

REPUBLIC O F KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ELC SUIT NO. E004 OF 2025 (O.S.)

RUMA PARK LODHE LIMITED.....

PLAINTIFF

-VERSUS -

KRISANTUS ODERO.....1st

DEFENDANT

THE LAND REGISTRAR, HOMA BAY

LANDS REGISTRY.....2ND

DEFENDANT

LAXMICHAND VIRCHAND GUTKA.....3RD

DEFENDANT

WILKISTA AWINO ODERO.....4TH

DEFENDANT

RULING

1. By an Originating Summons dated 3rd February 2025 the Plaintiff, a Limited Liability Company sued the Defendants seeking a number of reliefs including the relief of specific

performance of a contract based on an alleged sale of land. It did so under Order 37 Rule 14 of the Civil Procedure Rules. it was the Plaintiff's claim that it purchased the suit property, namely, Kanyamwa/Kabonyo/Kwandiku/1515, from the 1st Defendant, and commenced the process of transfer of the Title vide a duly signed letter of consent dated the 17th December 2014. Further, the 1st Defendant failed to transfer the property in question to it. It sought the determination of the following questions: -

1. THAT the 1 Defendant /Respondent to be compelled to surrender the Original title to the suit property KANYAMWA/KABONYO/KWANDIKU/1515 to facilitate the transfer and registration of New Title to the Plaintiff/Applicant.

2. THAT the Honourable court does issue a permanent injunction to the 1st Defendant/Respondent through his servants, agents barring him from selling, advertising for

sale and or in any way trying to alienate the suit property from the plaintiff /applicant and stop Trespassing and or Interfering with the quiet and peaceful possession and enjoyment of the suit property by the plaintiff/Applicant who is in possession of the suit property since the year 2015 as a bona fide purchaser having bought the same from the Defendant/Respondent.

3. THAT pending the hearing and Determination of this suit the 1st Defendant/ Respondent be ordered to Deposit the Original Title to the suit property in Court to preserve the subject matter herein.

4. THAT this Honourable court be pleased to make a finding that an order of Specific Performance is issued against the 1"Defendant/Applicant and proceed to order the Land Registrar to proceed and issue Title to the Plaintiff/Applicant herein by Taking Judicial Notice of the Court Proceedings

referred to herein and the supporting Documents filed.

5. THAT this Court does proceed to further issue an order directed to the 2nd Defendant for the removal/ cancellation of the caveat lodged against the title to the suit property including the one lodged by the 3rd Respondent in order to facilitate the transfer of the suit property or the Applicant.

6. THAT the Lands Registrar Homabay Land registry be and is hereby ordered to remove and cancel the said caveats lodged against the title to the suit property including the one lodged by the 3rd Respondent in order to facilitate the transfer of the suit property to the Applicant.

7. THAT the Honourable court be pleased to issue any other order and or directions in the interest of justice.

8. That the costs of this originating summons (to) be provided for.

- 2.** It relied on the grounds whose contents were rehashed in the Supporting Affidavit sworn by Bernard Gesicho Omae, one of the Directors of the Plaintiff, on 3rd February 2025. He deposed that the Plaintiff purchase the suit property on the 17th Day of December 2014. A letter of Consent to Transfer the suit property was issued by the land control board after the Defendant applied for it. Subsequent to that the Defendant did not avail the Original Title of the suit Property to it for transfer. Therefore, the Defendant filed a suit in Kisii High Court, being ELC case No. 464 of 2015. The suit was later transferred to Migori High court and given a new number of High Court at Migori ELC No. 78 of 2017. It was against two Defendants therein who were in Possession of the Original Title to the suit property.
- 3.** The Plaintiff herein averred further that in the pleadings of the said suit the Defendant admitted that he sought for the release of the original title in order to complete the sale transaction.

The Defendant acknowledged receipt of the purchase price as evidenced from the payment documents.

- 4.** Judgment was delivered in the suit. The Defendant (*sic*) herein, who was the plaintiff in the suit appealed vide Civil Appeal Number 117 of 2018. The Court of Appeal delivered its Judgement on the 8th Day of November 2024 in favour of the Defendant. Subsequently, the Defendant in the instant suit got possession of his Original Title to the suit property recently. Instead of facilitating the transfer to the plaintiff, he attempted to dispose the suit property to other would be buyers, and was busy trespassing onto it with the interested buyers. This was despite the fact of having given possession to the Plaintiff who was in occupation since 2015.
- 5.** The plaintiff lodged a caveat on the title to the property. It seeks specific Performance on the part of the Defendant. The 3rd Respondent too lodged a caution which was automatically cancelled by virtue of the Judgement by court of Appeal. The Plaintiff/Applicant prayed that this Court orders the removal of the said caveat in order to facilitate the transfer of the suit

property to the Applicant. Further, the Defendant was keeping the original Title to frustrate Plaintiff. The Plaintiff stood to suffer irreparable loss and damage if the Defendant was not compelled to produce the original Title for KANYAMWA/KABONYO/KWANDIKU/1515. He prayed for the reliefs sought.

