



Mwatela & another v County Government of Mombasa (Environment & Land Case 185 of 2021) [2023] KEELC 17332 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17332 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 185 OF 2021**

LL NAIKUNI, J

MAY 3, 2023

BETWEEN

CALIST ANDREW MWATELA 1ST PLAINTIFF

JACINTA WANJALA MWATELA 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MOMBASA DEFENDANT

RULING

I. Introduction

1. By a Notice of Preliminary Objection dated 22nd October, 2021 by the Defendant raised the following grounds of objection: -
 - a. This Honourable Court does not have Jurisdiction to entertain the suit herein.
 - b. The suit is time barred, having been filed after the lapse of the statutory period set out under Section 3 (2) of the *Public Authorities Limitation Act*, Cap 39 of the Laws of Kenya.

II. Reply to the Preliminary objection by the Plaintiffs

2. On 16th November, 2021, the Plaintiffs replied to the Preliminary objection. They stated as follows:
 - a. This Honourable Court has jurisdiction to entertain the suit herein.
 - b. The suit as filed is not time barred for the following reason:-
 - i. The demand letter dated 12th April, 2019 interrupted the period of limitation.



- ii. The limitation period started running a fresh from the date of the demand letter.
- iii. The filing of suit in JR NO. 53 of 2019 JR NO. 53 of 2019 – Republic – Versus - The Chief Officer, Finance & Economic Planning and Another Ex - parte Calist Andrew Mwatela and Another interrupted the period of limitation.

III. Submissions

3. When this matter came up for directions on 17th October, 2022, the parties agreed to canvass the said preliminary objection by way of written submissions. Pursuant those directions given by the Court, both parties filed their written submissions by the time the court withdrew to write this ruling. The Honorable Court reserved a date for delivery of the ruling on 28th March, 2023.

A. The Written Submissions by the Defendant.

4. On 15th July, 2022 the Learned Counsel for the Defendant the Law firm Messrs. Muthee Kihiko Soni & Associates filed their written submissions with regards to the Preliminary Objection dated 19th October, 2021. The Learned Counsel stated that the Defendant sought for the dismissal of the Plaintiff's suit on the grounds that:
 - a. That the Honorable Court lacked jurisdiction to entertain this matter.
 - b. That the suit offended the provisions of Section 3(2) of the *Public Authorities Limitation Act*.
5. Based on the above grounds, the Learned Counsel identified two (2) issues for the considerations and determination by this Court as follows:-
 - a. Whether the Preliminary Objection dated 29th October, 2021 raises a pure point of law.
 - b. Whether the Preliminary Objection dated 29th October, 2021 was merited
 - c. Who should bear costs.
6. On the first issue, he held that it was now trite as what constituted a proper preliminary objection as founded in the case of "Caltex Oil (Kenya) Limited –Versus - Rono Limited (2016) eKLR, the Court of Appeal restated the now settled law on the raising of preliminary objection thus:-

“The essence of preliminary objection was given by Law, JA and Sir Charles Newbold P. in the locus classicus of Mukisa Biscuits Manufacturing Co. Ltd. – Versus - West End Distributors (1969) EA 696 at 700 wherein Law, JA stated that:

“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 objection 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.”

Sir Charles Newbold P. added as follows at page 701:

“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.” Emphasis ours.

7. The preliminary objection by the Defendant was based upon the provision of Section 3 (2) of the *Public Authorities Limitation Act* which provides that:

“No proceedings founded on contract shall be brought against the Government or local authority after the end of three years from the date on which the cause of action accrued.”

8. Based on this legal position, it was the contention of the Counsel that the Preliminary Objection raised a pure point of law and properly met the threshold set in the Mukisa Biscuits case.

9. Secondly, the Learned Counsel delved into whether the Preliminary Objection dated 29th October, 2021 had merit. The Defendant maintained that the suit for the Plaintiff was time barred by virtue of the provision of Section 3 (2) of the Public Authorities *Limitation of Actions Act*. According to the Counsel the principles underlying time barred suits were enunciated in the Court of Appeal case of: ”John Kariuki Maina – Versus - Attorney General [2021] eKLR” where the Court had this to say whilst citing the case of “Iga – Versus - Makerere University (1972) E.A. 62, which stated as follows:

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief.....

