



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Misc Appli 12 'A' of 2006**

**UASIN GICHU MEMORIAL HOSPITALBOARD LTD.....PLAINTIFF**

**VERSUS**

**MOI TEACHING & REFERAL HOSPITAL BOARD & OTHERS.....DEFENDANT**

**RULING**

Before me is a Notice of Preliminary Objection dated 31<sup>st</sup> January 2006 and filed in court on the same date by Katwa and Kemboy Advocates, who have conduct of this matter on behalf of the 1<sup>st</sup> defendant, Moi Teaching and Referral Hospital Board. The 2<sup>nd</sup> & 3<sup>rd</sup> defendants are the Minister for Health and the Hon. the Attorney General respectively. The 1<sup>st</sup> defendant objects to the Originating Summons filed in court on 11<sup>th</sup> January 2006 and dated 10<sup>th</sup> January 2006 for having no basis in law and fact and being an abuse of the court process.

The said Preliminary Objection was not specifically pleaded but at the hearing, Mr. Katwa urged three grounds in his arguments.

1. The 1<sup>st</sup> defendant objects to the filing of the Originating Summons dated 10<sup>th</sup> January 2006 and filed in this court on 11<sup>th</sup> January 2006 in Nairobi High Court. He contends that offends S.12 of the Civil Procedure Act;
2. This matter is Res judicata;
3. That this suit is time barred.

Mr. Ombwayo, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants supported the Preliminary Objection but the plaintiffs objected to it. The plaintiffs are represented by Mr. Kibet.

Mr. Katwa urged that the suit before the court involves proprietorship to land which is situate in Eldoret Municipality and S.12 of the Civil Procedure Act provides that a suit for determination of rights on immovable property should be instituted in a court within the local limits of whose jurisdiction the property is situate. The filing of this suit in Nairobi is therefore mischievous and an abuse of the court process.

The 2<sup>nd</sup> reason advanced by counsel as to why the suit should be filed in Eldoret is that three other cases have already been filed in Eldoret High Court involving the same parties and over the same subject matter. Mr. Katwa said that in HCC 123 of 1998, all the parties before the court now, were parties in that suit and an application had been made to join the Attorney General to that suit. Though that suit was dismissed, counsel contends that this matter should be before the Eldoret High Court for ease of reference to that particular file, that is HCC 123/98. Further counsel said that on 8<sup>th</sup> September 2005, the 1<sup>st</sup> defendant filed HCC 78 of 2005. It involves all the parties before the court and the plaintiff is the 15<sup>th</sup> defendant whereas the directors are 1-14<sup>th</sup> defendants. The issues involve the proprietorship of the hospital situate on the suit land plots 7/125 and 7/126, and orders of injunction were granted to the 1<sup>st</sup> defendant barring any interference with the said property. On 10<sup>th</sup> January 2006 when that matter came up for hearing, the parties agreed by consent that the order of injunction do remain in place. It is the submission of the 1<sup>st</sup> defendant that if the orders in the application before this court are granted, they will interfere with the orders granted in HCC 78 of 2005. Another suit as between the parties was filed by the plaintiff in Kisumu High Court HCC 58 of 2005 but the 1<sup>st</sup> defendant raised an objection and it was transferred to Eldoret. Other suits are HCC 15 of 2005 and HCC 80 of 2005. In addition to the above submissions as to why the suit should have been filed in Eldoret High Court, counsel submitted that the applicant's case raises constitutional questions under S.75 of the Constitution relating to deprivation. The same question is raised in HCC 78 of 2005 and as per legal No.133 of 2001, this suit should have been brought within. HCC 78 of 2005 as a Notice of Motion for that court to determine the constitutional issue.

The 2<sup>nd</sup> limb of the 1<sup>st</sup> defendant's objection is that this suit is Res judicata because HCC 123 of 1998 which was struck out on 15<sup>th</sup> June 2005 sought similar prayers to the ones now sought, i.e. a declaration that the transfer of Uasin Gishu Hospital to Moi Referral Hospital was unlawful and an injunction to stop any other party from interference and the court was asked to restore parcels 7/125 and 7/126 Eldoret Municipality to the plaintiff but the matter was canvassed and a decree was given on 15<sup>th</sup> June 2005 and the plaintiffs are estopped from filing a similar suit again. Though the plaintiffs allege that there was mischief in the dismissal of HCC 123 of 1998, there has been no application for review of the orders nor has there been an appeal.

