



Cheruiyot v Adero (Sued on his Behalf and as the Legal Administrator of the Estate of the Late Michael Adero Mudhune) & another; Rao (Interested Party) (Environment and Land Case E014 of 2023) [2025] KEELC 8509 (KLR) (4 December 2025) (Ruling)

Neutral citation: [2025] KEELC 8509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE E014 OF 2023
E ASATI, J
DECEMBER 4, 2025**

BETWEEN

HEZRONE KIMELI CHERUIYOT PLAINTIFF

AND

STEPHEN OKOTH ADERO (SUED ON HIS BEHALF AND AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE MICHAEL ADERO MUDHUNE) 1ST DEFENDANT

BRIAN KIPKIRUI KIPTERE 2ND DEFENDANT

AND

LUCY ACHIENG RAO INTERESTED PARTY

RULING

1. This ruling is in respect of a Preliminary Objection raised by the 1st Defendant vide the Notice of Preliminary Objection dated 3rd February, 2025.
2. The suit was initiated vide the plaint dated 9th October, 2023 by the plaintiff as a purchaser of the suit land seeking for orders of permanent injunction and specific performance against the Defendants.
3. Vide the Preliminary Objection, the 1st Defendant seeks that the suit be struck out on the grounds that;
 1. inclusion of Interested Party is non-suited as no cause of action is disclosed against her, no remedy sought, inclusion is an abuse of court process i.e. Order 1 rule 1, 3, and 15 of the Civil Procedure Rules.
 2. section 6 of *Land Control Act* renders any agreement for sale and transfer of agricultural land that has not been consented to by land board within six (6) months of its execution void for all



purposes. Prayer for specific performance, injunction and costs on a void agreement is an abuse of court process. Court has jurisdiction to extend time under section 8 of the [Land Control Act](#) and such extension can only be sought by way of an application.

3. parties are bound by Section 6 of the [Arbitration Act](#) 1995 to resolve the dispute by way of Arbitration as per clause 7c of Land Sale Agreement. Therefore, present suit is brought before court prematurely and is therefore an abuse of the process of this Honourable Court.
 4. the present suit is an abuse of court process as it offends Order 37 Rule (1) a & b of the Civil Procedure Rules as any claim of rights or interest by a creditor, devisees and/or legatee in respect to estate of the estate of deceased person ought to be initiated by way of summons and not plaint as is in the present case.
 5. the present suit is an abuse of court process as it offends section 4(1) of the Law of Limitation Act since the suit is founded on contract which has a limitation period of six (6) years from the date cause of action arose and prior leave of court not sought for an extension.
 6. this suit should consequently be struck out with costs.
4. The Preliminary Objection was disposed of by way of written submissions. Written submissions dated 3rd March, 2025 were filed by Joshua Odhiambo Nyamori Advocate on behalf of the Plaintiff. Counsel submitted that the issues for determination in the Preliminary Objection are;
1. whether the preliminary objection are merited.
 2. whether the Interested Party is a proper party in the suit.
 3. whether the Memorandum of Agreement of sale dated 24th March, 2011 is void by dint of section 6 of the [Land Control Act](#).
 4. whether the present suit is brought before court prematurely by dint of section 6 of the [Arbitration Act](#) 1995.
 5. whether the process of Originating Summons under Order 37 Rule 1(1) & (b) of the Civil Procedure Rules is suitable for originating the present suit to resolve complex and contentious question of facts and law.
 6. whether the present suit is time barred by dint of section 4(1) of the [Limitation of Actions Act](#) for being predicated on a contract executed on Memorandum of Agreement of sale dated 24th March, 2011.
 7. whether this suit should be struck out.
 8. who pays costs of the Preliminary Objection?
5. Relying on the cases of Mukisa Bisuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696, Mwalungu Mwambui Nginyo & 201 Others -vs- Total Oil Product (East Africa Limited & Another (2021)eKLR among others, Counsel submitted that a Preliminary Objection can only be raised purely on a point of law and not to question the truthfulness of a fact in a case because then, it would be a breach of the rules of procedure and ought not be entertained by courts of law.
6. That the 2nd, 3rd, 4th, and 5th grounds of the 1st Defendant's Notice of Preliminary Objection dated 3rd February, 2025 will require that the court considers and deals with matters of fact and consider evidence on the Memorandum of Agreement of Sale dated 24th March, 2011 and subsequent memoranda of



acknowledgement and correspondence between the parties, a process that should wait for the full hearing of the suit.