The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaint, and on grounds of exemption are shown in the plaint, the plaint must be rejected.” (Emphasis ours).

7. The Learned Counsel submitted that the prerequisites for vitiating a claim under Section 3(2) of the Public Authorities Limitation of Actions statute were basically two (2) namely demonstration that the claim was founded on contract, and second that the claim was lodged after the expiry of three (3) years as stipulated in the said section.

8. From a glance at both sets of pleadings, it is clear that the Plaintiffs’ suit is based upon the breach of the contract dated 14th February, 2017 by the Defendant. This is not in dispute.

i) When did the cause of action accrue?

9. According to Black’s Law Dictionary (10th Edition) the word “Accrue” meant “to come into existence as an enforceable claim or right.”

10. In the case of High Court in “Joseph Odira Ombok – Versus - South Nyanza Sugar Company Ltd. [2018] eKLR, the Judge took the position in the case of “South Nyanza Sugar Company Limited – Versus - Dickson Aoro Owuor MGR HCCA No. 85 of 2015 [2017] eKLR where the court held that;

“There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from the time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the



parties happens to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.” Emphasis ours.

11. According to the Learned Counsel, from the above authorities, it could be discerned that a cause of action in a case for breach of contract accrued to the Plaintiff when the Defendant breached the contract.

SUBDIVISION - ii) When was the contract breached?

12. The Counsel held that the answer to this query rested on the pleadings. The Plaintiffs accused the Defendant of breaching the contract dated 14th February, 2017 by failing to pay both the deposit or the balance of the purchase price.
13. The Defendant was required to pay the deposit at the time of executing the contract. That was not done. The Defendant did not dispute that fact.
14. Under the Contents of Paragraph 14 (b) of the Plaintiff particularizes “theloss of Kenya Shillings Twenty Five Million (Kshs. 25, 000, 000/=) being the agreed purchase price plus interests since February, 2017 till payment in full”.
15. Further still, under the contents of paragraph 18 of the Plaintiff it stated that:- “since February, 2017 to date the sum of a sum of Kenya Shillings Twenty Five Million (Kshs. 25, 000, 000/=) should be subjected to commercial interest of 14% per annum until payment in full. For this reason, as between 1st March, 2017 to 1st March, 2020 the accrued interest stood at a sum of Kenya Shillings Ten Million Five Hundred Thousand (Kshs. 10,500,000/=).”
16. The prayers (d) and (f) of the Plaintiff sought for computation of interest on the purchase price of a sum of Kenya Shillings Twenty Five Million (Kshs. 25, 000, 000.00/=) .. from 1st March, 2017 to the date of payment”. This was a clear indicator of the period when the cause of action arose that would entitle the Plaintiffs to claim interest as at that date.
17. The Learned Counsel argued that, one would therefore discern from the pleadings that the breach occurred when the Defendant failed to pay the deposit at the time of execution of the contract dated 14th February, 2017. Accordingly, the cause of action arose upon that breach by the Defendant. He emphasized that time started running as soon as the Defendant failed to pay the deposit of the purchase price on 14th February, 2017.

iii) When was the suit filed

18. The Counsel stated that the time when the Plaintiff lodged the dispute for determination by this Honorable Court, rested from the pleadings. He noted that the Plaintiff was filed on 2nd September, 2021. To him, the Defendant had established that the Plaintiff's cause of action arose on 14th February, 2017 when the Defendant failed to pay the deposit of the purchase price to the Plaintiffs. The Period between the accrual of the cause of action and the filing of the instant suit was four (4) years and Six (6) months.
19. According to the Learned Counsel and for the arguments sake, assuming the cause of action accrued in the year 2017, whereas the suit was filed on 2nd September, 2021: the same would still have been filed more than 4 years since the year the cause of action accrued. He invited this Honorable Court to find that by the time the instant suit was instituted a period of more than 3 years in contravention of Section 3(2) of the Public Authorities *Limitation of Actions Act*. To him, no leave or extension of time had been sought from this Honorable Court to institute the suit out of time. Equally, no grounds of



exemption had been illustrated in the Plaintiff. Therefore, the Plaintiff ought to be rejected in accordance with the legal ratio founded in the case of “John Kariuki Maina case (Supra)”.

iv) Does a demand letter stop the time from running?