- 6.** The 1st Defendant, Krisantus Odero, filed a Replying Affidavit he swore on 6th February 2025. He deposed that the application was misconceived, fraudulent, malicious, misleading and calculated (*sic*) and the Applicant had concealed material facts and information. Further, he did not dispute entering into a sale agreement with the Applicant for the sale of parcel No. KANYAMWA/ KABONYO/KWANDIKU/1515. Further, the Applicant acquired the consent for the transfer of the land without his knowledge and attendance at the land control board. They had agreed that the Applicant was to complete payment of the purchase price within 90 days after the date of signing the sale agreement but it failed to honour it. Moreover, his wives raised issues with the sale of the suit property because they did not participate in it and the subject was a matrimonial property.

- 7.** He added that consent of the land control board is valid for Six (6) months only, and upon expiry of the period the agreement for sale becomes null and void. He added that the agreement provided for referral of any dispute to Arbitration hence this court lacked Jurisdiction to entertain this matter.
- 8.** The 2nd Defendant filed grounds of opposition dated 22nd April 2025. They were that the Originating Summons was misconceived and without any basis in law; it did not disclose any cause of action against the said Defendant; the Plaintiff/Applicant did not demonstrate the involvement of the 2nd Defendant in the subject matter; the inclusion of the said Defendant was unjustified, speculative and an abuse of the court process; the 2nd Defendant had no legal interest or role in the dispute between the Plaintiff and the other parties to the suit; and the suit against the 2nd Defendant was fatally defective and ought to be struck out with costs.
- 9.** The 3rd Defendant, Laxmichand Virchand Gutka, filed a Replying Affidavit he swore on 28th February 2025. He deposed that the application was incurably defective, incompetent and

bad in law. It was scandalous, frivolous and vexatious and out rightly an abuse of the court process. Further, he lodged a caution to protect his legitimate instrument in the suit property. He did so under Section 71 of the Land Registration Act No. 3 of 2012.

10. He added that on 17th February,2014, he entered into a sale agreement with the 1st Defendant to purchase the suit land, at a purchase price of KShs 2,800,000/= only. The 1st Defendant was in the process of transferring the land parcel to him. He deposed that he would be prejudiced if the orders prayed for were granted. He swore further that the prayer to surrender of the original title to the suit property was premature and disregarded his established rights. The applicant would not suffer any prejudice if the same orders sought are not granted. He sought the dismissal of the application.

11. The 4th defend filed a Replying Affidavit she swore on 3rd May 2025, in which she deposed that the application was entirely misconceived, fraudulent, malicious and misleading. Further, she was neither present at the time of sale nor was she aware

that the suit land had been sold to the plaintiff hence the sale was done without her knowledge and consent. She deposed that Gesicho Omae expressed interest in buying the suit but since it was family it was agreed they (family) would have consultations within the family and give him a feedback. The sale agreement was entered into between the first defendant and without her involvement, knowledge or consent.

12. She deposed further that when the first defendant expressed intent to buy the suit land they had a meeting with him together with her husband at the first Defendant's Hotel in Kisii but she never heard of anything after that. On the material date of the meeting he caused her to thumb print on some document by giving them a sum of Kenya shillings 10,000/=. She could not understand how he went ahead and did an agreement with her husband despite knowing of her existence and that of her grandchildren. She also did not understand how the payments were made to the first defender since he never disclosed or exhibited any signs of the same and there was no clarity on the terms of payment of the contractual sum of

Kenya shillings 2.8 million and KShs 4.6 million. These made transaction questionable. There was no land control board consent given as required by law. The land was matrimonial property and the Land Control Board consent could have been issued without her physical presence. The plaintiff had come to court with unclean hands and a lot of untruth and discrepancies in the whole transaction. She asked that there should be dismissed with costs.

13. Following the institution of the suit and the service of the pleadings and filing of responses thereto, the 1st Defendant raised a Preliminary Objection dated 5th February 2025. It was based on three limbs which were that;

1. The suit is incompetent and an abuse of the Court process and should be struck out with costs at the earliest possible opportunity in that the same is time barred and or statute barred in accordance with the provisions of Section 4(1) (a) and Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya.

2. The Plaintiff/Applicant's suit herein is incurably defective as the same offends the provisions of Section 3(1) of the Arbitration Act Cap 49 Laws of Kenya for failure to refer the matter for arbitration as contemplated under paragraph 7 of the agreement between the parties hence this Honourable Court lacks Jurisdiction to entertain the suit.

