



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANGA**

**ELC NO. 53 OF 2018**

**KANDARA RESIDENTS ASSOCIATION.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**KARIRA KIMARA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**GEORGE NJIGU.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**JUDY WAIRIMU KIMEMIA .....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**MICHAEL NJOROGE.....5<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**DELMONTE (K) LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT - KIAMBU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT- MURANGA...4<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The 1st Defendant filed this preliminary objection dated 15/6/2020 premised on grounds that;
  - a. The suit is time barred.
  - b. The 1st plaintiff, being an incorporated body, has no capacity to sue in the manner it has purported to do. The 2nd, 3rd, 4th and 5th Plaintiffs have not alleged an independent cause of action.
  - c. This Honorable Court has no jurisdiction to hear and determine the claim herein which is based on alleged historical injustices.
2. Directions were taken on 6/7/2020 and 18/2/2021 to canvass the preliminary objection by way of written submissions.
3. The preliminary objection is opposed by the Plaintiffs while the 4th defendant supported it vide its written submissions dated 17/9/2020.
4. The 2<sup>nd</sup> 3<sup>rd</sup> and 5th defendants did not file any submissions.
5. On the issue of time bar the 1<sup>st</sup> Defendant submitted and relied on section 7 of the Limitations of Actions Act which disentitles one to recover land after a period of 12 years. That going by the assertion of the Plaintiffs that their historical land claims over the 1<sup>st</sup> Defendants lands date back to the 1890s, bringing the claim in 2018 renders it statute barred. It argued that this court is devoid of jurisdiction to hear the matter on account of time bar and should essentially down its tools. In this regard the 1<sup>st</sup> Defendant relied on the cases of; **Owners of Motor Vehicle Vessel "Lilain S V Caltex Oil Kenya Limited (1989) KLR 1; Haron Onyancha v the National police service Commission & Anor. [2017] eKLR & Moffat Muriithi Muchi v Wanjiru Wanjohi Gatundu & 2 Others [2019] eKLR**

6. In furtherance to the issue of time bar, the 1<sup>st</sup> Defendant noted that Section 15 of the National Land Commission (NLC) Act has opened a limited window for the hearing of the historical land injustices by the NLC which would otherwise be time barred. That such limited jurisdiction accorded to the NLC Act does not extend to this court by the very nature that under Section 15(3)(b)(ii) of the Act, the NLC admits claims of historical land injustices not capable of being addressed through the ordinary court system on the basis that such claims are debarred under section 7 of the Limitations of Actions Act. It relied on the case of **ELC No 86 od 2018-Kenya National Chamber of Commerce and Industry Muranga Chapter & others Vs Delmonte Kenya Limited & Others** in support.

7. As to whether the 1<sup>st</sup> Plaintiff, not being a legal person can maintain this suit, the 1<sup>st</sup> Defendant argued that the 1<sup>st</sup> Plaintiff is an unincorporated entity with no capacity to bring/maintain the suit before the court and the suit should be dismissed. It relied in the cases of; **Kipsiwo Community Self help group Vs Attorney Genral & 6 others (2013) EKLR; Nyamokenya Maranatha Faith Assemblies Vs Bosco Mogere & 5 others (2017) EKLR** in support.

8. It further submitted that the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs having not demonstrated an independent claim separate from the 1<sup>st</sup> Plaintiff's nor shown that they represent the 1<sup>st</sup> Plaintiff in a representative suit as per the provisions of Order 1 Rule 8, their claim should suffer the same fate of dismissal just like that of the 1<sup>st</sup> Plaintiff.

9. In support of the 1<sup>st</sup> Defendants preliminary objection, the 4<sup>th</sup> Defendant submitted that stated the 1st plaintiff's capacity to file suit is doubtful. That it does not represent the constituents of Kandara location and therefore its purported members are unknown. It stated that though the jurisdiction of this court has not been totally ousted in hearing claims based on historical injustices, the same ought to be heard by the NLC at the first instance.

10. The Plaintiffs opposed the objection and submitted that the foundation of the suit springs from the determination of the NLC. That the objection on statute bar does not arise as the suit stems from the provisions of Art 67 (2) (e) of the Constitution.