Mr. Katwa further urged that the application is Res judicata because the prayers sought in Misc. Application 350 of 2005 are similar to the prayers sought in this Originating Summons and Chamber Summons. In Misc. App 350/05, the court granted the plaintiffs an order restoring the property to the plaintiff after an order had been made by the Registrar of companies dissolving the plaintiff's company. Mr. Katwa urged that the plaintiff should be able to execute the said orders instead of coming to court to seek other orders. The 1<sup>st</sup> defendant has filed an appeal in that case which is yet to be determined and it would be prejudicial to the 1<sup>st</sup> defendant if this case proceeded before the appeal is finalized.

Mr. Katwa further submitted that the cause of action in this matter arose in 1998. Since it is a suit against the government, it should have been filed within one year. It is therefore time barred and should be struck out. Counsel relied on the following authorities: **NORTH WEST WATER LTD VS. BINNIE & PARTNERS (1990) 3 ALL ER 547** in which at page 561, the court held that where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependant on the same evidence. Since, not only was the party seeking to relitigate the issue prevented from doing so by issue of estoppel but it would also be an abuse of process to allow the issue to be relitigated.

2. **HUNTER VS. CHIEF CONSTABLE OF WEST MIDLANDS & ANOTHER 1981 ALL ER 727**

– the court adopted the principle in the earlier case on abuse of court process.

**3. K.B.S. & OTHERS VS. ATTORNEY GENERAL NRB HCC 413 OF 2005** where the constitutional court held that rules of procedure should be observed as failure to do so may result in prejudice and injustice and that failure to observe rules of procedure amounts to an abuse of the court process.

Lastly Mr. Katwa submitted on the jurat on the affidavit by Charles Kesse in support of the Originating Summons as being inappropriate as it offends S.18 of Cap 15 and he prayed for the dismissal of the suit on that basis. Counsel relied on the case of **DIAMOND TRUST BANK LTD VS. GAREX LTD & OTHERS HCC 1474 OF 2001** and **COWEST TRADING GMBH VS. SPECIALISED LIGHTING SYSTEMS LTD HCC 1251 OF 2002** where the courts struck out affidavits on account of defective jurats

Mr. Ombwayo supported the Preliminary Objection dated 30<sup>th</sup> January 2006 on the two grounds that the Originating Summons is Res judicata and that it should have been filed in Eldoret High court where other matters had been filed and specifically HCC 123 OF 1998 which was dismissed by the court. It is his submission that even if the Attorney General had not yet been joined to HCC 123/98, there was an application to do so before the dismissal and the parties were essentially the same and so were the issues.

He added that prayer 3 of the Originating Summons which seeks a declaration against the defendants cannot be granted because of S.16 of the Government Proceedings Act in respect of 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Mr. Kibet in opposing the Preliminary Objection submitted that what has been raised is not a Preliminary Objection in light of the case of **MUKISA BISCUITS** as reference has been made to all documents that have been filed. He also said that facts are disputed whereas a Preliminary Objection should be based on agreed facts, for example whereas Mr. Katwa said that Attorney general was a party in HCC 123 of 1998, Mr. Ombwayo said the suit was dismissed before the Attorney General was joined as a party to the suit.

Mr. Kibet further argued that before the court is a constitutional reference challenging the President's constitutional and statutory powers to take away one's property and that issue has not been litigated anywhere and HCC 123 of 1998 never dealt with that issue.

He further urged that the doctrine of Res judicata cannot apply in this case because the court's jurisdiction is invoked under S.84 of the constitution but not the Civil Procedure Act. Jurisdiction conferred under S.84 (2) of the constitution cannot be fettered.