3. The Plaintiff/Applicant's suit is incompetent, fatally defective, bad in law & an abuse of the Court process and should be struck out with costs to the 1st Respondent.

14. The Objection was canvassed by way of written submissions.

The 1st Defendant filed written Submissions dated 1st October 2025. He began by restating the grounds of the preliminary objection. Then he raised two issues for determination, being, whether the Plaintiff's suit is barred by effluxion of time as per Section 4(1)(a) and Section 7 of the Limitations of Actions Act. On these he submitted that Section 4 of the Limitations of Actions Act provides that actions founded on contract may not

be brought after the end of six years from the date on which the cause of action accrued. He added that Section 7 of the Act bars an action for recovery of land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. He defined the word "accrue", according to Black's Law Dictionary (10th Edition) to mean "to come into existence as an enforceable claim or right." He then summed it that the transaction between the Plaintiff and the 1st Defendant having taken place in the December of 2014, and Clause 3 thereof having provided that the balance of the purchase price was payable within 90 days of signing of the agreement the period of suing expired after six years yet the suit was filed on 4th FEBRUARY 2025. It therefore contravened Section 4 (I) of the Limitation of actions Act. He relied on the case in SOUTH NYANZA SUGAR COMPANY LIMITED v PAUL N LILA [2014] EKLR.

15. Regarding Section 7 of the Limitation of Actions Act, he argued that for one to recover land, they must have been in possession of the same before they lost it in one way or the

other for 12 years and more. He argued that the Plaintiff had not been in possession suit land by reason that the 1s Defendant had been litigating over the subject matter since the year 2015 in formerly KISII HIGH COURT ELC CASE 464 OF 2015 now MIGORI ELC CASE 78 OF 2017. He stated that all along the Plaintiff herein did not have possession nor use of the land. He relied on the Court of Appeal case of RUTH WANGARI KANYAGIA -VS- JOSEPHINE MUTHONI KINYANJUI [2017] eKLR. He added that the possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years which was not the case in the instant matter since only been ten (10) years had lapsed from when the cause of action accrued, and the Plaintiff was not in active possession or use of the and. He relied on the Court of Appeal case of GITHU - VS- NDEETE [1984] KLR 776.

16. He submitted further on what constitutes dispossession in adverse possession. I need not elaborate more on his submission on it because in the instant case I did not see a claim of adverse possession at all.

17. On its part, the Plaintiff submitted that the issues herein were whether the Preliminary Objection raises pure points of law capable of disposing of the suit at this stage; whether the facts relied upon by the 1st Defendant were contentious and therefore unsuitable for determination through a Preliminary Objection; whether the Plaintiff has demonstrated a valid and enforceable purchaser's interest warranting the matter to proceed for full hearing; and whether the Preliminary Objection is an abuse of the court process.

18. On the applicable law, it relied on the seminal decision on the nature and scope of preliminary objections, which is the *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where Law JA held that:

“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.”

19. It also added the definition by Sir Charles Newbold P. from the said decision which is to affect that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It

raises a pure point of law... It cannot be raised if any fact has to be ascertained

or if what is sought is the exercise of judicial discretion.”

20. It argued that the 1st Defendant’s Objection was not a pure point of law but was anchored on factual disputes, previous litigation, occupation, payment of consideration, and title possession. It was its contention that the Objection required evidentiary interrogation. It relied on the case of Oraro v Mbaja [2005] eKLR and that of Quick Enterprises Ltd v Kenya Railways Corporation Kisumu HCCC No. 22 of 1999.

21. It then argued that there was no contest that it purchased the suit property from the 1st Defendant and on 17th December 2014, the Land Control Board issued a valid Letter of Consent for transfer to the Plaintiff. That the 1st Defendant applied for this consent after receiving full consideration. It added that this

established a valid purchaser's interest as recognized in Section 52 of the Indian Transfer of Property Act (doctrine of lis pendens) and the equitable principles governing specific performance.

22. It argued further that the Applicant admitted in Kisii HCCC No. 464 of 2015 (later Migori ELC No. 78 of 2017) that he could not complete the transfer because the original title was in possession of third parties. That he expressly stated in the pleadings that he had sold the land to the Plaintiff and received the purchase price, and he approached the court to secure release of the original title so that he could complete the transfer. He added that that was an admission under Section 17 of the Evidence Act. He has since regained possession of the original title after judgment in the Migori ELC matter and the conclusion of the appeal therefrom on 8th November 2024 in his favour. He now has attempted to dispose the property to third parties and trespassed onto the land with strangers claiming to be potential buyers yet the Plaintiff was in occupation since 2015.

