



**Mutai & another v Kauria (Environment & Land Case  
E013 of 2021) [2023] KEELC 18701 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18701 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE E013 OF 2021**

**MC OUNDO, J**

**JULY 6, 2023**

**BETWEEN**

**ROSEMARY CHERONO MUTAI ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN KIPKORIR MUTAI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HENRY KIPRONO KAURIA ..... DEFENDANT**

**RULING**

1. By a plaint dated April 6, 2021, the plaintiffs herein had sought for the following orders.
  - i. A declaration that the defendant holds 4.0 hectares portion of the suit land No Kericho/ Kipkelion/Barsiele block 2 (Kaplaba)/81 in trust for the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs.
  - ii. An order compelling the defendants to take all the necessary steps and complete the process of transfer and registration of the 4.0 hectares portion approved to be excised from the suit land *vide* a letter of consent of the Land Control Board dated December 22, 2000 and in default the Deputy Registrar of this court be directed to execute mutation and instruments of transfer whereof the same shall be deemed sufficient to effect transfer of the subject portion of the suit land in favour of the plaintiffs.
  - iii. The cost of the suit plus interest at the current court rates.
  - iv. Any other and/or further relief this honorable court deems fit to grant.
2. In his defence, dated the August 5, 2021, the defendant denied in totality the plaintiff's averments stating that the plaintiffs were authors of their own misfortune. That the suit was incompetent, bad in law, frivolous or vexatious fatally defective and an abuse of the court process. That the plaintiffs lacked the *locus standi* to institute the suit and the same ought to be dismissed with costs.



3. It was in the course of the parties complying with pre-trial directions that the defendant had filed and notice of preliminary objection dated the October 28, 2022 objecting to the jurisdiction of the court to hear and determine the matter pursuant to the provisions of section 26 of the [Environment and Land Court Act](#). That the 1<sup>st</sup> plaintiff lacked the locus standi to institute the suit and lastly that the plaintiffs suit was time barred as it contravened section 7 of the [Limitation of Actions Act](#).
4. The court directed that the said preliminary objection be disposed of in the first instance by way of written submissions and despite there having been an order for the plaintiff to respond to the preliminary objection within 14 days, there had been no compliance.
5. The defendant filed their written submissions dated March 2, 2023 giving a background to the matter in issue to the effect that the plaintiffs moved to court *vide* a plaint dated April 6, 2021 claiming that in 1993 or thereabouts, 2<sup>nd</sup> plaintiff had on the May 5, 1993 entered into a land sale agreement with the defendant for the sale and purchase of 10 acres comprised in Kericho/Kipkelion Barsiele block 2 (Kaplaba) 81.
6. The defendant then framed his issues for determination as follows.
  - i. Whether court lacks jurisdiction to hear and determine the matter?
  - ii. Whether the 1<sup>st</sup> plaintiff herein lacks the requisite *locus standi* to institute this suit/claim?
  - iii. Whether the plaintiffs' case is time barred as it contravenes the provisions of section 7 of the [Limitations of Actions Act](#) cap 22?
7. On the first issue for determination on whether the court lacked jurisdiction to hear and determine the matter, the defendant, while basing their reliance on the decision in the case of [Samuel Kamau Macharia & another v Kenya commercial Bank & 2 others](#), application No 2 of 2011 [2012] eKILR, amongst a host of other authorities submitted that the Kericho Magistrate Courts were duly gazetted to handle disputes related to land and environment whose value was less than Kshs 20,000,000/= .That as per the averment of the 2<sup>nd</sup> plaintiff's affidavit dated the July 20, 2022 wherein he had deposed that he had bought the subject property at a consideration of Kshs 310,000/, the plaintiffs herein should have lodged their suit in the Magistrates Court since the value of the property in dispute was Kshs 300,000/= . That it was evident therefore that this honorable court lacked jurisdiction to hear and determine the matter.
8. As to whether the 1<sup>st</sup> plaintiff herein lacked the requisite locus standi to institute this suit/claim? The defendant submitted that in the light of the 2<sup>nd</sup> plaintiff's affidavit, the 1<sup>st</sup> plaintiff had no locus standi to file suit as she was not the one who had purchased the property. That in fact the 2<sup>nd</sup> plaintiff had deposed in his affidavit that he bought the subject parcel of land from the defendant and that he had no issue with the defendant. He had even urged the court to dismiss and/or strike out the suit.
9. On the third issue for determination as to whether the plaintiffs' case was time-barred for contravening the provisions of section 7 of the [Limitations of Actions Act](#), that it had been clear from the pleadings in the plaint that the land was sold to the plaintiffs in the year 1993 wherein the suit was filed in the year 2021. The matter thus ought to have been filed within a period of 6 years that is by 1999 because it was based on a contract. That since the plaintiffs by their admission under paragraph 8 of their plaint stated that the defendant had promised to cause the transfer and registration of the suit property in the year 2000, their right of action started running from the year 2000. Reliance was placed on the provisions of section 7 of the [Limitation of Action Act](#) which provides that no action shall be brought by person to recover land after 12 years.