In the alternative Mr. Kibet urged that this matter is not Res Judicata because HCC 123 of 1998 was dismissed on a preliminary issue that there was no Board of Directors of the plaintiff. He contended that for S.7 of the Civil Procedure Act to apply, the matter must have been heard and finally decided by the court on merit which was not done in HCC 123/98. In HCC 123 of 1998 counsel recalled that, after the President signed the Legal Notice 78 on 9<sup>th</sup> August 1996 transferring the ownership of the disputed hospital to the 1<sup>st</sup> defendant, the plaintiff filed HCC 123 of 1998 against the 1<sup>st</sup> defendant and the court granted an order of temporary injunction which subsisted till 2005. In March 2005 the Registrar of Companies dissolved the plaintiff as a company and 1<sup>st</sup> defendant filed an application in HCC 123 of 1998 seeking to strike the suit out under Order 6 Rule 13 (b) and (c).

The plaintiff was not in existence by then and the suit was struck out on that basis. Later the plaintiff filed Misc. Application 350 of 2005 in which the plaintiff was restored as a company. Mr. Kibet said that HCC 58 of 2005, 80 of 2005 and 15 of 2005 were judicial review applications which were seeking to restore the plaintiff as a company and were withdrawn once Misc. Application HCC 350 of 2005 was filed. He said that the only suit in existence is HCC 78 of 2005 where there are 14 defendants. He said that before filing the said suit, a letter originated from the 2<sup>nd</sup> defendant authorising the take over by the 1<sup>st</sup> defendant of the disputed hospital and the 1<sup>st</sup> defendant used violent means and politicians to take over

the hospital. 1<sup>st</sup> defendant then filed HCC 78 of 2005 seeking to ratify these actions, which the plaintiffs now challenge in this suit, as HCC 78 of 2005 is a perpetration of an illegality. He relied on decision in **CA 43 of 2006 DR C.M. MURUNGARU VS. KACC & ATTORNEY GENERAL** where the court said rights of all parties should be protected notwithstanding their standing in society. In **GUSII MWALIMU HOTEL CA 160 of 1995**, the Court of Appeal held that no party should be allowed to benefit from their own illegality which Mr. Kibet submitted the 1<sup>st</sup> defendants are trying to do in HCC 78 of 2005.

On the question of Res judicata counsel relied on the cases **WANGUHU VS. KANIA (1987) KLR JI** and **KIBOGY VS. CHEMWENO (1981) KLR 35** where the courts held that, for a matter to be Res judicata it ought to have been decided on merit.

Counsel also relied on the cases of **GAIRY VS. ATTORNEY GENERAL OF GRENADA (2001) UKPC 30** and **RAMLOGAN VS. THE MAYOR ALDERMAN & BURGESSES SAN FERNANDO 198 LRC 577** in which the courts held that there is no abuse of court powers when a party invokes the provisions of the constitution. The court must consider the applicant's case.

As to whether this matter should have been filed in Eldoret High Court, counsel said that there is no application for transferring the suit to Eldoret and the court is not properly moved to grant the order. He then relied on Order 46 Civil Procedure Rules which deals with High Court Registries and specifically Rule 5A which provides that all matters relating to immovable property will be filed at the Central Registry, which is in Nairobi and the case is therefore properly before this court.

As regards the issue of the jurat Mr. Kibet said he did not know the basis of the objection and in any event it could be cured by Order 18 R 7 Civil Procedure Rules as that would be a mere irregularity in form and the defendants would not be prejudiced.

In reply, Mr. Katwa said that this being a matter of Public Policy both estoppel and Res judicata apply.

He further urged that on 29<sup>th</sup> August 2005 the plaintiff was made the 15<sup>th</sup> defendant in HCC 78 of 2005 and the plaintiff cannot argue that parties in this case and 78 of 2005 are not same.

He further urged that the issue of deprivation of property has run through all the suits that have been before court and it is not a new issue.

On the authorities cited by the plaintiff's counsel, Mr. Katwa said they related to private individuals whereas the present case involves the Government.

Mr. Ombwayo in reply said that Rules 9 & 10 of Legal Notice 133, the constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001, commonly known as Chunga Rules, required that such an issue would have been filed in HCC 78 of 2005 by way of Notice of Motion and that Rule 32 of the Gicheru Rules or Legal Notice 6 of 2006 provides that any matter pending under Legal Notice 133 of 2001 shall be continued under these rules.

I have considered the submissions of all the three counsel, the case law referred to. The first issue that I will consider is whether what Mr. Katwa raised is a preliminary point that can be taken up at this stage or not.

