



REPUBLIC OF KENYA



**KENYA LAW**  
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**Teleposta Pension Scheme Trustees Registered v Crucial Properties Limited & another (Environment & Land Case E045 of 2022) [2022] KEELC 15549 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15549 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E045 OF 2022  
JO MBOYA, J  
DECEMBER 20, 2022**

**BETWEEN**

**TELEPOSTA PENSION SCHEME TRUSTEES REGISTERED ..... PLAINTIFF**

**AND**

**CRUCIAL PROPERTIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff herein filed and commenced the instant suit vide Plaintiff dated the 8<sup>th</sup> February 2022, and in respect of which the Plaintiff herein sought for various reliefs.
2. For clarity, the reliefs sought for are as hereunder;
  - a. A Declaration be and is hereby issued that the purported title and ownership by the 1st Defendant of the property known as Land Reference Number 209/3355, Nairobi is fraudulent, illegal, wrongful, null and void ab initio.
  - b. A Declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right of possession, occupation and use of all that property known as Land Reference Number 209/3355, Nairobi.
  - c. A Declaration be and is hereby issued that the 1st Defendant, whether by itself, servants or agents or otherwise howsoever, has no right, interest and or title to the said property Land Reference Number 209/3355, Nairobi and is wrongfully in occupation of the same, If at all, and is accordingly a trespasser.
  - d. An order be and is hereby issued revoking the title held by the 1<sup>st</sup> Defendant over the property known as Land Reference Number 209/3355, Nairobi and a



subsequent order be and is hereby issued directing the 2nd Defendant to issue to the Plaintiff a title over the property known as Land Reference Number 209/3355, Nairobi in the name of the Plaintiff, Telposta Pension Scheme Trustees Registered.

- e. An order directing the 1st Defendant to issue vacant possession of the property known as Land Reference Number 209/3355, Nairobi to the Plaintiff.
  - f. A permanent injunction restraining the 1st Defendant whether by itself or its agents and/or servants, from doing the following acts or any of them that is to say from interfering with rights of possession of the Plaintiff, advertising for sale, disposing of, selling by public auction or private treaty or otherwise at any time, or by completing by treaty, leasing, letting or otherwise howsoever interfering with the Plaintiff's ownership of title to and/or interest in all that piece of land known as Land Reference Number 209/3355, Nairobi.
  - g. In the alternative to prayers (a), (b), (c), (d), (e) and (f) above, an order for compensation/damages assessed at the prevailing market value of the property known as Land Reference Number 209/3355, Nairobi.
  - h. Mesne Profits.
    - i. Damages for trespass.
    - j. Advertisement charges.
    - k. Interest at court rates on (g), (h), (i) and (j) above from the date of judgment until payment in full.
    - l. Costs of this suit.
    - m. Any other relief which the Honourable Court may deem fit to grant in the circumstances
3. Upon service of the Plaint and summons to enter appearance, the 1<sup>st</sup> Defendant duly entered appearance and thereafter filed a Statement of Defense. For clarity, the Statement of Defense is dated the 27<sup>th</sup> June 2022.
4. Other than filing the Statement of Defense, the 1<sup>st</sup> Defendant also filed and lodged a Notice of Preliminary objection dated the 4<sup>th</sup> October 2022. In this regard, it is appropriate to reproduce the grounds obtaining at the foot of the Notice of Preliminary Objection.
5. For convenience, the grounds are reproduced as hereunder;
- i. Time Barred - The 1st Defendant avers that the Plaintiff's suit is time barred, stale, and incompetent.  
Section 7 of the [Limitation of Actions Act](#) provides as follows, "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". This provision applies mutatis mutandis to equitable interests to land which includes the Plaintiff's alleged interest in Land Reference Number 209/3335 (the "Suit Property") (see section 18 of the [Limitation of Actions Act](#)).



The Plaintiff's suit is hopelessly time barred in accordance with the *Limitation of Actions Act* since it has been filed over twelve (12) years from the period within which the Plaintiff's accrued right of action over the Suit Property would be applicable.

