



REPUBLIC OF KENYA



**Mungai v Ndi & another (Environment & Land Case E020 of 2022)  
[2023] KEELC 22562 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22562 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E020 OF 2022  
A KANIARU, J  
OCTOBER 3, 2023**

**BETWEEN**

**DENIS MUNGAI ..... PLAINTIFF**

**AND**

**ANTHONY NDII ..... 1<sup>ST</sup> DEFENDANT**

**KIRITIRI MBEERE SOUTH ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling relates to a Preliminary objection raised vide a notice dated 20.08.2022 and filed on 30.08.2022. The objection has been brought by the Hon Attorney General on behalf of the 2<sup>nd</sup> Defendant - Land Registrar, Kiritiri Mbeere South. It is premised on three legal postulates or limbs as follows:

- i. That the suit herein is barred under section 4 of the *Limitation of Actions Act* Cap 22 of the laws of Kenya.
- ii. That the suit herein offends Section 16 of the *Government Proceedings Act* Cap 40 of the Laws of Kenya.
- iii. That the matter herein is Res Judicata.

The objection was canvassed through written submissions.

2. The 1<sup>st</sup> Defendant filed his submissions on 31.03.2023 and sought to associate himself with the 2<sup>nd</sup> Defendant's submissions in terms of 2<sup>nd</sup> and 3<sup>rd</sup> limbs as set out in the preliminary objection. He thereafter proceeded to submit on the first limb which is whether the suit is barred under Section 4 of the *limitation of actions Act*. He relied on the cases of *Francis Munyiri Kamau vs Margaret Nyawira & 2 others* (2008) eKLR and *Kenya Farmers Association vs Quasar Limited & 5 others* (2021) eKLR to make his point.



3. The 2<sup>nd</sup> Defendant on the other hand filed submissions on 22.02.2023. He gave an analysis of the substance of the preliminary objection while only addressing himself to limbs no. (ii) and (iii) of the objection. It is noteworthy that he never addressed this court on limb no. (i) which is, whether the suit herein was barred under Section 4 of the Limitation of Actions Act. Instead he left it to be done by the 1<sup>st</sup> Defendant. To me, this is not satisfactory. This is because, having been the party who raised the Preliminary Objection, it was his duty and not that of the 1<sup>st</sup> Defendant's to prosecute all the three limbs raised in the preliminary objection.
4. The 2<sup>nd</sup> defendant sought to rely on the cases of *Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors Limited* (1969) EA. 696, Oraro vs Mbaja (2005) eKLR, The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others (2017) Eklr, and Alamin Sheikh Ahmed vs Registrar of Lands Kilifi County (2022) Eklr.
5. The Plaintiff on his part filed written submissions on 18.05.2023. He submitted that Section 4 of the Limitation of Actions Act did not apply in this matter as the cause of action herein is based on fraud and therefore limb (i) of the Preliminary Objection was misplaced. That on the second limb of the preliminary objection, which is whether the suit offends section 16 of the Government Proceedings Act, he sought to associate himself with the provisions of Section 16, 1 (i) & (ii) of the same Act.
6. Further, it was his submission that there is no other suit touching on the same subject matter before any other court, which has been heard and determined, and that the reliefs sought in this matter have not been presented before any other judicial forum for adjudication. Further that there is a Miscellaneous application that sought caution of the subject land before the lower court but that is not a suit. That also the existence of that misc application was disclosed and the lower court dealt with the same and held that there was no competent suit filed.
7. He sought to rely on Nairobi High Court Constitutional Petition No. E260 of 2021 - Boniface Akusala & Anor vs Law Society of Kenya & 12 Others (unreported) *Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd* (1969) E.A, 696, Civil Suit No. 85 of 1992, Oraro vs Mbaja (2005) Eklr 141, Omondi vs National Bank of Kenya Ltd & Others (2001) KLR 579; (2001) 1 EA 177, and Mary Wambui Munene vs Peter Gichuki Kingara & 6 others (2014) Eklr.
8. I have considered the objection as filed and the rival submissions. The issue for determination is whether the Preliminary Objection has merit.
9. The circumstances in which a preliminary objection can be raised was laid out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, as follows:
 

“ 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 effect of a preliminary objection if upheld, renders any further proceedings before the court redundant or unnecessary. Thus a preliminary objection may only be raised on a point 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.
10. The 2<sup>nd</sup> Defendant has raised his preliminary objection on three points or limbs which I will address separately. They are:



- i. That the suit herein is barred under section 4 of the *Limitation of Actions Act* Cap 22 of the laws of Kenya.
- ii. That the suit herein offends Section 16 of the *Government Proceedings Act* Cap 40 of the Laws of Kenya.
- iii. That the matter herein is Res Judicata.

