No.877/03. The question that arises for the determination by this court is whether this court is to take the prosecuting counsels statement from the bar that the link between the three suits is provided by the 3rd defendant in HCCC NO.870/03 which defendant has not even been served with summons to enter appearance nor filed defence therein and which defendant is not a party in HCCC 2905/93 and HCCC 877/03 and use them as a spring board to form locus standi for him to attack the proceedings in HCCC 877/03 or whether this court is to use the consolidation order of 29.3.2003 as the basis: The answer of this court as far as the first portion of the question is concerned in the negative because it is trite law that pleadings in any proceedings speak for themselves. They can only be altered in accordance with the rules governing alteration of pleadings. A counsel’s statement from the bar is not one of the modes of amendments of pleadings on unless it is meant to be an oral application for amendment which is allowed by the rules. The statement under consideration herein is not an oral application for amendment of pleadings in HCCC NO.2905/93 and HCCC 877/03 to introduce the 3rd defendant as a party there in order to provide a link between these two causes of action. This being the case the court has no alternative but to fall on to the consolidation order for assistance.

HCCC 2905/93 does not have a consolidation order endorsed in it. The consolidation order in HCCC No.877/03 endorsed on 28.8.03 simply says file consolidated with HCCC No. 870/03 which was to be the pilot file. No terms for consolidation were spelt out as regards how the pleadings of the parties were to relate to each other. For the plaintiffs in HCCC NO.2905/93 and the plaintiffs in HCCC.877/03 are the Plaintiffs in each, claiming the same subject matter in an opposite capacity. In the absence of a term in the Consolidation order that pleadings of either party in the separate suits are to form the opposing pleading against the pleadings of the other inter changeably as plaint and defence or counter claim the door was left open for the parties to each regularize their pleadings in each case and then have matters heard together as already consolidated more so when the consolidation order did not include a provision that pleadings were to be treated as having been closed as at the time of consolidation. The consolidation orders in HCCC.870/03 made on 28.8.2003 and 29.9.2003 do not offer any assistance. This being the case the correct position in law then is that in order for the prosecuting counsel to have locus standi to attack and fault the proceedings in HCCC No.877/03 the said counsel must and should have locus standi in that suit to do so or the locus standi in the suit he is operating from to do so. The prosecuting counsel in HCCC 2905/93 can only have locus standi over the plaintiffs in HCCC 877/03 if they are brought into HCCC 2905/93 as defendants if room exists for this and I think room exists for this. The plaintiffs in HCCC NO.2905/93 can follow the thread of LERO LUNO investments enterprises and reach the plaintiffs in HCCC NO.877/03 as defendants.

In order for Counsel in HCCC 2905/93 to have locus standi to attack the rights of the plaintiffs in HCCC NO.877/03 his clients must have locus stand in HCCC 877/03 to attack the pleading there in. A perusal of this record reveals the existence of a notice of appointment dated 27.8.2003 and filed on 28.8.2003 and a replying affidavit. These two documents were filed in pursuance to the provisions of order 50 rule 16(2) of the Civil Procedure Rules. The locus standi provided to the defendants herein is limited to the interim application only. The locus standi to attack any pleading herein has to be gained in the normal way through is service of summons to enter appearance and then entry of appearance. Entry of appearance either alone or with filing of the defence gives one locus stand to attack the pleading. In addition counsel prosecuting must be properly on record in the matter sought to be faulted which is not the case herein. In the absence of locus standi the merits of the preliminary objection whether the same is to be upheld however strong it may be cannot be gone into. For this reasons it is the finding of this court that counsel for the 3rd defendant in HCCC 870/03 who purported to attack the existence of HCCC 2905/93 has no locus standi to do so as the 3rd defendant in HCCC 870/03 is not a party in HCCC 2905/93. Likewise counsel prosecuting the preliminary objection on behalf of the plaintiffs in HCCC 2905/93 has no locus standi to attack the proceedings in HCCC 877/03.

Having arrived at the conclusion of lack of locus standi my hands are tied and cannot proceed to examine the merits of the preliminary objection in so far as to determine whether it is to be sustained or not to be sustained. That should be left for the court before which the matter will be revisited after the parties have regularized their status as outlined here below:-

This brings me to the way forward in this matter. The only way forward in this matter for purposes of providing guidance only which the parties and their respective counsel, may or may not take, and for purposes of ends of justice and fairness to all the parties involved in all the three suits who stand on equal footing before the law and the court as well. The advise is also made to lift the status of the cases from the current embarrassing position as perceived by this court only and pave the way for final determination. On that basis only the following guidelines are provided. As stated parties are free to take them or see how best they can proceed to hearing.

(1) All possible defendants capable of being defendants within the law should be brought into HCCC 2905/93.

(2) The Plaintiffs in HCCC 877/03 are free to regularize the position of the defendants therein or think of inclusion of a counter claim in HCCC 870/03.

After regularization of the proceeding as advised above and vesting of proper locus standi is when the issue of the preliminary objection raised can be revisited and heard on merit.

For now the same is dismissed on a point of technicality on the basis of lack of locus standi to raise it. There will be no order for costs as the recipient of the same lacked locus standi to oppose it.

DATED, READ AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY 2007.

R. NAMBUY/E

JUDGE