- ii. Absence of any Cause of Action-The 1st Defendant avers that the Plaintiff's suit does not raise any cause of action against it for the for reasons that the alleged vesting order being relied upon by the Plaintiff only applies to movable and immovable property that was vested in Kenya Posts and Telecommunications Corporation (KPTC) as at 30th June 1999 two years after the Plaintiff acquired the Suit Property.
- iii. Lack of Locus Standi-the 1st Defendant avers that the Plaintiff lacks the legal standing to institute this suit. Contrary, to the mandatory provisions of clause 6(b) as read with clause 7(a) of the Trust Deed, the Plaintiff's Letter of Authority to file the suit against the Client attached to the Plaint is only signed by two (2) Trustees rather than all the Trustees with the minimum number of Trustees being four (4). This means that the Plaintiff, according to its Trust Deed, does not have the right or capacity to institute this suit.

In conclusion, the 1st Defendant states that the entire suit is fatally defective, an abuse of the court process, frivolous, and ought to be dismissed with costs, in limine.

6. On the 21<sup>st</sup> November 2022, the subject matter came up for direction before the court as pertains to the manner of hearing and disposal of the Preliminary Objection. Consequently, the court proceeded to and directed that the preliminary objection be disposed of by way of written submission.
7. Pursuant to the foregoing, the 1<sup>st</sup> Defendant proceeded to and indeed filed written submissions dated the 28<sup>th</sup> November 2022, whilst on the other hand, the Plaintiff filed written submissions dated the 6<sup>th</sup> December 2022.
8. For completeness, the written submissions filed by the respective Parties forms part and parcel of the record of the Honourable court.

## **SUBMISSIONS BY THE PARTIES**

### **1<sup>ST</sup> DEFENDANT'S WRITTEN SUBMISSIONS**

9. Vide written submissions dated the 28<sup>th</sup> November 2022, the 1<sup>st</sup> Defendant has raised and highlighted three pertinent issues for consideration and determination.
10. First and foremost, counsel for the 1<sup>st</sup> Defendant has submitted that the Plaintiff's suit is barred by the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
11. In particular, counsel has contended that the suit property was transferred to and registered in the name of the 1<sup>st</sup> Defendant on the 22<sup>nd</sup> October 1998. In this regard, counsel for the 1<sup>st</sup> Defendant has therefore submitted that having acquired the suit property in the year 1998, it behooved the Plaintiff herein to file or commence any suit seeking recovery of the suit property, within 12 years from the date of such registration.
12. Nevertheless, counsel for the 1<sup>st</sup> Defendant has added that despite the fact that the suit Property was transferred and registered in her name in the year 1998, no proceedings were ever filed or commenced to challenge her registration and ownership rights.