### **Whether the matter is res judicata**

11. In the case of Christopher Kenyariri vs Salama Beach (2017) eKLR, as cited in Alfred Sagero Omweri vs Kennedy Omweri Sagero (2021) Eklr the court clearly stated the ingredients to be satisfied when determining Res Judicata as follows;

“...the following elements must be satisfied...in conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
  - b) Former suit was between same parties or parties under whom they or any of them claim.
  - c) Those parties are litigating under the same title.
  - d) The issue was heard and finally determined.
  - e) The court was competent to try the subsequent suit in which the suit is raised.”
12. The 2<sup>nd</sup> Defendant in his submissions claim that this suit is Res Judicata on the basis that the facts and issues raised in the Notice of Motion application dated 15<sup>th</sup> June 2022 are similar to the facts and issues in ELC Misc. Case No. E08 of 2021 dated 25<sup>th</sup> March, 2021 – Dennis Mungai vs Land Registrar. However, I am not certain whether counsel is referring to the Notice of Motion herein dated 23<sup>rd</sup> May 2022 or there is in fact a Notice of Motion dated 15<sup>th</sup> June 2022. I don’t deem it my duty at this point to infer facts or speculate. I conclude that the 2<sup>nd</sup> defendant in this case has not attached either the Notice of Motion or the proceedings/judgement/ruling or any documents in the said ELC Misc Case no. E08 of 2021 which he claims makes this suit Res Judicata. The court is at a loss on what basis it is being called to determine this issue.
  13. Res judicata is one of the issues that can be raised as a Preliminary Objection but the person raising it must place the documents relating to the previous suits and show clearly that the suit falls on all fours with the doctrine of res judicata. Where there is scanty information, which in essence forces the court to look outside the pleadings before it can make a determination, then it would be only proper to deal with the issue at the hearing.

### **Whether the suit offends section 16 of the *Government Proceedings Act*.**

14. The 2<sup>nd</sup> defendant in his submissions further claim that in the Notice of Motion dated 15<sup>th</sup> June 2022 (which application again is not in the court records) the plaintiff at paragraph 2 and 3 seeks relief of temporary injunction against the 2<sup>nd</sup> defendant (the Land Registrar Kiritiri Mbeere South) which reliefs cannot be sought against the 2<sup>nd</sup> defendant. However, the 2<sup>nd</sup> defendant’s preliminary objection is focused on the suit offending section 16 of the *Government Proceedings Act* and not on the application. However, the issue for determination before this court is whether the Preliminary Objection warrants dismissal of the suit. I will proceed to address the limb as raised the objection, which is whether this suit offends Section 16 of the *Government Proceedings Act*.



Section 16 of the said act provides as follows;

- (1) In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise give such appropriate relief as the case may require: Provided that—
  - (i) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties;
  - (ii) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.
- (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

15. Upon perusal of the plaint filed herein, the Plaintiff makes the following prayers;

- a. A declaration that the subsequent titles created on land Reference No. Mbeti/Gachuriri/253 in favour of the 1<sup>st</sup> Defendant was issued fraudulently and is therefore illegal, null and void.
- b. A declaration that the plaintiff is the absolute legal owner of Mbeti/Gachuriri/253 and the resultant subdivision thereto.
- c. An order for cancellation of the 1<sup>st</sup> Defendant's fraudulent title to the suit land
- d. A permanent injunction be issued stopping, prohibiting, barring and or restraining the 1<sup>st</sup> Defendant (emphasis mine) either by himself, agents, servants, employees and/or any 3<sup>rd</sup> parties claiming under him from interfering with the suit property either by selling, leasing, wasting, utilizing and trespassing into the suit land in whatever manner.
- e. Costs of the suit be awarded to the plaintiff.

16. I find no merit in the Applicants objection as the plaintiff's prayer for an order of injunction is against the 1<sup>st</sup> Defendant herein (Anthony Ndi) and not the 2<sup>nd</sup> Defendant. It is wrong for 2<sup>nd</sup> defendant to make it look as if an injunction is sought against him.

**Whether the suit is barred under section 4 of the Limitation of Actions Act.**

17. The 1<sup>st</sup> Defendant in his submissions claims that this suit is statutorily barred because it is based on fraud, yet the same was brought outside the statutory period, and that it is also based on an agreement which has been overtaken by events, it being beyond the 12 year period. He says further that the same suit offends section 4 (1) (a) of the said Act which provides that contract - based actions may not be brought beyond the six year period from the date of the Agreement and also section 4(2) of the same Act, which provides that tort based claims may not be brought after the end of three years from the date on which the cause of action occurred.



18. I do note that the plaintiff's case herein is based on fraud and section 26 (a) of the limitation of actions act (cap. 22) on the issue of the limitation period on fraud stipulates as follows:

“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: emphasis mine.

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

- i. In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- ii. In the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

19. From the foregoing, the law is clear that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. In this case, it is not clear from the pleadings when the plaintiff discovered the fraud. To try and ascertain the same would mean going to trial or try to do guesswork which would defeat the purpose of the preliminary objection.

20. In the case of Delilah Ondari v Francis Ondieki Atandi [2022] eKLR the court while addressing itself to this issue held that;

“It would defeat the purpose of this court as set out in section 1A, 1B and 3A of the Civil Procedure Act to not determine when the fraud was actually discovered and I refrain myself from holding a mini trial on the facts of the case in this Preliminary Objection as it would cease being a Preliminary Objection and become a Notice of Motion for striking out the suit. Furthermore, none of the parties has demonstrated that there is a criminal case on the alleged fraud or outcome emanating therefrom. Based on the above, I am clutching at a straw and with no stilts to stand on. The facts alleged by the Plaintiff have all been disputed by the Defendant. This is the essence of a trial and the grounds in the Preliminary Objection are not sufficient enough to strike out the suit in limine. Emphasis mine.”

From the foregoing, I find that the preliminary objection lacks merit and I hereby dismiss the it. Costs to plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 3<sup>RD</sup> DAY OF OCTOBER, 2023.**



**A.K. KANIARU**

**JUDGE**

Kivuti for Khaemba for plaintiffs and Mutiso for Andande for 1<sup>st</sup> defendant and Kiongo (A.G's office) for 2<sup>nd</sup> defendant.

Court assistant: Leadys

Interpretation: English/Kiswahili