20. In response to the Preliminary Objection, the Plaintiff argued that the demand letter dated 12th April, 2019 interrupted the period of limitation. The Learned Counsel strongly opposed this assertion because it was not founded on any law or legal principle. A demand did not fall within the ambit of being a document in which legal proceedings were commenced. It was merely informative and only a step in the enforcement of a claim or right. Thus, he urged the Honorable Court to disregard this assertion.

v) Did the filing of and subsequent withdrawal of a Judicial Review Suit stop time from running?

21. The claim by the Plaintiffs that due to filing of MSA JR No. 53 of 2019 (which was subsequently withdrawn), time started running afresh. The Learned Counsel submitted that if this argument on time running afresh due to the filing of a suit were to be allowed it would mean a case would be brought in perpetuity. There would never be an end to litigation because the aggrieved party (of dismissal of suits) would have a fresh start to sue the Defendant every time their case stood dismissed. The Plaintiffs’ argument was in direct variance with the intention of the legislation on limitation of actions.
22. He submitted that a cause of action only arose once. Time could only start running afresh if the breach or injury from which the cause of action arose was remedied; partially or otherwise. The breach of contract complained of by the Plaintiffs’ subsisted to date; from when it arose. The JR matter did not remedy the breach. That might well be the reason the Plaintiffs elected to abandon it.
23. To buttress on this point, the Counsel relied on the case of: Lillian Njeri Muranja & John Muranja Mahinda – Versus - Virginia Nyambura Ndiba & Kajiado County Government (2014) eKLR where the Court held that;

“For two reasons, I would not uphold that contention, firstly it would be stretching the law of limitation for one to argue that once a suit is filed time eases to run. The only rider to a Plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is the action is still within the limitation period. Certainly if this were not so then the suit filed would meant time begun to run on the filing of the suit. Effectively time would not stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running...”

24. From the above, for purposes of computation of time, the same was still running during the pendency of the judicial review suit. He urged this Honorable Court to disregard this assertion.
25. In conclusion, the Learned Counsel held that the Defendant had established that the Plaintiff’s suit was filed out of the statute provided period of three (3) years for matters based on contracts. Similarly, it was established that a demand letter never stopped time from running neither did the filing (and/or subsequent withdrawal) of a suit. The issue of limitation went to the jurisdiction of the Court and we therefore urge this Honorable Court to down its tools having found that it lacked jurisdiction to deal with this matter. He prayed the Honorable Court to uphold the Defendant’s Preliminary Objection dated 29th October, 2021.