10. That further section 4 of the *Limitation of Actions Act*, prescribes the limitation period for the institution of suits in regard to various causes of action. That actions founded on contract had a limitation period of six years. That the suit herein having been founded on an alleged contract for sale of land between John Kipkorir Mutai and Henry Kiprono Kauria the same therefore ought to have been instituted within a period of six years from the date when the cause of action accrued. Reliance was placed on the decision in the case of *Michael Benhardt Otieno v National Cereals & Produce Board* (2017) eKLR to submit that if a lawsuit was beyond the time limit set by the Act, the court cannot provide the desired remedy or relief.
11. That the purpose of the statute of limitations was to prevent plaintiffs from filing claims that were outdated and to safeguard defendants against unreasonable delays in legal proceedings brought against them. That the plaintiffs' suit was hopelessly out of time and the same should be dismissed. That equity helps the vigilant and not the indolent. That since the plaintiffs were trying to prosecute a stale claim, the court was invited to protect the defendant against unreasonable delay in the bringing of the suit against him.

### **Determination.**

12. I have carefully considered the defendant's preliminary objection, the submissions, the law applicable and the authorities herein cited. I have also considered the fact that despite there having been orders for the plaintiff to respond to the preliminary objection there was no compliance, but he had instead filed his submissions.
13. The Supreme Court of Kenya in *Gideon Sitelu Konchellab v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR had held as follows;

“A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. Absence of this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1<sup>st</sup> respondent on August 17, 2018 are of no effect.”
14. It is to this effect that the court finds that the plaintiff's written submissions dated the May 11, 2023 are of no effect in the absence of their foundational pleading, the replying affidavit herein.
15. All said and done, I find the issues arising for determination as being;
  - i. Whether the preliminary objection raised is sustainable.
  - ii. Whether the said preliminary objection has merit and should be upheld
16. A preliminary objection according to the decided case by the Court of Appeal in the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* (1969) EA 696 was stated to be thus:-

“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. 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.”



17. It is evident that a preliminary objection consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu HCCC No 22 of 1999, where the court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

18. In the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004, the court held that:-

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

19. In the present scenario, it is not in disputes that via an alleged sale agreement between the parties herein in 1993, the plaintiffs herein who are a couple, took possession of a portion of 4 hectares of land comprised in parcel of land No Kericho/Kipkelion/Barsiele Block 2 (Kaplaba)/81 on the agreement that the defendant would cause the transfer of the said land to them, and which promise he had not kept which led to the filing of the matter in court.

20. The defendant’s preliminary objection is premised on the allegation that the 1<sup>st</sup> plaintiff did not have the *locus standi* to file suit, the sale and purchase agreement having been entered into between the defendant and the 2<sup>nd</sup> plaintiff.

21. The issue of *locus standi* was defined in the case of *Alfred Njau & 5 others v City Council of Nairobi* [1983] eKLR to mean- “the right to appear in court.” Indeed the Court of Appeal in this case had held as follows:

“.....to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to.”

22. There has however been nothing adduced to confirm the allegations laid down by the defendant, no sale agreement has been annexed to the parties’ pleadings and therefore the issue as to who were parties to the agreement has and whether they had the *locus standi* has to be established through evidence which then throws the objection out of the ambit of the legal meaning of a preliminary objection as herein above stated. This line of argument therefore fails.

23. On the second issue as to whether the suit was time barred by virtue of the provisions of sections 4 and 7 of the *Limitation of Actions Act*, again from the pleadings it is clear that the plaintiffs were put into possession of the suit land in the year 1993 pursuant to a sale agreement between them and the defendant and therefore their claim was not for recovery of land but rather for specific performance of a land which was held in trust for them by the defendant and which is an equitable remedy grounded in the equitable maxim that “equity regards as done, that which ought to be done”.

24. In *Thrift Homes Ltd v Kays Investment Ltd*[2015] eKLR, the court held that;

“a plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications and which ought to have been performed at the date of the writ in action”



25. What other way can this be achieved other than through evidence? In the case of *Macharia Kibari v Ngigi Kibari* [1994] eKLR, the Court of Appeal had held that:-

“We are unable to accept Mr Thiongo’s contention that the suit was time-barred. Limitation prescribed in section 20 (2) of the Limitations of Actions Act, will not apply to a trust coming into existence under customary law. Under customary law the land even after the right of action has accrued, is held in trust even for decades before any step is contemplated for a formal transfer or division. Limitation does not apply in customary law. We reject this ground of appeal.”

26. The second line on the preliminary objection also fails.

27. On the last issue argued by the defendant that the court lacked jurisdiction to hear and determine the matter based on an allegation that value of the subject suit was less than Kshs 20,000,000/= this neither here nor there. Firstly the plaintiff’s suit was not one for recovery of land but rather for specific performance and secondly no valuation report had been tabled to confirm the allegation put forward by the defendant. This line of argument must also fail.

28. All in all I find that the preliminary objection dated the October 28, 2022 brought forth by the defendant does not consist of pure points of law capable of disposing of the suit, the same therefore lacks merit and is herein dismissed with costs to the plaintiffs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 6<sup>TH</sup> DAY OF JULY 2023**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

