



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 168 OF 2021**

**SASENYI MULTIPURPOSE COOPERATIVE SOCIETY LTD.....PLAINTIFF**

**VERSUS**

**RUKINGA RANCHING COMPANY LIMITED.....DEFENDANT**

**RULING**

The defendant raised a preliminary objection in this matter that this court lacks jurisdiction to entertain these proceedings as presented in light of the express, mandatory provisions of either and/or all of:

- i) Section 5, Civil Procedure Act, Cap. 21, Laws of Kenya;
- ii) Section 7, Civil Procedure Act, Cap. 21, Laws of Kenya;
- iii) Section 12, Civil Procedure Act, Cap. 21, Laws of Kenya;
- iv) Section 15, Civil Procedure Act, Cap. 21, Laws of Kenya;
- v) Section 4, Kenya; Limitation of Actions Act, Cap. 22, Laws of
- vi) Section 7, Kenya; Limitation of Actions Act, Cap. 22, Laws of
- vii) Section 120 Evidence Act, Cap. 80, Laws of Kenya;

viii) Sections 18 & 19 Land Registration Act, 2012, Laws of Kenya; that the plaintiff's suit as presented is fatally defective and the defendant prays for that the same be struck out or dismissed with costs.

The Defendant submitted that the incontrovertible issues herein are that there exists similar proceedings between the Plaintiff and the Defendant herein over the same subject matter, which proceedings are alive the Plaintiff herein is supported by a fatally defective verifying affidavit. The Plaintiff Company lacks requisite authority from her Shareholders and/or Directors.

The Plaintiff's submitted that the Defendant and/or its Agents had erroneously misled the Plaintiff to producing a provisional title which was in fact a Title for the Defendant's own portion of the land. This would lead to a suit to cancel the provisional title a suit settled by consent. The failure by the Defendant to satisfy its part of the agreement is what has led to this suit and subsequently the Preliminary Objection. That, from the above background, it is clear that what is before you are weighty issues regarding an incomplete land transaction which this court need to give parties an opportunity to express their view in a full hearing. This is a suit which should not be brought to an abrupt end in the manner the Defendant is seeking.

On the points of law, they submit that what has been presented are not really pure points of law. All the sections of law cited would require evidence to sustain them. The Defendant would need to call for facts to sustain them. To start with Sections 4 and 7 of the Limitation of Actions Act is not applicable.

What matters is when the cause of action occurred. The cause of action accrued on 23<sup>rd</sup> September 2020 when the Defendant's Advocate wrote denying liability to give the Plaintiff the title, while other parties were still negotiating in good faith as confirmed by the Defendant Director in their letter of 2018. Time would start running on this date when they reneged on their responsibility in September 2020. The Plaintiff has pleaded this in paragraph 9 of the plaint. The issue of when the time starts to run will rebut the Plaintiff's pleading. Section 5 of the Civil Procedure Act is not a question of law. This land is within Taita Taveta County. In paragraph 16 of the Plaint the Plaintiff has pleaded the value of the subject matter to be 500 Million and has complied with rule 16 of Practice and directions. This suit therefore is

properly before this court. The court should take Judicial Notice that there is no Environment and Land Court at the Voi Law Courts with similar jurisdiction as this court. Furthermore, the Gazetted subordinate courts with jurisdiction within that station are barred to hear this suit by virtue of lack of monetary jurisdictions section 7 of the Magistrate's Court Act comes to play. Section 7 of Cap 21 is not applicable for reason that the subject matter is different and further there has not been a suit touching on the same property. Even as parties engaged in the Originating Summons they both knew that they were still working out ways of sorting the Defendant's title which issue the Defendant has admitted knowing. It is after the provisional certificate settlement when the Defendant opted not to be obligated to give the Plaintiff its lease. That the Defendant cannot use a suit instituted for other reasons to now avoid fulfilling its rightful obligation in the contract. They are estopped from running away from their obligation.

Sections 12 and 15 are not applicable and are really not pure points of law to challenge their suit. This court has jurisdiction in both Mombasa and Taita Taveta Counties and that the suit is properly before this court. The Defendant has its registered offices in Taita Taveta within the jurisdiction of this Honourable Court. That if the Defendant should strongly feel that there is another competent court then they should apply under Section 18 of the Civil Procedure Act to transfer this suit to that other court for hearing and determination. That would cure the jurisdictional issue.

This court has considered the Preliminary Objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

*"..... 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"*

In the same case, Sir Charles Newbold said:

*"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 had to be ascertained or if what is sought is the exercise of judicial discretion".*

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

*"I think the principle is abundantly clear. A "preliminary objection", correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement ..... that, "where a court needs to investigate facts, a matter cannot be raised as a preliminary point."*

On the issue as to whether the matter of being time barred or the plaint is defective this can be determined upon the evidence adduced and is not a matter of law. The issue as to whether or not this suit is subjudice or res judicata is properly raised as a Preliminary Objection and the court will consider the same. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

*"No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"*

Section 7.

*"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."*

I have perused the pleadings referred to in the preliminary objection that is Mombasa Environment and Land Case Number 202 of 2016 and note that it is between the same parties and the same subject matter. The Chief Land Registrar is the second defendant in that matter. This also is not in dispute instead the Plaintiff submits that the Defendant cannot use a suit instituted for other reasons to now avoid fulfilling its rightful obligation in the contract. They are estopped from running away from their obligation. I find this suit is an abuse of the court process and is subjudice Mombasa Environment and Land Case Number 202 of 2016. I find this preliminary objection on this issue is merited and I strike out the suit with costs to the Defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7<sup>TH</sup> DECEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**