



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 253 OF 2014**

**SHITOLE MALESI.....PLAINTIFF**

**VERSUS**

**EDGAR KADENYI**

**MOSES M. LIHEMO**

**DISTRICT LAND REGISTRAR,**

**KAKAMEGA .....DEFENDANTS**

**RULING**

The 2<sup>nd</sup> defendant raised a preliminary objection and submitted that the plaintiff's entire case rests on fraud particularly to avoid coming under the provisions of the Limitation of Actions Act on ground that the case is time-barred. It is therefore incumbent on the plaintiff to provide even a little flesh on the skeleton of his allegations or his suit must fail even if it goes to full hearing.

In his pleadings and annexures under the 'list of documents to be relied upon', the plaintiff admits that the matter of ownership of the suit land was brought to the Shinyalu Land disputes Tribunal by the 2<sup>nd</sup> defendant when he sought eviction of the present/substituted plaintiff and one Ellam Shitote from the suit land. The tribunal found in favour of the 2<sup>nd</sup> defendant. Harani Shitote and Ellam Shitote appealed to the Western Province Provincial Appeals Committee which dismissed their appeal and they were after that evicted from the suit land since they never filed an appeal to the High Court against the committee's verdict. They had an opportunity then to raise the issue of the validity of the 1<sup>st</sup> defendant's and through him the 2<sup>nd</sup> defendant's title to the suit land. They never did and they are therefore surely estopped by record from bringing it up now or ever. The Central land Control Board's letter of Consent dated 8/6/78 authorised Shitote Malesi (original plaintiff herein) to subdivide land parcel Isukha/Lubao/589 and give a portion to Dr. Edgar Kadenyi absolutely for the consideration of Ksh. 7,000/=. The mutation (subdivision) form subdividing Isukha/Lubao/589 into 2 (two) numbers, 886 and 887, was signed by both the original plaintiff and the 1<sup>st</sup> defendant herein and was registered in October, 1978. The transfer of land form transferring title to Isukha/Lubao/887 to Dr. Edgar Kadenyi (1<sup>st</sup> defendant herein) was signed by both the original plaintiff and the 1<sup>st</sup> defendant herein before Mr. W. Minishi Advocate of the reputable firm of Khamati Minishi & Co. Advocates.

These documents are annexed to the plaint filed by the original plaintiff and the present/substituted plaintiff and they are proof that a clear and valid and aboveboard willing buyer willing seller transaction was done between the original plaintiff, Shitote Malesi, and the 1<sup>st</sup> defendant and under which the 1<sup>st</sup> defendant was given a clean clear and valid title to the suit land which he passed on to the 2<sup>nd</sup> defendant herein for valuable consideration. Is it therefore now being alleged that the documents which the plaintiff annexes and seeks to rely upon are forgeries. It is incumbent on the plaintiff to give specifics and particulars of where and how they are forgeries and who perpetrated them. Mere allegation will not suffice to sustain pleadings of fraud and it is for these reasons and on these grounds that the defendants pray that this case be dismissed at this stage with costs to the defendant.

The 1<sup>st</sup> defendant wants to associated himself fully with the submissions of the 2<sup>nd</sup> defendant's counsel on the preliminary objection raised by him and filed on 14<sup>th</sup> February, 2014 and wished to add as follows:-

The plaintiff's suit is not only incompetent, incurably defective but also offends the provisions of order 2 rule 10 (1) (a) of the Civil Procedure Rules 2010. The plaint as has been espoused by the learned counsel for the 1<sup>st</sup> defendant is lacking in material particulars.

The plaintiff submitted that, the law as regards what constitutes a proper preliminary point of law was re-stated in the oft-quoted case of Mukisa Biscuit Manufacturing co. Ltd. Vs. West End Distributors Ltd [1968] E.A. 697 where it was held that;

*"A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the*

*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 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.”*

J.B. Ojwang, J (as he then was) in the case of ‘Oraro vs. Mbajja [2005] e KLR had the following to state regarding a ‘Preliminary Objection’.

*“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.”*

The plaintiff submits that the issues raised by the 2<sup>nd</sup> defendant do not fall within the purview of the definition of preliminary objection and all the three grounds thereof should be dismissed with costs to the plaintiff.

This court has considered the preliminary objection and submissions therein. As stated above and as was held in the case of **Mukhisa Biscuit Manufacturers Limited vs West End Distributors Ltd** (Supra), Law , J.A. at page 700 observed:-

***“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 pleading and which if argued as Preliminary Objection may dispose of the suit.”***

The court held in *Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga v Eliud Timothy Mwamunga & Sagalla Ranchers Limited* (2017) eKLR

*“Indeed, as has been seen hereinabove, the effect of upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. Such summary dismissal or striking out of a case is a draconian issue that must be exercised with caution and as a last resort.”*

I find that the matters raised in the instant case are matters of evidence and not law and cannot be determined at this stage. The material particulars mentioned above are the facts of the case which need to be adduced and proved during the full hearing. Upholding a preliminary objection is to summarily dispose of an entire case without giving a party its day in court. I find that the preliminary objection has no merit and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7<sup>TH</sup> DAY OF MAY 2019.**

**N.A. MATHEKA**

**JUDGE**