



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 85 OF 2019

GATUANYAGA RESIDENTS ASSOCIATION.....PLAINTIFF/RESPONDENT

VERSUS

DELMONTE COMPANY LIMITED.....1ST DEFENDANT/OBJECTOR

NATIONAL LAND COMMISSION.....2ND DEFENDANT

COUNTY GOVERNMENT OF KIAMBU.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

By a **Notice of Preliminary Objection** dated **22nd May 2019**, the **1st Defendant/ Objector** sought for the dismissal of this suit on the grounds that;

- 1. The suit is time barred***
- 2. The Plaintiff being an unincorporated body has no capacity to sue in the manner it has purported to do.***
- 3. This Honourable Court has no jurisdiction to hear and determines the claim herein which is based on alleged historical injustices dating back to 1895.***

The Plaintiff/ Respondent opposed the said Preliminary Objection and filed a Reply to the Preliminary Objection dated **24th October 2019**, on the grounds that;

- 1. The Plaintiff is an incorporated body duly registered under the Societies Rules 1968 and was issued with certificate of registration number 51212. Thus, it has capacity to sue in the manner it has done.***
- 2. This Honourable Court has sufficient jurisdiction to determine the issue at hand under Article 162 and 165 of the Constitution of Kenya 2010.***
- 3. That this Honourable Court has the jurisdiction to issue interim orders to restrain the Defendant/ Respondent from interfering with the Applicant's peaceful enjoyment of her home pending the hearing and determination of the main suit.***
- 4. That the suit has merits and the prayers sought are well within the provisions of law and the jurisdiction of this Honourable Court.***

On **29th October 2019**, the Court directed that the Preliminary Objection be canvassed by way of written submissions and in compliance with the said directives, the **1st Defendant/ Objector** through the **Law Firm of Njoroge Regeru & Company Advocates**, filed its written submissions on **13th February 2020**, and submitted that the **Cause of Action** herein is the alleged eviction of the Plaintiff's alleged ancestors from the suit property before **1969**, and that the year of accrual of cause action has been specifically admitted in the Plaintiff's own evidence .

It was their submissions that under **section 7 of the Limitations of Actions Act**, such a claim ought to have been instituted within 12 years

and the said **12 years** lapsed **39 years ago**, hence the claim is hopelessly time barred. The 1st Defendant further submitted that it acquired its interest over the suit property before **1969**, and based on the assurance given by **Section 7 of the Limitations of Actions Act**, it proceeded to set up massive investments on the suit property and by instituting the instant suit, the Plaintiffs are seeking to undo the very rationale of **section 7 of the Limitations of Actions Act**.

It was their submissions that issue of Limitation goes to the jurisdiction of the Court to entertain the claim and in the circumstances, the Court does not have jurisdiction.

It was further submitted that the Plaintiff/ Respondent is described as a Society registered under the Societies Act, and that an unincorporated body has no capacity to sue and therefore the entire case ought to fail. The 1st Defendant/Objector relied on the case of **Kipsiwo Community Self Help Group...Vs... Attorney General & 6 others(2013)** in which the Court held that;

“I think the issue is not really whether unincorporated entities may commence action but the manner in which unincorporated entities may commence proceedings. A number of individuals may come together and form an identifiable group. They can bring action as the group, but it does not mean, that the group is now vested with legal capacity to sue and to be sued. In such instance, the members of the group have to bring action in their own names, as members of the Group, or a few can bring action on behalf of the other members of the group, in the nature of a representative action. Unincorporated entities have no legal capacity and cannot therefore sue in their own names. They can however sue through an entity with legal capacity. Just because the Constitution allows unincorporated bodies to sue, does not vest such bodies with legal capacity, and such bodies do not become persons in law, and cannot be the litigants or sue in their own standing. They still have to use the agency of a person recognized in law as having capacity to sue and to be sued.”