The law applicable in respect of the issue of preliminary point of objection is that laid down in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD (1969) EA 696**. At page 700, Law J.A. stated:

“So far as I am aware, 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.....”

and at page 701: Sir Charles Newbold said;

**“A preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is urged 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 defendants have raised an objection to the effect that the matter before the court is res judicata, in terms of S. 7 of Civil Procedure Act and that it is filed in the wrong court and contravenes Section 12 of the Civil Procedure Act. Both objections relate to jurisdiction and in my view, they are specific points of law to be considered at this stage of the proceedings because if sustained, they may dispose of the suit.

It is generally admitted that several suits have been filed before the Eldoret High Court relating to the proprietorship of Uasin Gishu Memorial Hospital and plots, Eldoret Municipality Block 7/125 and 7/126. It is admitted that in HCC 123 of 1998, the plaint was struck out and the suit dismissed on 15<sup>th</sup> June 2005 after an application was made by the 1<sup>st</sup> defendant under Order 6 Civil Procedure Rules. HCC 58 of 2005, 80 of 2005 and 15 of 2005 were Judicial Review Proceedings which have since been withdrawn after which Milimani Misc. Application 350 of 2005 was filed. It has been heard and an order given to the plaintiffs herein, restoring the company to its status and there is a pending appeal to the Court of Appeal filed by 1<sup>st</sup> defendant. There is then HCC 78 of 2005 filed by the 1<sup>st</sup> defendant against the directors of the plaintiff and the plaintiff has also been joined as the 15<sup>th</sup> defendant.

In HCC 123 of 1998 the parties were the plaintiffs herein as a plaintiff and the 1<sup>st</sup> defendant was sued in the same capacity. It was dismissed when there was a pending application by the plaintiff to join the Attorney General. Essentially there would have the same parties in that suit as the present one.

The question therefore posed is whether this matter is Res judicata. S. 7 of the Civil Procedure Act provides, **“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”**.

Under the above Section, the following elements have to exist for a suit to be Res judicata;

1. The issue before court was directly and substantially in issue in a former suit
2. The suit was between same parties or parties claiming under same title
3. The former suit has been heard and determined by the court on merit

In this suit, the parties, are essentially the same as those in HCC 123 of 1998. In any case under S.7 above, the parties need not be exactly the same for a matter to be res judicata. It could be a party under whom any of them claim or they could be litigating under the same title. This is true of the holding in the case of **N.W. WATER LTD VS. BINNIE** (supra), where it was held at page 548 that, **“where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependant on the same evidence, since not only was the party seeking to relitigate the issue prevented from doing so by issue of estoppel but it would also be an abuse of process to allow the issue to be relitigated.”**

It did not matter that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not yet parties to HCC 123 of 1998.

For one to plead that a matter is Res judicata, the matter that had been earlier litigated should have been

heard and determined on the merits. The cases of **KIBOGY VS. CHEMWENO** and **WANGUHU VS. KANIA** are clear authority on this point. HCC 123 of 1998 was dismissed upon a preliminary issue being raised that the suit was incompetent for having been instituted by a non-existent legal entity. The court never went into considering the issues as to whether the plaintiffs or defendants are the proprietors of the suit land and Hospital in issue. The matter cannot therefore be *Res judicata*, in the former suit and present suit.

Thirdly for a matter to be *Res judicata*, the issues to be determined should be the same. Though the underlying issue in the case earlier referred is proprietorship of the suit lands 7/125 and 7/126 and the hospital, the crux of this matter before this court is alleged violation of the Applicant's rights to property. It is a constitutional reference brought under Cap 5 of the Constitution, in which the powers of the President to take away one's property are challenged by the applicant. The issues in this reference are therefore different from those which were before Eldoret court in HCC 123/98. I do find that this matter is not *res judicata* and that ground of the objection must fail.

