



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC CASE NO.4 OF 2019 (O.S)**

**IN THE MATTER OF THE LAND REGISTRATION ACT NO.8 OF 2012 OF KENYA**

**AND**

**IN THE MATTER OF THE LAND ACT NO.6 OF 2012 LAWS OF KENYA**

**BETWEEN**

**DANIEL KIIO MBALI C/O MARTHA MWENDE MULEI.....APPLICANT**

**=VERSUS=**

**COSMAS MBALI MATHEKA.....RESPONDENT**

**R U L I N G**

1. By his Notice of Preliminary Objection dated 19<sup>th</sup> September, 2019 and filed in court on 20<sup>th</sup> September, 2019, the Respondent herein seeks to have the Applicant's entire suit dismissed and or struck out in limine on the grounds that: -

**(i) That this matter is time barred and/or stale.**

**(ii) That this suit is therefore an abuse of the court process and should be struck out at once with costs.**

2. In his grounds of opposition to the Preliminary Objection, the Applicant has stated that: -

**1) That the Preliminary Objection dated 19/09/2019 is a delaying tactic aimed at delaying and frustrating the Applicant from accessing justice and offends Articles 48 and 159 (2)(d) of the Constitution of Kenya, 2010, Sections 1A and 3A of the Civil Procedure Act, 2010, Section 11 of the Fair Administrative Actions Act, 2015 and the Applicant's Legitimate Expectation for a full trial on merit.**

**2) That the Preliminary Objection dated 19/09/2019 lodged by the Respondent in this matter which is brought by way of an Originating Summons is NOT a pure point of law, is general, speculative and academic for the facts of the matter are disputed the Respondent having filed a Replying Affidavit on record and requires calling of evidence-in-chief, cross-examination and re-examination of witnesses.**

**3) That the interest of justice requires that this matter should proceed for full hearing on merit without any further delay and procrastination by the Respondent.**

The grounds of opposition are dated 23<sup>rd</sup> October, 2019 and were filed in court on 05<sup>th</sup> December, 2019.

3. The Preliminary Objection was disposed off by way of written submissions with the Respondent and the Applicant filing their submissions on 05<sup>th</sup> December, 2019 and 30<sup>th</sup> January, 2020 respectively.

4. It was submitted on behalf of the Respondent that time in this suit started running in the year 1991 when the Respondent had the land registered in his name. That the Applicant cannot deny that he was not aware of the fraud as he has deponed in paragraph 13 of his supporting affidavit that they had a family meeting on 28<sup>th</sup> June, 2013 to address the issue and the chief of Kikumini location heard the

Applicant's grievances and that it was unanimously agreed that the Respondent should give it back to him. The Respondent's Counsel termed the act as a clear confession of the knowledge of fraud from the year 2013. The Counsel cited **Section 4(2) of the Limitation of Actions Act** which provides that: -

*"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued."*

5. In support of his submissions, the Counsel further relied on the case of **Bosire Ongero vs. Royal Media Services [2015] eKLR** where the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and as such, the instant suit is statute barred and the court has no jurisdiction to entertain it given that from the totality of the summons, the Applicant accuses the Respondent of fraud.

6. On the other hand, the Counsel for the Applicant submitted that the Preliminary Objection lodged by the Respondent is not a pure point of law in that it is general, speculative and academic for the facts of the matter are disputed through the replying affidavit filed by the Respondent. The Counsel added that this would require calling of evidence where witnesses will be subjected to cross-examination.

7. The Counsel termed the submissions by the Respondent's Counsel as the Counsel's own arguments and understanding of the evidence and the facts in this case. The Counsel was of the view that given those circumstances, there is no valid provision(s) of the law which has been cited as the basis of the purported preliminary objection in light of **Mukisa Biscuits Manufactures vs. West End Distributors [1969] EA 696** which defined what constitutes a preliminary objection. The Counsel relied on the case of **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others [2015] eKLR** where the Supreme Court pronounced itself thus: -

*"The Court endorsed the principle in Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696, in the case of Hassan Ali Joho & another vs. Suleiman Said Shahbal & 2 Others Petition No.10 of 2013, [2014] eKLR [paragraph 31];*

*"to restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors (1969) EA 696:*

*'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 demurer. 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 in the exercise of judicial discretion."*

*[15] The Joho decision has been subsequently cited by this Court in Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Civil Application No.23 of 2014, [2014] eKLR; and in Aviation & allied Workers Union Kenya vs. Kenya Airways Ltd & 3 Others, Application No.50 of 2014, [2015] eKLR, in which the Court further stated [paragraph 15]:*

*"Thus the preliminary objection may only be raised on a 'pure question 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."*

*[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Civil Application No.14 of 2014, [2014] eKLR)."*

The Counsel went on to submit that a glance at the facts of this case will clearly show that there are a number of disputed facts which will only be resolved after full hearing and as such, they cannot form the basis of a Preliminary Objection. The Counsel pointed out the Originating Summons is based on customary trust among other well founded provisions of the law. The Counsel added that the facts and evidence of the family meeting held on 28<sup>th</sup> June, 2013 will require examination of the witnesses.

8. It was also submitted that a Preliminary Objection cannot be based on disputed facts. The Applicant's Counsel added that the instant claim is properly before court and in accordance with the provisions of Order 37 Rules 1, 3 and 14 of the Civil Procedure Rules, 2010, Sections 1A and 3A of the Civil Procedure Act No.3 of 2012 and Land Act No.6 of 2012 as well as the rules made thereunder.

9. The Counsel termed the Preliminary Objection as a delaying tactic aimed at frustrating the Applicant from accessing justice. He urged the Court to dismiss the Preliminary Objection with costs.

10. Having read the Preliminary Objection, the grounds of opposition as well as the submission filed, it is clear that the facts herein regarding the Applicant's claim to 11.5 acres out of land parcel Makueni/Kikumini/412 are contested and this would call for ascertainment of the same during hearing. Even though the Respondent contends that the Applicant has based his claim on allegation of fraud, it cannot be gainsaid that the latter has primarily brought the issue of customary law amongst other provisions of the law as was correctly put by the Applicant's Counsel. I would agree with the Applicant's Counsel that the instant Notice of Preliminary Objection is meant to obscure the Originating Summons and as such, it does not meet the test of what constitutes a Preliminary Objection enunciated in the celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors [1969] EA 696**.

11. The upshot of the foregoing is that the Preliminary Objection lacks merit and same must fail. In the circumstances, I hereby proceed to dismiss it with costs to the Applicant.

**Signed, Dated and Delivered at Makueni via email this 21<sup>st</sup> day of May, 2020.**

**MBOGO C. G.,**

**JUDGE.**

**Mr. G. Kwemboi – Court Assistant**