13. In the premises, the 1<sup>st</sup> Defendant has therefore submitted that the Plaintiff's suit herein is essentially barred by the provisions of Section 7 of the [Limitation of Actions Act](#), Chapter 22 Laws of Kenya.
14. In support of the foregoing submissions, counsel for the 1<sup>st</sup> Defendant has cited and relied on the decision in the case of Gathoni versus Kenya Cooperative Creameries Ltd (1982)eKLR, Rawal versus Rawal (1990)KLR 275 and Melita versus Shah (1965)EA, 321.
15. Secondly, the counsel for the 1<sup>st</sup> Defendant has further submitted that the Plaintiff's suit does not disclose any reasonable cause of action as against the 1<sup>st</sup> Defendant or at all.
16. In this regard, it has been contended that the Plaintiff's case is premised and anchored on a vesting order issued vide legal notice number 131 of 14<sup>th</sup> September 2001, which related to movable and immovable properties that were hitherto vested in Kenya Post and Telecommunication Corporation.
17. Nevertheless, counsel for the 1<sup>st</sup> Defendant has submitted and contended that the impugned vesting orders, upon which the Plaintiff heavily relies on, did not affect the suit property.
18. For coherence, counsel for the 1<sup>st</sup> Defendant has submitted that by the time the impugned vesting order was being issued, the suit property had long been alienated and registered in the name of the 1<sup>st</sup> Defendant. In this regard, it was added that the vesting order could therefore not touch on or divest the 1<sup>st</sup> Defendant of her property.
19. In any event, the counsel for the 1<sup>st</sup> Defendant has invited the court to take cognizance of the case in Teleposta Pension Scheme Registered Trustees versus Inter-Countries Importers and Exporters Ltd & 4 Others (2016)eKLR, where the legal import and tenor of the vesting Order were discussed and addressed.
20. Based on the foregoing decision, counsel for the 1<sup>st</sup> Defendant has therefore submitted that the impugned vesting order was therefore inconsequential and ineffectual as far as the suit property is concerned.
21. In view of the foregoing, counsel for the 1<sup>st</sup> Defendant has thus stated and submitted that the Plaintiff herein therefore has no reasonable cause of action as against the 1<sup>st</sup> Defendant.
22. Thirdly, counsel for the 1<sup>st</sup> Defendant has contended that the Plaintiff herein lacks the requisite locus standi to commence, originate and maintain the instant suit.
23. In this regard, it has been contended that the suit as filed violates and contravenes the mandatory provisions of clause 6B as read together with clause 7A of the Plaintiff's Trust Deed.
24. Further, counsel for the 1<sup>st</sup> Defendant has added that the contents of the Trust Deed stipulates and provides that any Letter of authority for purposes of filing any suit or commencing Legal Proceedings, must be signed by all the trustees or a minimum of four trustees.
25. However, counsel has contended that despite the provisions and stipulation of the Trust Deed, the Letter of authority beforehand and which has been relied upon by the Plaintiff, has only been signed by two trustees.
26. In the premises, counsel for the 1<sup>st</sup> Defendant has therefore contended that the entire suit as filed by and on behalf of the Plaintiff is therefore premature, misconceived and legally untenable.
27. In a nutshell, counsel for the 1<sup>st</sup> Defendant has therefore invited the Honourable court to find and hold that the Plaintiff's suit is not only barred by the [Limitation of Actions Act](#), but same is also premature and misconceived.



## PLAINTIFF'S SUBMISSIONS:

28. The Plaintiff filed written submissions dated the 6<sup>th</sup> December 2022, and same has raised four pertinent issues for consideration and ultimate determination by the Honourable court.
29. In the first instance, counsel for the Plaintiff has contended that the preliminary objection which has been raised and canvased by the 1<sup>st</sup> Defendant herein does not raise pure points of law, capable of being canvased and ventilated in limine.
30. In particular, counsel for the Plaintiff has contended that the issues contained at the foot of the preliminary objection would require the court to plough through the witness statement and the documents attached thereto, with a view to ascertaining the veracity or otherwise the said allegations.
31. To the extent that the ascertainment of the issues in question would involve interrogation of factual or evidential issues, counsel for the Plaintiff submitted that the purported preliminary objection therefore fails the test that was established vide the *Loccus classicus* case of *Mukisa Biscuits Ltd versus Westend Distributors Ltd* (1969)EA, 696.
32. Secondly, counsel for the Plaintiff submitted that though the suit Property herein may have been transferred and registered in the name of the 1<sup>st</sup> Defendant on the 22<sup>nd</sup> October 1998, however, the issue pertaining to such registration was never known to or within the knowledge of the Plaintiff.
33. Suffice it to point out that counsel has submitted that the issue of the registration of the suit property in the name of the 1<sup>st</sup> Defendant, was only discovered or established in the year 2013 and not otherwise.
34. To this end, counsel for the Plaintiff has submitted that the timeline for computing the date when the cause of action arose and accrued is therefore reckoned from the date of discovery of the fraud or mistake.
35. To vindicate the foregoing submissions, counsel for the Plaintiff has invited the Honourable court to take cognizance of the provisions of Section 26 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
36. Thirdly, counsel for the Plaintiff has also contended that the suit property was designated and alienated for public use in 1951. For clarity, it has been pointed out that the suit property was first owned by East African Post and Telecommunication Corporation and thereafter Kenya Post and Telecommunication Corporation.
37. Essentially, the counsel for the Plaintiff has contended that the suit property is therefore public property and hence proceedings calculated to recover same are exempted from the provisions of the *Limitation of Actions Act* by dint of Section 42(1) (k) of the said Act.
38. Fourthly, counsel for the Plaintiff has contended that the suit before hand discloses a reasonable cause of action premised and predicated on inter alia, illegal and unlawful alienation of reserved public land to and in favor of the 1<sup>st</sup> Defendant.
39. On the other hand, counsel for the Plaintiff has further submitted that the instant suit has also raised a pertinent issue pertaining to and concerning whether the suit property remained to be unalienated Government land, which was available for alienation to and in favor of the 1<sup>st</sup> Defendant.
40. In the premises, counsel has reiterated that the suit before hand discloses reasonable grounds, upon which the Honourable court needs to carryout and undertake appropriate investigations to ascertain the veracity or otherwise of the claims alluded to thereunder.