7. Counsel submitted further that the Supreme Court in the *Communication Commission of Kenya & 4 Others -vs- Royal Media Services Limited & 7 Others* [2014]eKLR relying on the holding of the High Court in the case of *Meme -vs- Republic* [2004] 1 EA 124, the court provided qualifications for one to be joined in a suit as an interested party as follows – where joinder of the Interested Party would result in complete settlement of the matter in dispute, provide for the protection of the rights of a party which would otherwise be adversely affected and to prevent likely course of proliferated litigation. That two questions need to be answered in determining whether or not to join a party into the proceedings namely; what is the intended party’s state and relevance in the proceedings and, will the indented Interested Party suffer ant prejudice if denied joinder?
8. That the Interested Party in the suit meets the qualification to be a proper party to the present dispute as set out in the plaint.
9. That the Interested Party has instructed Counsel and has not only indicated that she has an interest in a portion of the disputed property but that she actually holds the title deed for the same.
10. On whether the Memorandum of Agreement of Sale dated 24th March, 2011 is void by dint of section 6 of the *Land Control Act*, Counsel submitted that the transaction between the deceased and the Plaintiff having put the Plaintiff in possession of the subject property created a constructive trust in favour of the Plaintiff hence the Defendant cannot take advantage of the provisions of Section 6 of the *Land Control Act*, Counsel relied on the case of *In re Estate of Nasotokini Ole Sane alias Nasotokini Lesane (Deceased)* (2019)eKLR among other cases to support the submissions.
11. On whether the suit was brought before court prematurely by dint of section 6 of the *Arbitration Act*, 1995;

Counsel submitted that a party who claims that a contract is a forgery generally cannot plead the arbitration clause within that contract and due to the principle of separability. That if the Defendant is claiming that the contract if fraudulent, it means that the arbitration clause is also invalid and cannot be enforced.
12. That the suit needs to proceed to full hearing for the parties to have opportunity to present evidence. Counsel submitted that Originating Summons under Order 37 Rule 1(a) and (b) is generally not suitable for initiating a suit with complex and contentious question of fact and law as the court will have to deal with in the present suit.
13. Counsel submitted further that the present suit is not time barred by dint of section 4(1) of the *Limitation of Actions Act*.
14. Counsel urged the court to find that the 1st Defendant’s objections are not merited and to overrule the same.

No submissions were filed by the Defendants and the Interested Party.

15. I have considered the grounds of the Preliminary Objection and the submissions filed by the Plaintiff.
16. Without any submissions being filed by the 1st Defendant the grounds of the Preliminary Objection remain bare and un-expounded.
17. Ground 1 of the Preliminary Objection relates to joinder of the Interest Party as a party in the suit.



18. No objection has been raised by the Interested Party on her joinder in the suit. The Plaintiff has demonstrated that the Interested Party who claims an interested in the suit land was properly joined as a party in the suit.
19. Regarding ground 2 of the Preliminary Objection which relates to the provisions of Section 6 of the Land Control Act, this court is guided by the decision of the Court of Appeal in Willy Kimutai Kitlit -vs- Michael Kibet [2018]eKLR where it was held that;

Thus since the current Constitution has by virtue of article 10(2)(b) elevated equity as a principle of justice to a constitutional principle and requires the court in exercising judicial authority to protect and promote that principle amongst others, it follows that the equitable doctrine of constructive trust and proprietary estoppel are applicable to and supercede the Land Control Act where a transaction relating to an interest in land is void ab initio and unenforceable for lack of consent of the Land Control Board.

- (26) For the reasons in paragraph 20, 21, 22, 23, 24 and 25 above, we are in agreement with Macharia Mwangi Maina decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act though this is subject to the circumstances of the particular case. Upon the application of the equitable doctrines, the court in its discretion may award damages and where damages are an inadequate remedy, grant the equitable remedy of specific performance.
20. That Court of Appeal proceeded to hold in the case that lack of consent of the Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust.
21. In the present case, the Plaintiff pleaded that upon execution of the agreement he was put in possession of the property and that he is willing to perform his part of the sale agreement.
22. I have considered the grounds of the Preliminary Objection against the principle that courts should endeavor to sustain suits as opposed to terminating them summarily. I have also read the decision in Blue Shield Insurance Company Ltd -vs- Joseph Mboya Oguttu (2009)eKLR where the Court of Appeal held that striking out of pleadings is a drastic remedy and should only be resorted to where a pleading is a complete sham.
23. The claim in the plaint cannot be said to be a complete sham. It requires an opportunity to be prosecuted by the Plaintiff and interrogated/tested by the defence.
24. For the foregoing reasons, the court finds that the Preliminary Objection is unfounded and hereby dismisses it.
25. Costs to in the main suit.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 4TH DAY OF DECEMBER, 2025 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:



Maureen: Court Assistant.

Odhiambo for the Plaintiff.

No appearance for the Defendants and the Interested Party.

