



**REPUBLIC OF KENYA**

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

**E.L.C CASE NO 69 OF 2015**

**ELIAS MABEYA MAGANA .....PLAINTIFF**

**VERSUS**

**GRACE NYANCHAMA GWARO.....1<sup>ST</sup> DEFENDANT**

**ANGELA NYANGANYI GWARO.....2<sup>ND</sup> DEFENDANT**

**EAST AFRICA UNION LIMITED**

**(MWEMBE SDA CHURCH).....3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR KISII COUNTY.....4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff filed this suit against the defendant on the 18<sup>th</sup> day of February 2015 claiming that he purchased land parcel no. NYARIBARI CHACHE/B/BOBURIA/7754 from the defendants at a consideration of Kshs. 850,000 pursuant to a sale agreement dated 7<sup>th</sup> September 2006. The plaintiff took possession of the suit property but despite having paid the full purchase price, the defendant refused to transfer the suit property to him and instead fraudulently transferred it to the 3<sup>rd</sup> defendant.

2. In their defence dated 17<sup>th</sup> April 2015, the 1<sup>st</sup> and 2<sup>nd</sup> defendants denied the plaintiff's claim and contended that the plaintiff's suit was misconceived, bad in law and legally untenable. They stated that they reserved the right to raise a preliminary objection on various grounds. The first one is that the suit being one anchored on contract was statutorily time –barred. Secondly, the claim of fraud was barred by section 4(1) of the Limitations of Actions Act, Cap 22 of the Laws of Kenya. Thirdly, the defendants stated that the claim is an affront to the provisions of section 6 of the Land Control Act. Fourthly, that the suit is premature, misconceived and bad in law. Fifthly, the Plaintiff herein does not disclose any reasonable cause of action against the defendants, more particularly the 1<sup>st</sup> and 2<sup>nd</sup> defendants and sixthly that the Plaintiff is non-suited against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

3. The court directed that the Preliminary Objection be heard before the main suit and that the same be canvassed by way of written submissions. Both parties filed their submissions which I have considered.

**ISSUES FOR DETERMINATION:**

- i. Whether the Preliminary Objection raises pure points of law.
- ii. Whether the claim founded on contract is statute-barred contrary to section 4(2) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya
- iii. Whether the claim founded on fraud is statute-barred contrary to section 4(1) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya
- iv. Whether the suit offends the provisions of section 6 of the Land Control Act
- v. Whether the Plaintiff discloses a reasonable cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> defendants

vi. Whether the suit constitutes an abuse of the process of the court.

## **ANALYSIS AND DETERMINATION**

4. The starting point is to define what a preliminary objection is.

The case of **Mukisa Biscuits V West End Distributors Ltd (1969) E.A 696** held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

*Justice Newbold in the said suit argues that*

*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”*

5. In **George Oraro v Barack Eston Mbaja Nbi HCCC No. 85 of 1992** J.B Ojwang (as he then was) held as follows:

*“A Preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through evidence”.*

He further observed that:

*“...Any assertion which claims to be a 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”*

6. Looking at the various grounds set out in the Preliminary Objection put forth by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, it is clear that they are a mixture of both points of law and points of fact which will require to be authenticated by evidence. For example, the issue of when the breach of contract occurred will have to be proved by adducing evidence. The issue of fraud is subject to the provisions of section 26 of the Limitation of Actions Act, as to when the fraud was discovered. The other issue that is in contention is whether the suit property is agricultural land or not. All these are matters that can only be proved by producing evidence which must be tested on cross-examination.

7. In view of the foregoing, I am not persuaded that the preliminary objection taken raises pure points of law. Having arrived at this finding, I need not delve into the other issues. I therefore find no merit in the preliminary objection and I dismiss it with costs to the plaintiff.

**Dated, signed and delivered at Kisii this 31<sup>st</sup> day of January 2020.**

**J.M ONYANGO**

**JUDGE**