41. Finally, counsel for the Plaintiff has also submitted that the issue as to whether or not the Plaintiff herein has locus standi to commence and maintain the instant suit touches on the interpretation to be given to the Trust Deed.
42. In this regard, counsel has pointed out, that the interrogation and interpretation, if any, of the Trust Deed cannot be undertaken or carried out on the basis of a preliminary objection.
43. In short, counsel for the Plaintiff has submitted that the totality of the issues raised and canvassed by the 1<sup>st</sup> Defendant cannot be addressed and resolved on the basis of a preliminary objection, either in the manner sought or at all.
44. To vindicate and buttress the various submissions highlighted on behalf of the Plaintiff counsel has cited and relied on various decisions inter-alia River Bank Plaza Ltd versus Nairobi City County (2021)eKLR, Kenya Anti-Corruption Commission versus Caroline Rotich & Another (2013)eKLR, Seventh Day Adventist Church (EA) Ltd versus Evangelical Lutheran Church in Kenya Registered Trustees (2013)eKLR and Justus Tureti Obara versus Peter Koipeitai (2014)eKLR, respectively.

## ISSUES FOR DETERMINATION

45. Having reviewed the Notice of Preliminary Objection dated the 4<sup>th</sup> October 2022, and having similarly considered the written submissions filed by the Parties, the following issues do arise and are thus worthy of determination;
  - i. Whether the suit/claim by the Plaintiff is statute barred by dint of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
  - ii. Whether the Plaintiff's suit discloses a reasonable cause of action.
  - iii. Whether the Plaintiff has the requisite Locus standi to commence, originate and maintain the subject suit.

## ANALYSIS AND DETERMINATION

### ISSUE NUMBER 1

Whether the suit/claim by the Plaintiff is statute barred by dint of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

46. Before venturing to address and resolve the first issue herein, it is imperative to point out that where a party is keen to mount and propagate a Preliminary Objection, it behooves the named Party to ensure that the issues canvassed at the foot of the preliminary objection touch on and concern pure points of law.
47. On the other hand, it is also appropriate to state and underscore that where the issue in question or point to be canvassed touches on and concerns exercise of discretion, then such a point cannot be canvassed or ventilated vide a Preliminary objection.
48. Additionally, where the Honourable court will be called upon to carry out or undertake an evaluation or analysis of the facts and the evidence, whether contained in the witness statements or such other documents filed before the court, then the matter cannot be ventilated and canvassed (sic) as a preliminary objection.



49. To this end, it is appropriate to take cognizance of the succinct and apt decision of the Supreme Court of Kenya in the case of Independent Electoral & Boundaries Commission versus Jane Cheperenger & 2 others [2015] eKLR, where the court stated and observed as hereunder;

“As to whether a preliminary objection is one of merit, this Court has already pronounced itself on the threshold to be met. The Court endorsed the principle in *Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696, in the case of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR [paragraph 31]:

“To restate the relevant principle from the precedent-setting case, *Mukhisa Biscuit Manufacturing Co. Ltd –vs.- West End Distributors* (1969) EA 696:

‘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 ... 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.’

- (15) The Joho decision has been subsequently cited by this Court in *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 23 of 2014, [2014] eKLR; and in *Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:

“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.”

- (16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (see *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).

- (17) On that basis, two questions emerge for this Court’s consideration: what pure point of law has the 1st respondent raised in her preliminary objection? Are the facts in issue, settled?

