



REPUBLIC OF KENYA



KENYA LAW
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**Gathendu v Mwai & 4 others (Environment & Land Case E080 of 2021)
[2022] KEELC 15488 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E080 OF 2021**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

SYLVIA WANJIRU GATHENDU PLAINTIFF

AND

LILIAN WAITHERA MWAI 1ST DEFENDANT

PETER KAMAU KABI 2ND DEFENDANT

RUTH WANJIKU KAMAU 3RD DEFENDANT

FRANCIS MWAURA MUNGARA 4TH DEFENDANT

LAND REGISTRAR, THIKA 5TH DEFENDANT

RULING

1. The 4th defendant filed a notice of preliminary objection dated 15/2/2022 on grounds that;
 - a. That the entire suit is time barred and unmaintainable in light of the provisions of section 4, 7 and 26 of the *Limitation of Actions Act* cap 22 laws of Kenya.
 - b. Without prejudice to paragraph 1 above, the entire suit is an abuse of court process and *res judicata* under section 7 of the *Civil Procedure Act*; Nairobi HCCC No 2111 of 2000 – Francis Mwaura Mungara vs Lilian Waithera Mwai.
2. The plaintiff, Sylvia Wanjiru Gathendu opposed the preliminary objection *vide* her replying affidavit sworn on 9/8/2022. She conceded the existence of Nairobi HCCC No 2111 of 2000 (hereinafter the Nairobi case) but maintained that the issues therein are different and distinct from the issues and prayers herein. She denied participating in the Nairobi case having fallen out with her advocates sometime in 2006 and reiterated that the preliminary objection raises factual issues which can only be determined on trial by way of evidence.



3. The 1st, 2nd and 3rd defendants despite service have not entered appearance herein. The 5th defendant supports the preliminary objection.
4. On October 11, 2022 directions were taken for parties to canvass the preliminary objection by way of written submissions. Neither the plaintiff nor the 4th defendant filed any submissions.
5. The sole issue for determination is whether the preliminary objection is merited.
6. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the court is enjoined to apply in determining the merits or otherwise of the preliminary objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 law JA stated:

“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. 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.”
7. At page 701 Sir Charles Newbold, P added:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”
8. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
9. The 4th defendant’s preliminary objection is two-fold; that the suit is time barred and further that it is res judicata on account of the Nairobi case. The plaintiff vehemently denies the objections as raised and was adamant that the issues and prayers in the instant suit are distinct from those in the Nairobi case.
10. A glean of the plaint dated 19/7/2021 filed herein discloses the cause of action as fraudulent dealings on the 4th defendant’s part in the plaintiff’s land parcel known as Ruiru East Block5/229 (the suit land). The plaintiff relies on the finding of the court in Thika Criminal Case No 5294 of 2000 whereby the 1st defendant herein was charged and convicted *inter alia* for obtaining money by false pretenses from the 2nd and 3rd defendants who later sold the suit land to the 4th defendant. At para 12 of the plaint the plaintiff also disclosed the existence of the Nairobi case as filed by the 4th defendant herein. The plaintiff further averred at para 14 that the Nairobi case *vide* a judgment delivered on 24/6/2002 found that the suit land belonged to the plaintiff herein.
11. In the same light, the plaintiff at para 13 states that the Nairobi case was dismissed for want of prosecution. The said averments in my view allude to contradicting position on the outcomes of the Nairobi case and the 4th defendant did not appraise the court on the position of that case. Be that as it may for this court to fully reach a conclusion that this suit is *res judicata*, the elements of section 7 [Civil Procedure Act](#) must be established and the same can only be done by way of examination of evidence.



12. Section 7 Civil Procedure Act states;

“7. Res judicata

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 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.”

13. On the limb of the suit being time barred, again reference is made to section 7 Limitation of Actions Act which provides;

“7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

14. For the court to invoke the said provision, it is necessary to determine when the plaintiff’s cause of action arose. This cannot be done at this preliminary stage for it calls for analysis of evidence and the therefore the preliminary objection fails to the extent that it does not raise pure points of law only. The preliminary objection is unmerited and it is for dismissal with no orders as to costs.

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Gitau for Plaintiffs

1st, 2nd and 3rd Defendants – Absent

Ms. Tipira HB Tumu for 4th Defendant

5th Defendant – Absent

Court Assistant – Phyllis / Kevin

