



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC CASE NO. 1 OF 2021**

**PATRICK NGIGI GITAU.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**GRACE WAMBUI NJUGUNA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**-VERSUS-**

**MARGARET NDUTA NGUGI.....1<sup>ST</sup> DEFENDANT/OBJECTOR**

**JOHN NJENGA KARIUKI.....2<sup>ND</sup> DEFENDANT/OBJECTOR**

**SAMUEL NGUGI KARIUKI.....3<sup>RD</sup> DEFENDANT/OBJECTOR**

**RULING**

The matter for determination is the **Notice of Preliminary Objection** dated **4<sup>th</sup> February 2021**, brought by the Defendants/ Objectors on the grounds that;

***I. This suit is bad in law and an abuse of due process of law.***

***II. this suit is time barred under the statute of Limitations of Actions Act.***

***III. This suit is Res Judicata as a different suit touching on the same issues and the same parties has been determined.***

***IV. This application is unprocedural and fatally defective in the presence of a parallel application filed by the Respondents seeking evictions orders against the applicant on similar facts in Succession Cause No. 1213 of 2001.***

***V. This suit is void ab initio for want of compliance with the law on the sought prayers.***

The Notice of Preliminary Objection was canvassed by way of written submissions and the Defendants/Objectors through the **Law Firm of R.W Muhuhu & Company Advocates**, filed their submissions on **3<sup>rd</sup> March 2021**, and submitted that a Grant for the estate of the deceased issued to **Wilson Ngugi Karanja**, in the year **2000**, was revoked and subsequently issued on **27<sup>th</sup> November 2002**, with the Plaintiffs/ Respondents full knowledge and on **15<sup>th</sup> February 2008**, all transactions that had taken place on the Deceased title were revoked. That since then, the Plaintiffs/ Respondents have not filed any claim either for Specific Performance or endorsement or completion, thus their Claims are barred by **Section 7 of the Limitation of Actions Act**. It was further submitted that as in the instant suit, there was no sale agreement, evidence of payment and as the claims were brought out of time, the suit is a nonstarter and ought to be struck out. They relied on the case of **Danson Muniu Njeru ....Vs.... William Kiptarbei Korir & 6 others (2014) eKLR**.

It was their further submission that the Plaintiffs/Respondents admitted to having participated in **Succession Cause No. 1213 of 2001**, which was determined in **2008**, and that they admitted that it related to ownership of land that they alleged to have purchased from the Deceased while the instant suit relates to claim of ownership of the same parcel of land and specific performance. That the Plaintiffs/Respondents litigated a similar issue and lost. That the decision cannot be contradicted by a Court of even jurisdiction. Further that the Application is unprocedural and fatally defective in the presence of a parallel Application by the objectors seeking eviction orders against the Plaintiffs/ Respondents on similar facts in **Succession Cause No. 1213 of 2001**. That should the Court grant injunctive orders, it would have defeated the pending Application. The Court was therefore urged to strike out the pleadings.

The Plaintiffs/ Respondents through the **Law Firm of Ngaruiya Gitau & Company Advocates**, filed their submissions on **24<sup>th</sup> March**

2021, and submitted that the **Preliminary Objection** as filed by the Defendants/Objectors is not a **Preliminary Objection** in the true sense and fails to satisfy the test. That the issue of **limitation of actions**, does not arise in this case as the Plaintiffs/ Respondents have been and still are in actual possession of the land and the title document is registered in their names. It was further averred that the judgement of the Court in **Succession Cause No 282 of 2006**, in **Nakuru** was a matter substantially on administration of the estate of the deceased, and was not effectively instituted to determine the final rights of the parties and hence the reason why the Court did not issue eviction orders.

It was their submission that the instant Preliminary Objection is not properly before the Court and they relied on the case of ***D.T Dobie & Company (Kenya) Limited...Vs... Joseph Mbaria Muchina & Anor (1980) eKLR*** and urged the Court to dismiss the Preliminary Objection as it seeks matters that require the probing of evidence and matters of judicial discretion.

**The Court has now carefully read and considered the Notice of Preliminary Objection, the written submissions and the Pleadings in general and finds that the issue for determination is whether the Notice of Preliminary Objection is merited.**

Do the Grounds of Objections raised by the Defendants/ Objectors herein qualify to be a **Preliminary Objection** as was described in the case of ***Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696***, where Law J A stated that;

**“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 the pleadings and which objection point may dispose the suit”.**

Further the Court stated;

**“A preliminary objection raises a pure point to 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 Court has considered the five grounds raised by the Defendants/Objectors. The Objectors have raised various issues amongst them that the suit is **Res Judicata**; the same is **bad in law** and that the same is **fatally defective** as there is a parallel Application by them seeking eviction orders. In the case of ***Henry Wanyama Khaemba...Vs...Standard Chartered Bank Ltd & Another (2014) eKLR***, the Court held that:

**“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1<sup>st</sup> Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1<sup>st</sup> Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Court of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly”.**

Further in the case of ***George Kamau Kimani & 4 Others...Vs...County Government of Trans Nzoia & Another (2014), eKLR***, the Court held that:-