Should this case have been filed in Eldoret High Court? And now that it is filed here, what is its fate? In the case pending before the Eldoret High Court, HCC 78 of 2005, the parties therein are the 1<sup>st</sup> defendant herein as the plaintiff, the 14 directors of the plaintiff herein as the defendants and the plaintiff is the 15<sup>th</sup> defendant. In that suit, the 1<sup>st</sup> defendant seeks orders that the disputed land and the assets thereon be transferred to the 1<sup>st</sup> defendant thus claiming ownership. What is before this court is a constitutional reference brought under Cap 5 of the constitution. As noted above though the underlying dispute is over the same suit land Eldoret municipality Block 7/125 and 7/126, the plaintiff is alleging breach of his Fundamental Rights under Cap 5 of the constitution. I do note that the 1<sup>st</sup> defendant has acknowledged that fact in para 12 of the affidavit by Agunda Ochanda filed in court on 13<sup>th</sup> February 2006, that this is a constitutional reference. Has this issue been considered in the cases filed before the Eldoret High Court? The answer is No. I have already looked at the case that is pending before the Eldoret High Court HCC 78/05. There was no allegation of breach of fundamental rights in HCC 123/98. In that suit the plaintiffs claimed ownership of the Uasin Gishu Memorial Hospital, the suit land and an injunction to restrain the 1<sup>st</sup> defendant herein from interference. It was not a constitutional reference. In Milimani Misc Application 350/05, the plaintiffs sought to have their company restored to the register, having been dissolved by the registrar and it was ordered restored to its position prior to the dissolution. The other matters 80/05, 58/05 and 15/05 were said to have been Judicial Review applications which were withdrawn. I therefore hold that so far, the plaintiff has not filed any other constitutional reference in respect of this matter.

It is not in dispute that HCC 78/05 was filed on 29<sup>th</sup> August 2005 whereas this constitutional Reference was filed later on 11<sup>th</sup> January 2006.

Under Rule 9 of legal Notice 133 of 2001, or the Chunga Rules, which Rules were then still in operation, where there was allegation of contravention of fundamental rights and freedoms other than in the cause of proceedings, an application would be made directly to the High Court. Under Rule 10 (a) of the same Rules, if violation of fundamental rights was alleged in any proceedings that were pending before the High Court, an application for determination of the question should have been made by Notice of Motion in the matter and provisions of Order 50 Civil Procedure Rules would apply and the pending proceedings would be stayed pending determination of the constitutional issue. In this case, the plaintiffs have not filed any Notice of Motion in HCC 78/05 though ideally, they should have because the constitutional issue stems from the claim in that suit. The Eldoret High Court though a constitutional court, has not been moved by the plaintiff. The question is whether this court can order a transfer of this reference to that court? In my considered view, what is filed before this court is an originating summons. Even if it is transferred to Eldoret, it would not be transformed into a Notice of Motion and it would therefore serve no purpose to transfer it to Eldoret.

The 1<sup>st</sup> defendant made reliance on Section 12 of the Civil Procedure Act as regards the court which has jurisdiction to try this matter. Section 12 provides that subject to the pecuniary or other limitations prescribed by any law, suits for recovery of immovable property with or without rents or profits where the

property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate. The land in dispute is situate in Eldoret Municipality and there is a High Court in Eldoret which can hear and determine this case. The plaintiff's counsel made reliance on Order 46 Rule 5 A Civil Procedure Rules which provides that proceedings against the Government shall not, except with the consent of the Government, be directed to be tried elsewhere than at the High Court sitting in the area of the central Registry which is at Nairobi.

In my view the Attorney General's office having opened several registries in High Court stations, makes that provision outdated. In any event order 46 Civil Procedure Rules is a subsidiary legislation passed by the Rules Committee set up under Section 81 of the Civil Procedure Act and cannot override the express provision of the Civil Procedure Act which is an Act of Parliament. Ordinarily this suit should have been filed in Eldoret High Court.

This matter is now before this court having been filed in January 2006. What should this court do with it? As earlier noted, before me is a constitutional reference, not an ordinary suit. The constitution is the supreme law of the land and hence supercedes all the other provisions of law.

