

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 757 OF 2017

ALI MOHAMED EGAL PLAINTIFF

VERSUS

ANTONY SAITOTI SENET 1ST DEFENDANT

PATRICK KIBET MUNERIA 2ND

DEFENDANT DISTRICT LAND REGISTRAR KAJIADO 3RD

DEFENDANT

RULING

(In respect of the Notice of Preliminary Objection dated 1st August 2018 by the 1st and 2nd Defendant)

1. This ruling is in respect of the **Notice of Preliminary Objection** dated **1st August 2018** by the 1st and 2nd Defendants (*hereinafter referred to as "the Objectors"*). By way of the said Preliminary Objection, the Objectors seek orders that the Plaintiff's suit be struck out or dismissed *in limine*, with costs awarded to them.
2. The objection is founded on the following grounds:
 - a) **Locus Standi:** That the Plaintiff lacks the requisite *locus standi* to institute and prosecute this suit.
 - b) **Limitation of Actions:** That the events complained of arose 19 years ago during the lifetime of one Mohamed Danir Egal, who took no action during his lifetime, rendering the suit stale and time-barred.
 - c) **Statutory Non-Compliance:** That the suit offends the mandatory provisions of **Section 3(3) of the Law of Contract Act (Chapter 23, Laws of Kenya)** regarding the requirement for written contracts in dispositions of land.

- d) **Frivolity of the Suit:** That the suit is founded on hearsay, greed, and spite and ought to fail at the threshold.
- e) **Lack of Evidentiary Material:** That there is no evidence supporting the alleged sale by the grandfather to the 1st Defendant to the father of the Plaintiff. Specifically, the 1st and 2nd Defendants aver that there is:
- i. No contract of sale;
 - ii. No application for consent to transfer;
 - iii. No consent to transfer;
 - iv. No application for registration of transfer;
 - v. No mutation forms or sketch plans indicating the land allegedly purchased by the Plaintiff's father;
 - vi. No evidence of the creation of the alleged L.R. No. Kajiado/Ololoitikoshi Kitengela/139; and
 - vii. No copy of the alleged will annexed to the grant of probate.

Directions

3. The court directed that the preliminary objection be canvassed by way of written submissions. The submissions of which have been duly considered in the writing of this ruling.

Analysis and Determination

4. The issue for determination before this Court is a singular one; whether the 1st and 2nd Defendants' Notice of Preliminary Objection dated 1st August 2018 raises pure points of law capable of disposing of this suit at this preliminary stage.
5. The law regarding what constitutes a valid Preliminary Objection is settled in this jurisdiction. The *locus classicus* on this subject is the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696**, where Sir Charles Newbold P. stated:

"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."

6. The Learned Judge proceeded to issue a critical caveat which guides this Court today, when he stated 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 has to be ascertained or if what is sought is the exercise of judicial discretion."

7. I have carefully examined the grounds raised by the 1st and 2nd Defendants in their Preliminary Objection. Ground 1 alleges lack of *locus standi*; Ground 2 alleges that the suit is time-barred due to events occurring 19 years ago; and Ground 3 alleges non-compliance with Section 3(3) of the Law of Contract Act. Most notably, Ground 5 lists a series of factual assertions, stating there is *"no single shred of evidence"* regarding the sale, consent, or mutation of the suit land.
8. A plain reading of these grounds reveals that they are not pure points of law. To determine whether the Plaintiff has *locus standi*, this Court would be required to examine documents regarding the estate of the deceased and the capacity in which the Plaintiff sues. Similarly, the plea of Limitation of Actions (Ground 2) is not absolute on the face of the pleadings; determining whether the suit is time-barred often requires the Court to ascertain when the cause of action actually arose, or if there are equitable reasons (such as fraud or trust) that might exempt the suit from the limitation period. These are matters of evidence, not law.

9. Furthermore, Ground 5 of the objection invites the Court to conduct a "mini-trial" to ascertain the existence or non-existence of a contract, consents, and mutation forms. The Defendants are asking the Court to look at the sufficiency of evidence before the trial has even commenced.
10. As stated in Oraro vs. Mbaja [2005] eKLR, a court cannot determine disputed facts through a preliminary objection. The question of whether there was a valid sale or if Section 3(3) of the Law of Contract Act was violated relies heavily on the factual matrix of the transaction, which can only be unearthed through *viva voce* evidence and cross-examination.
11. Consequently, I find that the issues raised by the Applicants require the ascertainment of facts and the exercise of judicial discretion. They do not meet the threshold of a Preliminary Objection as envisaged in the *Mukisa Biscuit* case.
12. I do note that the so called preliminary objection has been pending in court over the last 7 years. It is inconceivable that it is still being referred to as 'a preliminary objection'. It is stale. Preliminary objections ought to be heard at the earliest opportunity otherwise they lose their meaning.
13. Accordingly, the Preliminary Objection dated 1st August 2018 is found to be devoid of merit. The Preliminary Objection dated is hereby dismissed with costs to the Plaintiff.
- It is so ordered.

Dated Signed and Delivered at Kajiado Virtually this 29th Day of January 2026.

**M.D. MWANGI
JUDGE**

In the virtual presence of:

Mr. Skikanda h/b for Mr. Osundwa for the Plaintiff
Mr. Ojwang Agina for the 1st and 2nd Defendants
N/A by the 3rd Defendant
Court Assistant: Mpoye

M.D. MWANGI

JUDGE

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