B.The Written Submissions by the Plaintiffs

26. On 9th September, 2022, the Law firm of Messrs. M/s. Munyithya, Mutugi, Umara & Muzna Co. Advocates for the Plaintiffs filed their written submissions dated 5th September, 2022. The Learned Counsel submitted that the Plaintiffs are the registered proprietors of the property known as MN/II/27 Mombasa measuring approximately 2.5 acres. Around the year 2004 several squatters invaded the plaintiffs land and put up temporary structures with a view to settling therein. The Plaintiffs subsequently filed MSA HCC NO. 275 OF 2004 seeking vacant possession and damages for trespass.
27. The Learned Counsel submitted that the Defendant approached the plaintiffs with a view to purchasing the property to settle the squatters. This led to exchanging of several correspondences between the Plaintiffs, the National Land Commission and the Defendant, which culminated in the signing of the Sale Agreement dated 14th February, 2017. The Defendant however, failed to pay the purchase price despite several oral promises to do so. The Plaintiffs filed MSA JR NO.53 of 2019 against the Defendant, seeking for the prerogative order of Mandamus to compel them to settle the purchase price. This application was withdrawn on 18th August, 2021 paving way for the filing of the present suit.
28. The Learned Counsel submitted that the Plaintiff opposed the Defendant’s Preliminary Objection dated 22nd October, 2021. The objection raised never met the principles in the case of:”Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Ltd and other decisions thereafter. In the case of Mukisa Biscuits Manufacturing Co. Ltd, Newbold P. observed that:-
- “A preliminary objection is in the nature of what used to be a demurrer it raised 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...”
29. The Learned Counsel argued that the facts in this case ought to be ascertained to confirm whether the suit was barred by limitation. This would be done from the intention of the parties in the contract dated 14th April, 2017. Prior to the contract, the court would be called upon to peruse the documents and correspondences exchanged between the parties notably:
- a. Valuation reports dated 20th November, 2014 and 22nd November, 2016.
 - b. Various letters from the Ministry of Lands and the National Land Commission to the Mombasa County Attorney’s office.
29. The Learned Counsel argued the fact that the Court was being called upon to peruse these documents at this stage was an indication that the preliminary objection raised must fail. In the case of “Kalpana Rawal & 2 others – Versus – JSC (2016) the Supreme Court stated that the examples of jurisdiction and limitations given by Law J.A in the case “Mukisa Biscuits case were but only two examples and that a checklist approach to the test as to whether a matter merited and fell under the Mukisa Biscuits case was not in consonant with the spirit and letter of *the Constitution*.
30. The Learned Counsel referred to the case of:- “Charles Onchari Ogoti – Versus - Safaricom Ltd & Anor, whereby Justice Edward Muriithi referred to several cases on the preliminary objection



procedure. The judge referred to the Supreme Court case of: “IEBC – Versus - Jane Cheperenger & 2 others (2015) where the court stated as follows:-

“.....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 saves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute resolution. 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..”

29. The Learned Counsel submitted that the Supreme Court laid it clear that the focus ought to be both the purpose as well as the nature of the Preliminary Objection, with a rider and caution that disputes were better off being resolved judicially not summarily. The Court of Appeal in “Diana Katumbi Kiiio – Versus - Reuben Musyoki Muli (2018) in determining whether an Agreement for Sale for land gave rise to a cause of action for recovery of the land or a cause of action in contract, referred to decisions where a cause of action was defined as:-

“.....every fact which is material to be proved to entitle a party to succeed and every fact which the Defendant would have a right to traverse.”, and

“.....every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the Judgment of the Court.”

29. The Learned Counsel held that the Court noted that a cause of action in a contract arose from breach of the contract and not at the time it is executed. The Court’s view was that the Court must consider the nature of the interest conveyed in the agreement between the parties, the conduct of the parties subsequent to the execution of the agreement and the point at which the alleged breach occurred. The Court determined in the case of ‘Diana Katumbi Kiiio – Versus - Reuben Musvoki Muli (2018) case that the cause of action in the matter was determinable upon examination of the elements. Further, that the issue of the nature of interest conveyed was in the providence of oral evidence.

30. The Learned Counsel averred that based on the findings of the superior court mentioned above, the Plaintiff’s suit should be determined on the merit. The Court should look at the conduct of the parties before the signing of the agreement dated 14th February, 2017. To do this, the Court would be required to take the evidence of the parties to establish the circumstances leading to the execution of the agreement. The interest conveyed in the agreement must also be determined by the court. The Plaintiffs submitted that in the circumstances the Preliminary Objection raised by the Defendants must fail. The nature of the objection required the Court to look into the documents filed by the Plaintiffs, call for evidence to determine the intention of the parties and thereafter determine at what point the breach occurred to ascertain the cause of action.

31. The Learned Counsel submitted that as stated in paragraph 10 of the Plaintiff’s statement, it was the Plaintiff’s submissions that the Defendant through its finance officers, orally promised the Plaintiffs that the purchase price would be paid. Failure by the Defendant to pay the purchase price despite oral promises to do so necessitated the issuance of the demand letter dated 14th February, 2019. The Defendant failed to fulfil its part of the bargain despite service of the demand letter. The Plaintiff submitted that the cause of action arose from the date that the demand letter was served upon the Defendant.