S. 84 (1) of the constitution under which the reference is brought provides as follows;

1. "Subject to subsection (6), if a person alleges that any of the provisions of Sections 70 –83 (inclusive) has been, is being or is likely to be contravened in relation to him (or the case of a person who is detained, if another person alleges a contravention in relation to the detained person) then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

2. **The High Court shall have original jurisdiction-**

(a) **to hear and determine an application made by a person in pursuance of subsection (1);**

(b) **to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3);**

**and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 (inclusive)".**

A reading of this Section discloses that the availability of other causes of action is not a bar to a party who alleges a contravention of his rights under the constitution. This is what **EDDO J** stated in the case of **RAMLOGAN VS THE MAYOR OF SAN FERNANDO (1986) LRC (Const) 377 (Trinidad & Tobago)** where the learned judge held at page 378

**"The present proceedings were properly instituted as being well within the ambit of the provisions of the constitution for protection of rights of property. While the applicant might be able to pursue a claim of judicial review or in private law by an action for trespass, she was nevertheless entitled to invoke the fundamental rights provision of the constitution, under Section 14 (1) of the constitution, without prejudice to any other action lawfully available to her....."**

The plaintiff is alleging that the president had no powers to alienate private land without due process and that as a result the rights to their land have been violated as the plaintiff has been unlawfully deprived of that land. The plaintiff needs to be accorded a chance to prove these allegations for the court to determine whether or not these allegations are correct. Of course the burden will be on the plaintiff to show the court, based on the facts, that what the plaintiff claims is true. Since this application would have to be dealt with before the substantive suit it would mean that it be given preference and that is why the Gicheru Rules or the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006 just like the repealed Chunga Rules, provide that all applications and references to the High court shall be given

priority hearing over all other cases and shall be heard and determined expeditiously (Rule 32).

In the case of **RASHID ODHIAMBO ALOGGOH & 245 OTHERS V HACO INDUSTRIES LTD CA 110/01** which considered the **RAMLOGAN CASE**, it was the Court of Appeal's view that once there was allegation of violation of fundamental rights, the court had to hear the complainant. The Hon. the CJ – Justice Gicheru also reached a similar decision in the case of **LAWRENCE NDUTU & 156 OTHERS V KENYA BREWERIES LTD HCC 279/03**. The Court of Appeal was stressing the point that where there is allegation of violation of fundamental rights, the court has to give the party a hearing to establish the truthfulness or otherwise of the allegations. It means that the courts jurisdiction cannot be fettered in such a matter though the court will consider each case on its peculiar circumstances. This court cannot elevate the provisions of Section 12 of the Civil Procedure Act as regards jurisdiction, to the constitutional provisions. In any case, Section 12 Civil Procedure Act specifically provides that it is applicable subject to "Limitations prescribed by any law". Section 12 Civil Procedure Act must bow to the constitutional provisions.

From the foregoing observations, I do find and hold that since this court has been moved under the constitution, it cannot shut the plaintiffs out. The court has to hear them and determine on the evidence whether their fundamental rights have been violated or not, for, that is this court's mandate. It will neither order a transfer of the suit to Eldoret because the Eldoret court has not been moved nor will it dismiss it. Had this issue been raised by the defendants right from the on set at the filing stage, the court would have considered whether or not to sent it back to Eldoret but this court is now seized of it and will hear and determine it. That ground of objection must fail.

Is this suit time barred? Mr. Katwa did not tell the court what provision of law he was relying upon in raising this objection. Under Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya, suits relating to immovable property should be instituted within 12 years. Under Section 136 of the Government Lands Act Cap 286 Laws of Kenya, all actions brought against the Government should be instituted within one year of the cause of action. Though Mr. Kibet never specifically made a reply to the objection, yet in light of my findings above, that objection must fail. This is a constitutional reference and cannot be barred by any other statute. The court has to hear and determine the constitutional issue whether brought within one year or not.

In any event the issue of whether or not the suit was time barred is a matter of fact which can only be established by evidence. It cannot be decided at this preliminary state. See **EL BUSAIDY V COMMISSIONER OF LANDS & 2 OTHERS (2002) 1 KLR 508**.

Mr. Katwa also raised an objection regarding the jurat to Mr. Kesse's affidavit, in support of the Originating Summons. An examination of the jurat shows that it is properly commissioned by Njeri Onyango Advocate at Nairobi and signed by the deponent. The nature of the objection is not clear. It cannot be sustained.

The upshot of this, is that I do dismiss the defendants' Preliminary Objection for the aforesaid reasons. Costs to abide the hearing of the reference.

Dated and delivered this 13<sup>th</sup> day of October 2006.

R.P.V. WENDOH

**JUDGE**