



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gudka (Representative of the Estate of Mahesh Somchand Gudka) v Gudka (Environment & Land Case E032 of 2023) [2025] KEELC 343 (KLR) (5 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 343 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE E032 OF 2023**  
**SM KIBUNJA, J**  
**FEBRUARY 5, 2025**

**BETWEEN**

**PRABHA MAHESK GUDKA ..... PLAINTIFF**  
**REPRESENTATIVE OF THE ESTATE OF MAHESH SOMCHAND GUDKA**

**AND**

**SURENDRAKUMAR SOMCHAND GUDKA ..... DEFENDANT**

**RULING**

**Preliminary Objection Dated 2nd September 2024**

1. The plaintiff commenced this suit through the plaint dated 31<sup>st</sup> March 2023 seeking for:
  - i. Declaration that the defendant's unilateral subdivision of the suit property into go-downs A & B and entering into lease agreements with third parties was illegal.
  - ii. Mesne profits of Kshs.5,855,828/-
  - iii. Interest of mesne profits at 19% per annum from the dates set out in paragraph 11 of the plaint.
  - iv. Permanent injunction against defendant, his family, agents, servants or anyone else claiming under them.
  - v. Vacant possession in 90 days of judgement.
  - vi. Partition of Mombasa/Block X1X/21 and issuance of individual titles thereof, or alternatively, separation and sale of the shares by public auction or other suitable means, or sale of the said land by public auction or any other suitable means.
  - vii. Costs.



The suit was referred to court annexed mediation on the 16<sup>th</sup> January 2024, and prayers (iv), (v) and (vi) settled through the partial mediation settlement agreement dated the 30<sup>th</sup> April 2024, that was adopted as an order of the court on 6<sup>th</sup> June 2024.

2. The defendant filed the notice of preliminary objection dated the 4<sup>th</sup> June 2024, raising two grounds that:
  - i. That the claim for mesne profits and interest thereon is time barred by dint of section 8 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
  - ii. That the honourable Court lacks jurisdiction over this suit.

The defendant therefore seeks for the plaintiff's suit to be dismissed with costs on those two grounds. The court on 6<sup>th</sup> June 2024 issued directions on the filing and exchange of submissions on the preliminary objection. The learned counsel for the defendant and plaintiff filed their submissions dated 4<sup>th</sup> September 2024 and 26<sup>th</sup> September 2024 respectively, which the court has considered.

3. The issues for determination by the court are as follows:
  - a. Whether the notice of preliminary objection raises pure points of law that can be determined without calling evidence.
  - b. Whether the grounds on the preliminary objections raises any point of law, that if upheld can determine the suit.
  - c. Who pays the costs?
4. After careful consideration on the grounds on the notice of preliminary objection, the rival submissions by learned counsel, the superior courts decisions cited thereof, the pleadings and record, the court has come to the following determinations:
  - i. The locus classicus of preliminary objection is undoubtedly the case of *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd. (1969) EA 696*, where the Court held as follows:

“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”.

The Supreme Court in the case of *Independent Electoral & Boundaries Commission versus Jane Cheperenger & 2 Others [2015] eKLR* made the following observation as relates to preliminary objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party



to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

As stated above, this suit is partially settled in respect of prayers (iv) to (vi), but prayers (i) to (iii) are outstanding. The outstanding prayers are for:

- i. Declaration that the defendant’s unilateral subdivision of the suit property into godowns A & B and entering into lease agreements with third parties was illegal.
- ii. Mesne profits of Kshs.5,855,828/-
- iii. Interest of mesne profits at 19% per annum from the dates set out in paragraph 11 of the plaint. I understand the defendant’s preliminary objection to be only in respect of prayers (ii) and (iii) of the plaint, that seeks mesne profits and interests thereof.
- ii. The objection on the ground of limitation raises the issue of whether or not the court has jurisdiction on the matter. Jurisdiction is everything to the court, and without it, the court has no option but to down its tools. The question of jurisdiction is therefore a pure question of law. In the case of Owners of Motor Vessel “Lilian S” versus Caltex Oil (K) Ltd (1989) KLR 1 the court stated that;

“.....jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The defence counsel argument was that this court lacked jurisdiction on the plaintiff’s prayers on mesne profits and interests thereof, as the suit was filed outside the statutory time limit.