50. Other than the foregoing decision, the scope and circumstances under which a preliminary objection can be raised, canvassed and ventilated was also addressed by the supreme court in the case of *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others* (2015)eKLR, where the Court adopted and reiterated the position in *Mukhisa Biscuit Manufacturing Company Limited*.



51. For coherence, the Supreme Court further held that;
- “ Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”
52. Having taken cognizance of the holding and observation by the supreme court in the decisions cited in the preceding paragraphs, it is now appropriate to interrogate whether or not the Plaintiff’s suit is time barred.
53. Suffice it to point out that the Plaintiff has contended that the suit property hitherto belonged to Kenya Post and Telecommunications Corporation Ltd and thereafter the suit property comprised of part of the immovable properties that were vested in the Plaintiff vide legal notice number 131 of 14<sup>th</sup> September 2001.
54. Notwithstanding the foregoing, the Plaintiff has further averred that contrary to and despite the vesting order, it transpired that the suit property had been transferred and registered in the name of the 1<sup>st</sup> Defendant. For clarity, the Plaintiff contended that the information pertaining to such registration came to the knowledge of the Plaintiff sometime in the year 2013.
55. In this respect, it is important to take cognizance of the contents of paragraphs 11 and 12 of the Plaintiff.
56. Consequently, the contents thereof are reproduced as hereunder;
11. It has since emerged that despite the vesting order issued by the Minister of Finance, the Suit Property is registered in the name of an unknown third party, Crucial Properties Limited. This information came to the knowledge of the Plaintiff sometime in the year 2013.
12. The Plaintiff avers that the Property subject matter of this caution was designated and alienated for public use and was therefore as a matter of law, not available for private allocation.
57. My understanding of the contents of paragraph 11 of the Plaintiff is that the cause of action pertaining to and concerning the recovery of the suit property came to light and therefore arose in the year 2013 and not otherwise.
58. In this respect, it is appropriate to recall and observe that the provisions of Section 26 of the *Limitation of Actions Act*, prescribe that where fraud or mistake is concealed, the time for filing or commencing suit shall be reckoned and computed from when the fraud or mistake is discovered and not earlier.
59. To underscore the important and significance of the provisions of Section 26 of the *Limitation of Actions Act*, Chapter 22 laws of Kenya, it is appropriate to reproduce same.
60. For convenience, the provisions of Section 26 of the *Limitation of Actions Act* (supra) are reproduced as hereunder;
26. Extension of limitation period in case of fraud or mistake Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or (b) the right of action is concealed by the fraud of any such person as aforesaid; or (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until



the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

61. Having taken cognizance of the provisions of Section 26 of the *Limitation of Actions Act* and taken in account of the contents of paragraph 11 of the Plaint, I come to the conclusion that the impugned cause of action arose and accrued in the year 2013.
62. On the other hand, being a cause of action that touches on and concerns recovery of land, it then means that the Plaintiff herein would be entitled to commence and maintain a suit for such recovery within the twelve-year duration w.e.f 2013.
63. Premised from the foregoing, I therefore come to the conclusion that the Plaintiffs suit, which essentially touches on and concerns recovery of the suit property, was timeously filed and lodged before the honourable court.
64. Put differently, I come to the conclusion that the contention that the suit was filed outside the Limitation duration, is premised and anchored on a misconception. Consequently, the plea of Limitation fails.

## **ISSUE NUMBER 2**

Whether the Plaintiffs suit Discloses a reasonable cause of action.