32. The Learned Counsel submitted that the Court of Appeal in “Mariano Dinacci – Versus - Angelo Lattineli (2015) stated that failure to comply with a demand notice crystalized the Appellant’s cause



of action and therefore time started running from the date of the demand. The Appellant was entitled to force redemption by resorting to court after giving due notice.

33. The Learned Counsel submitted that parties to a contract are bound by the terms and conditions stipulated therein. The parties intention herein was to contract. The defendant failed to complete the transaction within the stipulated period. The Defendant failed to abide by the provisions in Clause 4 of the contract. Therefore, the Defendant could not rely on his own default to escape his obligation to pay the purchase price nor should it claim that the suit is barred by limitation.
34. The Learned Counsel on the intention of the parties submitted that the intention of the 2nd Defendant in approaching the Plaintiff to purchase the suit premises was to settle squatters who had invaded the property. The Court could look at the surrounding or relevant facts in order to establish the intention of the parties to give a fair and justifiable interpretation of the contract. The known background of the parties including evidence of genesis and aim of the transaction can be looked at by the Court.
35. On the terms of contract the Learned Counsel argued that the intention of the parties to an agreement is to be determined from the words used in the agreement. In the case of the case of “Magezi & Anor – Versus – Ruparella” the court stated that in resolving the ambiguity, Courts could look at its commercial purpose and the factual background against which it had been made. Intention of the parties was to be discerned from what reasonable persons in the situation of the parties would have had in mind.
36. The Learned Counsel concluded that from the above submissions and authorities the Plaintiffs prayed that the Preliminary Objection by the Defendant must fail and that the same should be dismissed with costs.

IV. Analysis & Determination

29. I have considered the Notice of Preliminary Objection dated 22nd October, 2022 by the Defendant and the rival submissions, the relevant precedents and provisions of *the Constitution* of Kenya , 2010 and statutes. For the Court to arrive at an informed, reasonable, just and fair decision, it has framed three (3) issues for its all determination with regard to the raised Objection. These are:-
 - a. Whether the Preliminary objection dated 22nd October, 2022 by the Defendant herein meets the standards of an objection based on Law and precedents
 - b. Whether suit is statutorily barred by the Limitation of action or time;
 - c. Who will bear the Costs of the objection?

ISSUE No. a). Whether the Preliminary objection dated 22nd October, 2022 by the Defendant herein meets the standards of an objection based on Law and precedents

29. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition being the meaning, scope and nature of preliminary objection has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited –



Versus- West End Distributors Limited. [1969] E.A. 696. Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

29. I further wish to cite the case of “Attorney General & Another –Versus- Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-

- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

29. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the Defendant are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the Defendant was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

ISSUE b). Whether suit is statutorily barred by the Limitation of action or time.

29. Undoubtedly, the suit herein is founded on breach of contract which is evidenced by the demand letter issued by the Plaintiff dated 12th April, 2019 and through the signing of the sale agreement dated 14th February, 2017 for the property known as MN/II/27 Mombasa measuring approximately 2.5 acres. The Defendant intended to buy the property from the Plaintiffs to settle squatters. It is also a fact which all parties seem to have a consensus on that the cause of action arose 14th Defendant, 2017.

30. Further to this, it is not disputed that the suit was filed after the lapse of three (3) years from the date when the cause of action arose only that the Plaintiffs’ contends that they filed MSA JR NO.53 of 2019 against the Defendant, seeking for the prerogative order of Mandamus to compel them to settle the purchase price. Subsequently, on 18th August, 2021, this application was withdrawn to pave way for the filing of the present suit.