The Defendant/objector further submitted that the Preliminary Objection is merited and urged the Court to dismiss the suit with costs

The Plaintiff/ Respondent through the **Law Firm of Mburu Machua & Company Advocates**, filed its submissions dated **21st July 2020**, and submitted that their suit arises from the moment the 1st Defendant's lease was bound to expire. It was further submitted that in **Kipsiwo Community Self Help Group...Vs... Attorney General & 6 others (2010)**, the Court expressed itself that there was no provision in either the **Constitution** or the **National Land Commission Act**, which ousts the jurisdiction of the trial Court to make a determination, that was founded on historical injustices. It was their further submissions that by their conduct of not coming to Court, did not relieve the government or any of its organ from the obligations relating to the bill of rights. Further that the right to own property as envisaged under the Constitution is inviolable and that the Plaintiff /Respondent has not in its pleadings used the term historical injustices and that their claim is based on violation of their rights to property.

Further that **Article 260** of the **Constitution** defines a person to include;

“includes a Company, Association or other body of persons whether incorporated or unincorporated;”

It was their further submissions that the Plaintiff/ Respondent is an Association of individuals, who have come together to bring this suit as opposed to having multiple suits, all involving the same subject matter and that the plaintiff has brought the matter in good faith so as to uphold the supremacy of the **Constitution** and therefore the plaintiffs have the **capacity** to sue. Plaintiffs relied in the case of **Mumo Matemu...Vs...Trusted Society of Human Rights Alliance & 5 others(2014)eKLR**. The court was urged to dismiss the Preliminary Objection

The 1st Defendant/Objector filed Supplementary Submissions dated **15th June 2020** and submitted that vide a ruling dated **3rd June 2020**, the **Honourable Lady Justice Grace Kemei** upheld a Preliminary Objection in **Murang'a ELC No. 86 of 2018, Kenya National Chambers of Commerce & Industry, Murang'a Chapter & Others...Vs... Delmonte Kenya Limited & Others**, which was similar to the one before this Court and the Court was urged to be persuaded by the same

The Court has carefully read and considered the written submissions, the Preliminary Objection, the relevant provisions of law and finds the issue for determination is ***whether the Preliminary Objection is merited.***

What is a Preliminary Objection? Whatever has been raised by the 1st Defendant/Objector, does it amounts to a Preliminary Objection? If so, is the said Preliminary Objection merited?

The locus classicus of what a Preliminary objection is, is the case of **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** wherein the Court described a Preliminary Objection to mean:-

“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 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”.

Further In the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, 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.”

Therefore, it is clear that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

Having made a description of what a Preliminary Objection is , the Court will then determine whether what has been raised by the 1st Defendant/Objector amounts to a Preliminary Objection.

The Preliminary Objection herein is based on three limbs. That the suit is **time barred**, that the Plaintiff does not have the **locus standi** to bring the instant suit and that the Court does not have jurisdiction to hear and determine the matter.

The 1st Defendant's/ Objector's submitted that the instant suit is time barred as it is based on the alleged eviction of the Plaintiffs ancestors in **1969**. Courts have occasionally held that the issue of Limitation goes to the jurisdiction of the Court. Is the Court herein barred by **Section 7 of the Limitation of Actions Act** from entertaining the matter.

It is not in doubt that jurisdiction is everything and a Court without jurisdiction must down its tools. See the case of *Owners of Motor Vessel "Lillian" ...Vs...Caltex Oil Kenya Ltd 1989 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 the moment it holds the opinion that it is without jurisdiction."

Further it is not in doubt that the issue on whether or not the instant suit is time barred raises a point of law that will not require the ascertaining of facts. The Court will only have to look at the pleadings and determines what the law says to make a finding on whether the Preliminary Objection is merited. Therefore, the Court finds and holds that the issue of time Limitation and the jurisdiction of this Court are Preliminary Objections properly raised.

The Preliminary Objection is also based on the grounds that the Plaintiff being a Society registered under the Societies Act cannot sustain the suit. The question of whether the Plaintiffs have **locus standi** to file this suit goes to the jurisdiction of this Court. Without **locus**, a suit cannot stand and thus the Court finds and holds that the same is a properly raised Preliminary Objection. See the case of *Law Society of Kenya ...Vs... Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000*, where the Court held that :-

"Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law". Further in the case of Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-

"the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings".

The Court has already held and found that what has been raised amounts to properly raised Preliminary Objections, and the next issue to determine is whether the said Preliminary Objection is merited.