- iii. The defendant’s learned counsel relied on the following superior courts decisions; Sohanlaldurgadass Rajput & Another versus Divisional Integrated Development Programmes Co. Ltd (2021) eKLR, Edward Moonge Lengusuranga versus James Lanaryara & Another (2019) eKLR, Mistry Valji versus Janendra Raichand & 2 Others [2016] eKLR, and Martha Karwirwa Anthony versus Barclays Bank of Kenya Limited [2019] eKLR. In the Sohanlaldurgadass Rajput case [supra] the court stated that “for a preliminary objection to be maintained, the pure points of law raised must sprout from the pleadings.” The counsel then referred to the paragraphs of the plaint where the plaintiff alleges that the defendant leased out portions of the go-downs to third parties from 2001 to 2023, and submitted that the mesne profits and interests thereof for the same period, are time barred. That such claims are barred by section 8 of the Limitation of Actions Act, if not commenced before expiry of six (6) years, as was held in the Mistry Valji case [supra], where the court held that “mesne profits is defined in section 2 of the Civil Procedure Act to mean; - in relation to property, means those profits which the person in wrongful possession of such property actually received .... The cause of action from this definition clearly fell under section 8 of the Limitation of Actions, namely an action for distress or for the recovery of rent, or damages which may not be brought after the end of 6 years from the date on which the arrears became due.....”
- iv. In their submissions, the learned counsel for the plaintiff referred to the various paragraphs of the plaint where the plaintiff inter alia pleaded that her name replaced that of her late husband in the suit land’s title on 30<sup>th</sup> March 2016, and that the defendant had kept hidden from her the details of the third party leases over the said property for the period of 2001 to



2023. The learned counsel relied on the following superior courts decisions; Mukisa Biscuits Manufacturing Co. Ltd [supra], Oraro versus Mbaja [2005] eKLR, Onyango versus Mangala & Aother [2024] KEELC 5552 (KLR), Invergue Investments versus Hacketh (1995) 3 AII ER 842, Mistry Valji case [supra], Eliud Njoroge Gachiri versus Stephen Kamau Nganga [2018] eKLR, Henry versus Bank of AM 147 A.D 3d 599, 601, cited in the American case of Steven Plavin versus Group Health Incorporated 3:17-CV-1462, The German School Society & Another versus Ohany & Another (2023) KECA 894 (KLR), Rajan Shah t/a Rajan S. Shah & Partners versus Bipin P. Shah [2016] eKLR, and Eric V. J. Makokha & 4 Others versus Lawrence Sagini & 2 Others [1994] eKLR. The counsel inter alia submitted that the defendant's objection was over disputed facts contrary to the finding in Mukisa Biscuits, Oraro versus Mbaja and Onyango versus Mangala cases [supra]. That as the facts are disputed, then a decision on whether or not the claims were statute time barred can only be made after evidence is taken. The learned counsel further submitted that section 8 of the Limitation of Actions Act does not apply to mesne profits where there is an element of continuous injury due to continued possession as was held in the cases of Mistry Valji, Henry versus Bank of Am, and The German School cases [supra], to the effect that continuous wrongs doctrine is an exception to the general rule of the statute of limitation.

- v. This court's jurisdiction is conferred by Article 162(2)(b) of the Constitution and section 13 of the Environment and Land Court Act No. 19 of 2011 among others statutes. That both counsel are from their respective submissions, in agreement on what constitutes mesne profits. Though the court is not expected to make any final findings on any matters of laws or facts at this interlocutory stage, I find the parties herein have not addressed through their respective submissions, the issue of whether or not the defendant was in illegal possession of the suit property. Though the counsel for the plaintiff argued in their submissions that the defendant was in trespass of the plaintiff's undivided half share of the suit property, the defendant's counsel did not make any specific submissions on the same. However, in the amended statement of Defence dated 7th November 2023, the Defendant disputed that he was trespassing, and alleged that the estate of the deceased participated in all activities of the suit property, and received proceeds. The foregoing points to one conclusion, that though the grounds of whether or not the claims of mesne profits and interests thereof arises from the pleadings, the facts are disputed and do not therefore amount to a pure points of laws. Further, and considering that the consideration of prayer (i) of the plaint will essentially determine if there was a trespass or not by the defendant, the grounds relied on in the preliminary objections would require evidence to be taken before a decision one way or the other can be made. The defendant's preliminary objection therefore fails.
- i. Section 27 of the Civil Procedure Act provides that costs abide the outcome of the matter, unless where otherwise directed on good cause. That I find no basis not to follow that general rule and as the defendant is unsuccessful in their preliminary objection, he will pay the plaintiff's costs.
5. From the foregoing conclusions on the defendant's notice of preliminary objection dated the 2<sup>nd</sup> September 2024, I find and order as follows:
- a. The preliminary objection is dismissed.
- b. The defendant to bear the plaintiff's costs in the preliminary objection.
- Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5<sup>TH</sup> DAY OF FEBRUARY 2025.**



**S. M. Kibunja, J.**

**ELC MOMBASA.**

In the presence Of:

Plaintiff : Mr Thiga

Defendant : M/s Oruta

Shitemi – Court Assistant.

**S. M. Kibunja, J.**

**ELC MOMBASA.**