31. It is now critically significant to assess the provisions of Section 3 (2) of the *Public Authorities Limitation Act* (PALA) Cap 39 Laws of Kenya which states:

“No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

29. From the surrounding facts and inferences herein, the suit by the Plaintiff herein was filed in the year 2021. This was within the three (3) years given by the act from when the cause of action arose meaning the time when the breach of agreement occurred - which was in the year 2019 when the Defendant failed to oblige. Therefore, it was not time barred by dint or envisaged under the provision of Section 3 (2) of the PALA. In saying so, the Court gathers support from the Court of Appeal decision in the case of “Anacleet Kalia Musau – Versus - Attorney General & 2 others [2020] e KLR which stated that:-

“.....the overriding purpose of all limitation statutes is based on the maxim interest reipublicae ut sit finis litium, that it is in the public interest that there be an end to litigation. A party will not be permitted to prosecute stale claims.”

29. The contention of Plaintiff was that the limitation period started running fresh from the date of the demand letter was issued. The provision of Section 57 of the *Interpretation and General Provisions Act* Cap. 2 stated:

Computation of time.

In computing time for the purposes of a written law, unless the contrary intention appears—

- a. a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
- b. if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
- c. where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
- d. where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

29. It instructive to note that this is a land matter and as such has it's a very emotive and sensitive issue to just dismiss by way of a preliminary objection. I say so especially because the Defendant does not dispute that it is true that they bought land from the Plaintiffs but failed to pay for the entire purchase time. However, in my own view such are matters of fact to be proved at the trial of the suit. The Court cannot properly make a finding on whether the suit is caught by Limitation of time unless it investigates on evidence when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. This cannot be regarded as a pure point of law as it requires investigation of some facts. At this stage, I am only beholden to look at the pleadings rather than consider any statement of fact detailed in submissions. Instead, these are matters that are fit and proper for arguments in the



substantive suit. Further to this, I feel it imperative to invoke my inherent powers vested in me from the provisions of Sections 3 and 13 of the Environment and Land Act, No. 19 of 2011; Sections 101 of the Land Registration Act, No. 3 of 2012 and Land Act, No. 6 of 2012 and Articles 159 (1) and (2) of the Constitution of Kenya, 2010 to decline granting the objection.

Issue no. c). Who will bear the Costs of the objection?

29. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award that is granted to a party upon the conclusion of a legal action, or process or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. (See the Supreme case of “Jasbir Rai Singh Rai – Versus – Tarchalon Singh (2014) eKLR, the Court of appeal case of Mary Wambui Munene – Versus – Ihururu Dairy Co – Operative and Cecilia Karuru Ngayu – Versus – Barclays bank of Kenya & Another (2016) eKLR. Where the Courts held that:-

“The basic rule on attribution of Costs is that Costs follow the event. It is well recognized that the principles on Costs follow the events is not to be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting or defending the case”.

29. By events, it means the results of the legal action, process or proceedings by parties thereof. In this case, the results of the matter is that the preliminary objection raised by the Defendant has not been successful on the laid down principles as stated above. Nonetheless, taking that this matter is still proceeding on for full trial it is in the interest of natural justice, Equity, Conscience, fair and reasonable that the cost to be in the cause.

V. Conclusion & Disposition

29. Consequently, having caused an indepth anaylsis of the framed issues herein, the Honorable Court proceeds to make the following orders: -

- a. THAT the Notice of Preliminary objection dated 22nd October, 2021 by the Defendant found to have no merit and thus be and is hereby dismissed.
- b. THAT for expediency sake, this suit be set down for full trial and determination within the next one hundred and eighty (180) days from the date of delivery of this Ruling commencing on 30th October, 2023. There should be a mention on 7th June, 2023 for purposes of holding a Pre-trial Conference and other directions pursuant to the Provisions of Order 11 of the Civil Procedure Rules, 2010.
- c. THAT costs will be in the cause.

30 It Is So Ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS3RD DAY OFMAY.....2023.

HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA

In the presence of:



- a. M/s. Gillian, the Court Assistant.
- b. Mr. Mkomba holding brief for M/s. Umara Advocate for the 1st & 2nd Plaintiffs.
- c. Mr. Nga'nga' Advocate for the Defendant