65. Other than the plea of limitation, the 1<sup>st</sup> Defendant has also contended that the Plaintiff's suit does not raise nor disclose a reasonable cause of action or at all against the 1<sup>st</sup> Defendant.
66. Premised on the contention that the Plaintiff's suit does not disclose a reasonable cause of action, the 1<sup>st</sup> Defendant has therefore invited the Honourable court to find and hold that the Plaintiff's suit merits being struck out.
67. Be that as it may, it is imperative to authenticate what then is the cause of action and the claims that are being raised by the Plaintiff.
68. Firstly, the Plaintiff has contended that the suit property was designated and reserved for public use and thereafter same was vested in East African Post and Telecommunication Corporation Ltd. In this regard, it has been pointed out that the suit property remained owned by the said East African Post and Telecommunication Corporation Ltd.
69. Subsequently, it has been pointed out that the suit property vested in Kenya Post and Telecommunication Corporation Ltd, upon the dissolution of her predecessor.
70. Other than the foregoing, it has also been contended that following the dissolution of Kenya Post and Telecommunication Corporation Ltd, the suit property was vested in the Plaintiff by dint of Legal notice number 131 of 14<sup>th</sup> September 2001.
71. Arising from the foregoing, what becomes apparent is that the Plaintiff is staking a claim to be the lawful and legitimate proprietor/owner of the suit property, save for (sic) the fraudulent activities culminating into the registration of the suit property in favor of the 1<sup>st</sup> Defendant.
72. Additionally, the Plaintiff has also contended that the suit property was already designated, reserved and thus stood alienated. In this regard, the position taken by the Plaintiff is that the suit property was therefore not available for further alienation in favor of the 1<sup>st</sup> Defendant.



73. Without endeavoring to exhaust all the claims ventilated at the foot of the Plaint, it is evident that the Plaintiff's suit indeed raises and espouses pertinent issues, which are ex-facie arguable and thus deserving of a plenary hearing.
74. To my mind, where a suit raises and discloses a semblance of a cause of action, then it behooves a court of law to allow the claimant to pursue the suit/claim.
75. Put differently, a court of law ought not to terminate a suit, merely on the basis that the cause of action appears weak. For clarity, where a suit is capable of redemption vide amendment or otherwise, then it is imperative that such a suit be sustained and be heard on merits.
76. In this respect, it is appropriate to reiterate the holding of the Court of Appeal in the case of DT Dobbie Ltd versus Muchina (1980)eKLR, where the court stated and observed as hereunder;
- “ That a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal even where such a suit exhibits the slightest semblance of a cause of action.”
77. Duly guided and nourished by the dictum emanating from the foregoing decision, I beg to point out that the Plaintiff's suit herein does not only exhibit a semblance of a cause of action, but same truly espouses triable issues that can only be interrogated during a plenary hearing, subject to production of evidence and cross examination, in accordance with the law.
78. Consequently and in the premises, I resist the invitation and persuasion that the subject suit does not disclose a reasonable cause of action as against the 1<sup>st</sup> Defendant. Contrarily, I find and hold that the suit raises various triable Issues.
79. In any event, it is important to note that in an endeavor to ascertain whether or not a suit discloses a reasonable cause of action, the court is not obligated to carry out or undertake minute analysis of various documents and issues of law, which ought to be canvassed in the usual manner of trial.
80. Without belaboring the point, it suffices to invoke and adopt the apt observation of the Court of Appeal in the case of Industrial and Commercial Development Corporation versus Daber Enterprises Limited [2000] eKLR, where the Court observed as hereunder;
- “ Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross examination - see the case of Wenlock v. Moloney and Others , [1965] 1 W.L.R. 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment. The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable.
81. In a nutshell, it is my finding and holding that the suit before hand discloses a reasonable cause of action as against both the impleaded Defendants. Consequently, the suit merits trial in the usual manner.

### **ISSUE NUMBER 3:**

Whether the Plaintiff has the requisite locus standi to commence, originate and maintain the subject suit.



