



REPUBLIC OF KENYA



Ruo v Joint Commercial Agencies Ltd & 2 others (Environment & Land Case E181 of 2023) [2024] KEMC 65 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEMC 65 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
ENVIRONMENT & LAND CASE E181 OF 2023
PA NDEGE, SPM
JANUARY 30, 2024**

BETWEEN

FELIX MBUGUA RUO PLAINTIFF

AND

JOINT COMMERCIAL AGENCIES LTD 1ST DEFENDANT

DAVIS KARANJA MWANGI 2ND DEFENDANT

SAMWEL WANJOHI KARIUKI 3RD DEFENDANT

RULING

Introduction

1. In this suit, the plaintiff herein, Joseph Kamande Mugane, is seeking the following orders against the defendants herein, Point Commercial Agencies, David Karanja Mwangi and Samwel Wanjohi Kariuki (hereinafter referred to as the 1st, 2nd and 3rd Defendant, respectively): -
 - a. A declaration that the plaintiff herein is the legal owner of the parcel of land known as Dundori/ Lanet Block 33/78.
 - b. Cancellation of the Title Number Dundori/ Lanet Block 33/78
 - c. An order of permanent injunction restraining the defendants either by themselves, their agents, their servants, employees and/or agents from in any way interfering with the plaintiff's parcel of land known as Dundori/ Lanet Block33/78.
 - d. Costs of the suit and interests.
2. The 3rd defendant herein filed his Statements of Defence dated 07.11.2023 where he denied the plaintiff's claim to the suit premises herein, denied the allegations of fraud levelled against him and



notified the plaintiff of his intention to raise a preliminary objection to the suit herein, based on the following grounds: -

- a. That the suit being founded on contract of 08/11/2013 is statute barred by effluxion of time by dint of section 4(1)(a) of the Limitations of Actions Act, Cap 22 Laws of Kenya, and as such the suit is bad in law, misconceived and incurably defective.
 - b. That this suit being an abuse of court process should be dismissed with costs to the 3rd Defendant.
3. This ruling arises out of the Preliminary Objection.

Procedural Facts

4. This suit came up for mention on 09.11.2023, for hearing of an interlocutory application dated 23.05.2023, which was filed alongside the plaint for temporary conservatory orders. It was then agreed that the Preliminary Objection raised herein be canvassed before the application is set down for hearing. Directions were taken that the parties herein were to file and exchange their written arguments, submissions and authorities on the preliminary objection. Submissions were confirmed closed on 23.01.2023.

The Law on Preliminary Objections

5. I start off by stating that the law as to what constitutes a preliminary point of objection is relatively clear. The case of Mukisa Biscuit Manufacturing Co. Ltd –v- West End Distributors Ltd [1969] EA 696 lay it out pretty well that it is a point of law of either limitation or jurisdiction argued on the basis or premise that the facts as pleaded are true. In Mukisa (supra), Law J.A defined a preliminary objection to be: -

... 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 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.

6. On the same judgment Charles Newbold, P., Stated as follows:

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.

7. The High Court in Moses Likoye Wanjala v Bernard Wekesa Sambu [2013] eKLR defined the threshold for Preliminary Objection as follows: -

Threshold for Preliminary Objection

The legal delimitations for a preliminary objection were set a long time ago in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696. The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. It has been and continues to be quoted and reinforced by the superior courts including the Court of Appeal, and recently by the Supreme Court. I did not, therefore, understand why Mr Onsando wanted to re-invent the wheel. Nonetheless, I shall restate the principle for purposes of clarity.



As per Law J.A:

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.”

As per Sir Charles Newbold P:

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.”

As per our own J.B. Ojwang J (as he then was) in a simple and clear manner in the case of *Oraro v Mbajja* [2005] e KLR that:

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.?

8. In other words, when a party says that he has a preliminary objection to take out, the court expects the matter objected to be a complete demurrer in the plain eye-sight of the court.

Court's Determination

9. In this case, the plaintiff has based his claim on a sale agreement dated 08/11/2013, which the 3rd defendant has claimed not being aware of. The plaintiff however alleges fraud which, according to witness statements filed herein, was discovered on some times after 20.09.2021, the date when the 3rd Defendant herein is alleged to have been fraudulently issued with the title deed to the parcel herein. In my view, therefore, this suit requires a trial to ascertain as to when the plaintiff discovered the fraud or the fact that he would not get ownership and I rely on the authority of *Justus Tureti Obara vrs Peter Koipetai Nengisoi* [2014] e KLR where Okongo J. stated: -

...the proviso to section 26(a) of the *Limitation of Actions Act*, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.

10. The re-statement of the limited scope of a preliminary objection in the judicial decisions cited hereinabove brings me to the point where I hold that the Preliminary Objection by the plaintiff herein is not a true Preliminary Objection in the sense of the law. I have to refrain myself from holding a mini trial on the facts of the case in this Preliminary Objection as it would cease being a Preliminary Objection and become a Notice of Motion for striking out the suit. The issues herein are thus incapable of being handled as preliminary objections because of the limited scope of the



jurisdiction on preliminary objection. This is the reason why courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly.¹

11. In short, the issues in the preliminary objection herein requires proof by way of evidence of the facts which cannot be adduced by way of a preliminary objection. It is also trite that evidence must be on oath, except those of tender children. Such oath could be in the form of affidavits. No such material was properly laid for me in this preliminary objection. Even if they could have been laid, then the limited scope of preliminary objection could not have permitted me to look into the same.
12. Based on the above, I am clutching at a straw and with no stilts to stand on. The facts alleged by the parties herein are still disputed. This is the essence of a trial and the grounds in the Preliminary Objection are not sufficient enough to strike out the suit in limine. The upshot is that the Preliminary Objection is disallowed. Costs to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAKURU THIS 30TH DAY OF JANUARY, 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of: -

Plaintiff's Counsel: N/A

3rd Defendants' Counsel: Cheruiyot

Plaintiff: N/A

3rd Defendant: N/a

Cheruyot: We can have a mention date.

CT: Mention on 27/02/2024. MNTI

¹ See the words of Newbold P. in registering a strong deprecation on such improper preliminary objections in the Mukisa Biscuits case that "That the improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