23. It argued that Equity would not permit the vendor who to defeat transfer. He relied on *Patel v Singh* [1987] KLR. It added that it lodged a caveat on the property to protect its purchaser's interest. Further, that the 3rd Respondent had lodged a separate caution also claiming purchaser's interest. These claims could not be resolved at the preliminary stage.

24. It relied on *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd* [2009] eKLR to define abuse of process. It added that it paid full consideration, took possession nearly ten years ago, made permanent developments and obtained valid consent for transfer. It prayed for the dismissal of the Objection.

ISSUE, ANALYSIS AND DETERMINATION

25. This Court was called upon to determine a preliminary objection raised by the 1st Defendant. The law on Preliminary Objections was enunciated well in ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696***, where the Court of Appeal for Eastern Africa, stated (Law JA) in part that

"So far as I'm 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."

26. In the same decision Sir Charles Newbold, President of the Court went on to state;

"a Preliminary Objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (Page 710).

27. In the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

28. It turns me to determining the point of law. Regarding jurisdiction, it is not to be gainsaid that it is everything when it comes to courts' powers to determine disputes. Without it the court does nothing no work at all even if that work may be demonstrated by any amount of output: it is simply a nullity.

29. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment)**, Nyarangi JA, underscored the significant of in the following terms:

“30. With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right

away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

30. Regarding the pleadings herein, the whole suit turns on a contract entered between the Defendant and the Plaintiff in the year 2014. Of it the plaintiff seeks specific performance. It has also sued the other defendants on account of the fact that by virtue of that said contract it had an interest in the suit land. Therefore, their actions regarding the cautions they had lodged on the said parcel of land were untenable and should be ordered cancelled. The first defendant raised a preliminary objection to the suit to the effect that it is time barred by virtue of Section 4(1) Limitation of Actions Act. The said

provision is to the effect that one can only sue on a contract within six years from the time of entry of the contract.

31. This court has considered the objection as against the law. It is clear from the record that the suit was, indeed, commenced in February 2025. This was which was after ten years from the entry or signing of the agreement which is alleged to have been breached. This is because from the plaintiff's own pleadings it averred that it bought the suit land from the 1st Defendant on 17th December 2014 and obtained the land control board consent for transfer on the said date but the defendant refused or failed and/ or neglected to surrender to the original title deed for purposes of the transfer of the property to it. It is clear to me therefore that the cause of action arose on 17th of December 2014. The six years the law provides for to sue would, after 17th December 2014 end on 16th of December 2020. That being so, and this suit having been instituted on 5th February 2025 it was four years after the expiry of the period. Thus, any declarations regarding breach

of that contract and specific performance are time barred by virtue of Section 4(1) of the Limitation of Actions.

32. It follows that the basis for the claim on the contract which would have given proprietary interest on the suit land having faded by virtue of limitation of time, the claims against the other defendants that they lodged cautions to the detriment of the plaintiff too are not legally tenable due to limitation of actions. The Plaintiff cannot base the contract to sue the other Defendants over their actions to lodge the cautions they placed on the suit parcel. They too are time barred. As I have stated above the Plaintiff's main claims in this suit were based on the contention that it had acquired interest on the parcel of land by virtue of the agreement which it was trying to enforce and the first defendant failed to honor. It therefore goes that if the court has found that the enforcement by way of a suit of the said agreement is time barred. His interests on the automatically faded with the finding above. Thus, the suit against other defendants cannot be sustained given that the

suit against the 1st by virtue of the contract cannot be enforced.

33. The upshot, therefore, is that the preliminary objection is merited. The entire suit is dismissed for being time barred.

34. The 1st Defendant's argued extensively on Section 7 of the Limitation of Actions Act, about recovery of the land. As I have stated before, there was no claim for adverse possession in this matter. Secondly, even if there could have been such a claim, the plaintiff himself had pleaded that the put-up structures on the suit land in 2015. Thus, since cause of action arose from the year 2015 regard between it and the 1st Defendant, these proceedings interrupted the period which adverse position could have run from. Be that as it may, the argument is neither here nor there, and I leave it at that.

35. Regarding costs of this it is humble view that only the 1st Defendant can recover or be awarded the costs of the suit since he was the only one who raised the instant Preliminary Objection which succeeded. Therefore, the rest of the other defendants would bear their own costs of the suit.

36. Orders accordingly

Ruling dated, signed and delivered virtually via the Team's Platform on this 19th day of February 2026.

Honorable Dr. iur Nyagaka

Judge

In the presence of;

1. Mr. Bosire Advocate for the Plaintiff.
2. Ms. Ochieng holding brief for Mr. Owuor for the 1st Defendant.
3. Ms. Ochieng for the Interested Party.
4. Ms. Omusi holding brief for Ochoki for 3rd Defendant.