11. As to whether the 1<sup>st</sup> Plaintiff has capacity to sue the Plaintiffs referred to the application seeking leave to amend the Plaintiff and insist that the 2<sup>nd</sup> Plaintiff having now been given the authority to represent the 1<sup>st</sup> Plaintiff brings the suit within the legal capacity to sue. Further it faulted the 1<sup>st</sup> Defendant for raising two points of law in one objection to wit; locus standi on the part of the 1<sup>st</sup> Plaintiff and lack of independent cause of action on the part of the 2<sup>nd</sup> -5<sup>th</sup> Defendants. In their opinion these two questions cannot be put in one objection as they call for separate legal interpretations. As to the latter objection, the court would have to call for evidence and inquire into the pleadings hence not a pure point of law. In any event they argued this can only be ascertained at the trial.

12. Further that the failure on the part of the Plaintiffs to file the requisite authority does not invalidate the suit as the same can be filed at any time before the suit is fixed for hearing. Relying on the case of **D T Dobie & Company Ltd vs Muchina (1982) KLR 1** the Plaintiffs urged the court to sustain the suit instead of striking it out, a step that would be draconian.

13. In addition, that the current suit is not concerned with historical injustices but the action of the defendants with respect with the recommendations made by the NLC.

14. The parties are in agreement on what constitutes a preliminary objection. The 1st defendant cited the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** which defined a preliminary objection as; -

“...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.”

15. This decision has been affirmed and reiterated severally in our courts including the Supreme court in **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others Civil Application No. 36 of 2014 [2015] eKLR** that a preliminary objection should be founded upon a settled and crisp point of law.

16. The test to be applied in determining a proper preliminary objection can be deduced as follows; -

a. A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.

b. A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.

c. A Preliminary Objection cannot be entertained where;

i). The facts are disputed/contested.

The facts are liable to be contested.

I. Facts are to be proved through process of evidence.

II. What is sought is an exercise of judicial discretion.

17. On the issue of time bar, the starting point is the plaint dated the 27/6/18 in which the Plaintiffs filed suit against the Defendants seeking the following orders;

- a. An order compelling the Defendants to implement the recommendations of the report on the meeting held between the Plaintiffs, the 2<sup>nd</sup> Defendant and Muranga County Assembly on the 16/11/16.
- b. An order nullifying any subdivision or registration of new leases in relation to the properties that have been done after the determination of the 2<sup>nd</sup> Defendant made pursuant to the letter dated the 24/7/18
- c. A permanent injunction against the Defendants from conducting negotiations with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or any 3<sup>rd</sup> parties without involvement of the Plaintiffs.
- d. The cost of this suit.
- e. Interest at above Court rates.

18. It is on record and admitted by the parties that the Plaintiffs filed a complaint before the NLC upon which certain recommendations were made. Going by the disclosed cause of action read together with the prayers sought therein, it is therefore clear that the cause of action of the Plaintiffs suit arose from certain recommendations arrived between the NLC and the 3<sup>rd</sup> Defendant which recommendations were the basis of an injunction to stop the extension of the leases in favour of the 1<sup>st</sup> Defendant.

19. It is also on record that the NLC did determine the complaint of the Plaintiffs on the 7/2/2019.

20. It is the conclusion of the court that the objection with respect to time bar is unsustainable on the account that the Plaintiffs claim is based on the actions emanating from the recommendations in the course of hearing the claim on historical injustice by the NLC which complaint as stated has been determined. This is a derivative cause of action in my view. The objection is therefore dismissed.

21. Having held as I did in para 20, my answer to the 3<sup>rd</sup> objection which is whether the court has jurisdiction to hear and determine the suit, is in the affirmative.

22. The jurisdiction of the ELC Court as set out under Article 162(2) (b) of the Constitution read together with section 13 of the ELC Act gives the court wide powers to deal with land including any other dispute relating to environment and land. A claim under historical land injustice would then fit in a claim to title to land. In saying so, I am guided by the Court of Appeal pronouncements in the case of **Safepak Limited v Henry Wambega & 11 others [2019] eKLR** which quoted the decision in the **Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others [2018] eKLR** where the Court stated

“On the question whether a Court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a Court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seized of the matter. Our conviction stems from our reading of Article 67(2) (e) of the Constitution. The Article provides that the NLC can investigate “present or historical” land injustices. We lay emphasis on the word “present.” If the NLC had initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the National Land Commission Act which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary Court system. Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a Court in relation to a claim founded on historical injustice.”