82. The 1<sup>st</sup> Defendant has contended and argued that according to the Plaintiff's Trust Deed, a letter of authority to authorize the filing and lodgment of a suit ought to be executed by all the registered trustees of the Plaintiff.
83. In the alternative, the 1<sup>st</sup> Defendant has contended that to the contrary, the letter of authority ought to be executed by a minimum of four trustees and not otherwise. In this regard, the 1<sup>st</sup> Defendant has invoked and relied on the provisions of clause 6B and 7 of the Trust Deed.
84. Be that as it may, what is important to note and observe is that the Trust Deed, is not part and parcel of the pleading filed by the Plaintiff herein. For clarity, a pleading comprises of the Plaintiff and the Verifying affidavit only and not otherwise. See Section 2 of the *Civil Procedure Act*.
85. Secondly, it is important to underscore that where a party is keen to canvass and argue a preliminary objection, same is argued on the basis and on the assumption that the pleadings raised by the adverse Party (in this case the Plaintiff) are deemed as correct.
86. Premised on the foregoing observation, it is therefore evident that the first Defendant cannot be allowed to travel far and yonder and seek to anchor her preliminary objection on evidential issues, that are yet to be produced and tendered in evidence before the Honourable Court in the conventional manner.
87. Additionally, the contents of the Plaintiff and coupled with the verifying affidavit seem to signify that the letter of authority which has been filed alongside the Plaintiff is lawful and legitimate.
88. Consequently and if the 1<sup>st</sup> Defendant seeks to impeach and impugn the contents of the Letter of authority and by extension whether the Trust Deed authorizes two trustees to execute the authority letter, then such an issue would automatically attract minute interpretation of the contents of the Trust Deed.
89. In my humble view, the honourable court cannot venture to and endeavor to analyze whether or not the letter of authority that has been filed is lawful and valid; and whether or not the person who executed the verifying affidavit was (sic) duly authorized.
90. In my humble view, the aspects raised and canvassed by the 1<sup>st</sup> Defendant to anchor the contention or lack of locus standi, cannot be legally addressed and be resolved on the basis of a Preliminary objection.
91. In the premises, it is similarly my finding and holding that the 1<sup>st</sup> Defendant is seeking to invite the Honourable court to expand the scope of a preliminary objection and to delve into factual analysis.
92. Be that as it may, I am afraid such invitation must be resisted, deprecated and frowned upon.
93. To this end, it is worthy to adopt and endorse the extremely succinct statement of the law that was espoused vide the case of Oraro versus Mbaja (2005)eKLR, where the court stated and observed as hereunder;

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs



to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message.

In addition to the ones I have cited, Mr. Ougo drew my attention to yet others. In *El-Busaidy v. Commissioner of Lands & 2 Others* [2002] 1KLR 508 Mr. Justice Onyancha in this Court remarked as follows (pp. 515 – 516):

“I have considered the arguments and the legal authorities quoted from both sides. It is my prima facie finding of the Defendant’s application basing it on affidavit that the origin of the title known as Mombasa/Block IX/102, needs to be investigated to establish whether or not the title was an absolute title under the Registration of Titles Act. It should be established in evidence whether or not the conversion of the said title to operate under [the] Government Lands Act, Cap. 280 by [the] first Defendant was proper and lawful and therefore effective and not null and void. It is my further finding that until that is done, all the relevant facts thereto are in dispute. Under those circumstances the law applicable in relation to the issue of a preliminary point of objection is that laid in the case of *Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd .* [1969] E.A. 696 at page 700...”

The learned Judge went on to say (p.516):

“The preliminary objection herein was raised by the Defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of section 136(1) to it to make the Plaintiff’s pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff’s facts as pleaded. Clearly therefore, the Defendant’s preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction.”

94. From the foregoing, it becomes evident and apparent that the 1<sup>st</sup> Defendant cannot seek to prop, anchor and ground her preliminary objection by seeking to import evidence and facts from extraneous documents, which do not form part of the pleadings.

#### **FINAL DISPOSITION:**

95. Having considered, analyzed and evaluated the various perspectives, that were raised and canvassed by the Parties, I have come to the conclusion that the Notice of Preliminary objection was/is devoid of merits.
96. Firstly, the plea of Limitation, was not well grounded. For clarity, paragraph 11 of the Plaint provided the fulcrum for determination of the date of accrual of the impugned cause of action.
97. On the other hand, I have also found and established that the Plaint before hand discloses a plethora of triable issues, which can only be interrogated and investigated vide a plenary hearing.
98. Consequently, it is my finding and holding that the Preliminary Objection dated the 4<sup>th</sup> October 2022, is Devoid and bereft of Merits. In this regard, same be and is hereby Dismissed with costs.
99. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS \_\_20<sup>TH</sup>\_\_ DAY OF DECEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;



*Benson - Court Assistant.*

*Mr. Jomo Nyaribo for the Plaintiff.*

*Mr. Wairoto for the 1<sup>st</sup> Defendant.*

*Mr. Motari the 2<sup>nd</sup> Defendant*