**“I have considered the points raised by the 1<sup>st</sup> Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.**

It is not in doubt that for the Court to ascertain whether the instant suit is **Res Judicata**, unprocedural or bad in law and an abuse of the Court process, the Court will have to ascertain and probe evidence more so as the parties are disputing various issues. Therefore the Court finds and holds that grounds **No.1,3,4** and **5** are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence, probing it and the Court ascertaining facts from elsewhere and therefore the same are not properly raised Preliminary Objection. See the case of ***Quick Enterprises Ltd..Vs..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.”**

See also the case of ***United Insurance Co. Ltd...Vs...Scholastica A. Odera, Kisumu HCCA No.6 of 2005***, where the court held that:-

**“A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”**

On ground **No.2**, on jurisdiction and the allegations that the suit has been barred by statute, it is clear that the issue of whether or not the provisions of the law have been complied with before the filing of the suit, goes to the jurisdiction of the Court and does not require the ascertaining of facts, as Jurisdiction is everything without it and the court has no option but to down its tools. See the case of ***Owners of Motor Vessel ‘Lilian S’...Vs...Caltex Oil (Kenya) LTD (1989) 1 KLR***, where the Court held 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 at the moment it holds the opinion that it is without Jurisdiction.”***

The Court is required to determine what the law says and whether indeed the suit is barred by **Limitation of Actions Act** and that will not require the probing of evidence. All that the Court will need to do is determine what the law says and this would only mean that the same raises a pure point of law.

From the description of Preliminary Objection in the ***Mukisa Biscuits case (supra)*** and given that an issue of whether the suit is barred by the Limitations of time, does not involve ascertaining of facts, then the instant ***Notice of Preliminary Objection*** as raised by the Defendants/ Objectors meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere but from the pleadings. Therefore, the Court finds and holds that the ground 2 of the ***Notice of Preliminary Objection*** as filed by the Defendants/ Objector is a Preliminary Objection as per the ***Mukisa Biscuits case (supra)***. Consequently, the Court will then determine whether the Preliminary Objection on jurisdiction is merited.

The Defendants / Objectors have contended that the instant suit is time barred as the Plaintiff's/ Respondent's allegation that though there was no sale agreement, he had paid for the land and took possession in 1999. That a Grant to the Estate issued to **Wilson Ngugi Karanja** was revoked and subsequently re-issued in 2002, with full knowledge of the Plaintiffs/Respondents herein and that on 15<sup>th</sup> February 2008, all the transactions that had taken place on the title deed were cancelled.

The objectors anchored their Objection on **Section 7 of the Limitation of Actions Act**, which provides that;

***“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person”***

When then did the right of actions accrue? In the case of ***Edward Moonge Lengusuranga ...Vs... James Lanaiyara & another [2019] eKLR*** the Court held that

***“A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the 13<sup>th</sup> January 2015 and a period of three years ended on 13<sup>th</sup> January 2018. These proceedings were filed on the 20<sup>th</sup> August 2018 which period was beyond the 3 years from the date the fraud was discovered.”***

Persuaded by the above findings of the Court, it is not in doubt that a cause of action is a set of facts to justify a right to sue. What then in this case are the sets of facts that the Plaintiffs/Respondents used to justify their rights to sue?

It is evident that on **15<sup>th</sup> February 2008**, the Court revoked the Grant that had been issued and in the Plaintiffs/ Respondents own submissions, they admitted being parties to the said Succession Cause. It is thus the Court finding that the cause of action rose in **2008**, as the set of facts being the revocation of the transactions justified the right to sue. From the year **2008** to the year **2021**, when the instant suit was filed, there is no doubt that **13 years** have since passed. There is no evidence that the Plaintiffs/Respondents sought to assert their right or that time stopped running at any one point.

The Court has gone through the Complaint dated **15<sup>th</sup> January 2021**, and notes that the Plaintiffs/ Respondents are seeking orders of Specific Performance. In the Case of ***Reliable Electrical Engineers Ltd.....Vs.... Mantrac Kenya Limited (2006) eKLR***, wherein Justice Maraga (as he then was) stated that:-

***“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”***

***“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract.....”***

Therefore, a prayer of Specific Performance is based on a Contract. The time Limitation of bringing a suit anchored on a Contract is **6 years**. This suit having been brought after the lapse of over **12 years** could only mean that the suit is barred by the Limitation of Actions.

Consequently, this Court finds and holds that the **Notice of Preliminary Objection** dated **15<sup>th</sup> February 2021**, is merited and the same is **Upheld**. This Court has no jurisdiction and it must therefore down its tools. For the above reasons, the suit herein is struck out entirely with costs to the Defendants/ Objectors.

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT THIKA THIS 6TH DAY OF MAY 2021.**

**L. GACHERU**

**JUDGE**

6/5/2021

Court Assistant – Phyllis

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**M/s Ngaruiya for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents**

**M/s Muhuhu for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Objectors**

**L. GACHERU**

**JUDGE**

6/5/2021