23. Let me now address the 2<sup>nd</sup> objection which is whether the 1<sup>st</sup> Plaintiff has capacity to sue and whether the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs have adverted an independent cause of action separate from that of the 1<sup>st</sup> Plaintiff.

24. The term Locus Standi refers to a right to appear in Court and be heard. To say that a person has no Locus Standi means that he has no right to appear or be heard in the suit. See Black’s Law Dictionary, 9th Edition.

25. To begin with I have perused the record and note that there is an application seeking leave to amend the Plaint. This in itself is clear manifestation and admission that there indeed is a flaw on the Plaint as drafted. The said application is yet to be determined. The instant objection therefore will be determined with reference to the current Plaint in the eyes of the court and as filed on the 27/6/18.

26. In the said Plaint the 1<sup>st</sup> Plaintiff is described as a community based organization registered under the Societies Act. Alongside the verifying affidavit the 2<sup>nd</sup> Plaintiff deponed that he is the Chairman of the 1<sup>st</sup> Plaintiff and is therefore competent to swear the affidavit on its behalf. He also swore the affidavit on behalf of the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs from whom he claimed under their authority.

27. The law in Kenya is that unincorporated bodies such as the 1<sup>st</sup> plaintiff is not clothe with the power to sue or be sued in its name. By law it must file suit through its office bearers. As stated above the suit has not been instituted in the name of the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs on behalf of the 1<sup>st</sup> Plaintiff or as representatives of the 1<sup>st</sup> Plaintiff. In this case, the 1<sup>st</sup> Plaintiff being devoid of authority to sue cannot donate any to the

2<sup>nd</sup> -5<sup>th</sup> Plaintiffs.

28. It is on record that the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs have not been disclosed as office bearers of the 1<sup>st</sup> Plaintiff.

29. I am therefore persuaded by the decision of the court in **Kipsiwo Community Self Help Group v Attorney General And 6 Others [2013] eKLR** when it stated that;

“Kipsiwo Self Help Group had no capacity to institute action in its own name. A person recognized in law had to sue on behalf of members of Kipsiwo Self Help Group and such members had to be named and identified with precision. The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order.” [emphasis is mine].

30. In conclusion I am persuaded that the 1<sup>st</sup> Plaintiff has no legal capacity to bring this suit.

31. With respect to the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs a perusal of the Complaint shows that they have been described as Kenyans of male and female gender suing on their own capacity. It was not disclosed that they are representatives of the 1<sup>st</sup> Plaintiff. The cause of action with respect to the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs can be gleaned from paras 12, 14,15 18, 22, 24,25, inter alia of the Complaint. I associate myself with the decision of the court in **Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga ...Vs...Eliud Timothy Mwangi & Sagalla Ranchers Limited [2017] eKLR**, where the court held that whether a party had a cause of action can only be determined at the trial.

32. I find that the issues raised by the Plaintiffs on their own individual capacity are issues that concern the merit of the suit and can only be ascertained at the hearing. If the court were to determine whether or not the 2<sup>nd</sup> -5<sup>th</sup> Plaintiffs have a cause of action, it would have to investigate facts thus ousting the question from being a pure point of law.

33. Final orders and disposal.

- a. In the end the Preliminary objection partly succeeds.
- b. The 1<sup>st</sup> Plaintiff's suit is incompetent and therefore struck out.
- c. Costs shall be in favour of the 1<sup>st</sup> and 3<sup>rd</sup> Defendants.

34. **It is so ordered.**

**DATED, SIGNED AND DELIVERED ONLINE AT MURANG'A THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Wamukoya HB for Okatch for the 1<sup>st</sup> – 5<sup>th</sup> Plaintiffs

Thuo for the 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent – Absent

Ms Muchiri for 3<sup>rd</sup> Respondent

4<sup>th</sup> & 5<sup>th</sup> Respondents – Absent

Court Assistants: Alex/Kuiyaki