It is the Objector's contention that the suit is time barred as it raises issues that are time barred specifically by **section 7 of the Limitations of Actions Act** . That the suit is hinged on the eviction of the Plaintiffs alleged ancestors in **1969**. However, the Plaintiff/ Respondent has denied this and averred that their cause of action is on the expired lease by the 1st Defendant/Respondent. The Court was further urged to be persuaded by the Ruling of the Court in the case ELC 86 of 2018 Murang'a. While the Court does not have the benefit of the pleadings in the said suit, the Court notes that as per the Court's ruling in paragraph 2 in that case the Plaintiffs had sought for;

"The Plaintiffs sought inter alia ; a declaration that the Plaintiffs area entitled to 1500 acres of land out of the suit lands , the 1st defendant do transfer the said 1500 acres to the Plaintiffs to hold in trust for the members of the 1st plaintiff, a permanent injunction restraining the Defendants from renewing and or extending the leases of the suit lands in favour of the 1st defendant until the historical interests of the Plaintiffs have been provided for."

In the above case, the Court in holding that the suit was statute barred held that the cause of action according to the Plaintiffs arose in **1895**, when the colonial government illegally alienated land that belonged to their ancestors and therefore the claim is time barred given that the Limitations of Actions Act was enacted and came into force on the **19th April 1968**. It was the Court's further contention that under **Section 15 of the National Land Commission Act**, the Commission was exempted from the provisions of the Limitation of Actions Act, the same does not apply to the Court.

However, having gone through the instant suit, apart from the fact that the orders sought in the instant suit are distinct from the ones sought in the above suit, it is the Court's considered view that the instant suit stems from the Gazette Notice dated **1st March 2019**. That is essentially what the Plaintiff's/Respondent's claim seeks to impugn; the said gazette Notice by the **National Land Commission**, the 2nd Defendant herein. What then the Court would be determining in this instance case, would be whether the Gazette Notice is merited or not and given that the said Gazette Notice is dated **1st March 2019**, the Court finds and holds that the suit is not time barred.

While in the Murang'a case, the Plaintiffs were seeking for their entitlement of the property, the Plaintiffs in this case are seeking to impugn a Gazette Notice by a body which has the mandate to look into historical injustices. Therefore, this Court finds and holds that the suit is not time barred by the Provisions of **Section 7 of the Limitations of Actions Act**.

On whether the Plaintiffs have the requisite **locus** to maintain this suit, under **paragraph 1 of the Complaint dated 7th May 2019**, the Plaintiffs describe themselves as an Association duly registered under the Societies Act and a Certificate of Registration number **51212 issued. Section 41** of the **Societies Act** provides;

“Whereby a Society is charged with an offence under this Act or any rules made thereunder, the Society may appear by a representative, who may enter a plea on behalf of the Society and conduct the Society’s defence on its behalf.

(2) In this Section representative in relation to a Society means a person who the Court is satisfied has been duly appointed in writing by the Society to represent it.”

It is not in doubt that the law requires a Society to bring the suit through its representative which in this case the Plaintiffs have failed to do. The Plaintiffs having brought the suit in their own name, then the Court will have no option but to find and hold that indeed the Plaintiff does not have the requisite **locus standi**. Without **locus**, then it follows that the suit cannot stand and the Court thus lacks jurisdiction

Having now carefully read and considered the pleadings by the parties and the rival written submissions, the Court finds and holds that the instant suit is not time barred. However, the Plaintiff herein has no **locus standi** to bring the instant suit and therefore the suit herein is bad in law

The Upshot of the foregoing is that the **Preliminary Objection** is found to be **merited** on the basis that the Plaintiff has no **locus standi** and therefore the suit is found to be without merit for lack of standing (*locus Standi*). Consequently the Preliminary Objection dated **22nd May 2019**, is upheld and the suit is struck out entirely with costs to the 1st Defendant/ objector.

It is so ordered.

Dated, signed and Delivered at Thika this 5th day of November 2020

L. GACHERU

JUDGE

5/11/2020

Court Assistant – Lucy

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 **15th 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 Karanja Holding Brief for Mburu Machua for the Plaintiff/

Respondent

Mr. Thuo for the 1st Defendant/Objector

No Appearance for the 2nd Defendant

No Appearance for the 3rd Defendant

No Appearance for the 4th Defendant

L. GACHERU

JUDGE

5/11/2020