



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO. 58 OF 2018

KAGWE TEA FACTOR COMPANY LIMITED.....PLAINTIFF

VERSUS

GRACE JELAT KIPCHOIM & 83 OTHERS.....DEFENDANTS

AND

KENYA FORST SERVICE AND 3 OTHERS.....INTERESTED PARTY

RULING

1. On the 29th October 2018, the Plaintiff Company herein filed an Application dated the 25th October 2018 wherein they sought to have the application certified as urgent. The Plaintiff also sought for leave to serve the 83 Defendants and the 4 interested parties by way of substituted service through a newspaper of wide circulation for reason that the 1st – 83rd Defendants did not provide their contact details at the point of transaction. Further that the Plaintiff could not trace each individual Defendant for purpose of serving pleadings and summons to enter appearance.
2. The Plaintiffs also sought for conservatory orders to maintain the status quo prevailing between the parties pending the hearing and determination of both the application and the suit thereafter.
3. Leave was granted to the Plaintiff/Applicant to effect service upon the 1st – 83rd Defendants through substituted service in one of the daily newspapers within the next 14 days and a copy of the said notice be affixed upon the court's notice board within the said 14 days. The court also directed that service upon the 1st – 4th interested parties be effected upon them within 14 days in the normal way as the physical location of their offices are known.
4. Interim orders of status quo were issued pending the hearing and determination of the application inter parties.
5. When the matter came up for inter-parties hearing on the 20th November 2018, there was no appearance for the 83rd Defendant, the court was informed that the 1st Defendant was deceased. Counsel for the Plaintiff informed the court he had been served with a Notice of Preliminary Objection wherein he protested that the same was filed without leave of court and outside the provisions of Order 51 Rule 14 of the Civil Procedure Rule service and therefore the application be deemed to be ex parte and the Preliminary Objection be struck out with orders as to costs.
6. In response, Counsel for the 2nd to 83rd Defendants submitted that the matter was served by way of an advertisement in the paper. That his clients came from an area where they did not have access to the paper. That it had been their relatives who had informed them of the said advertisement. The number was big and it was not easy for Counsel to obtain instructions from all the parties although he had endeavored to do so.
7. He also submitted that land matters were not issues to be dealt with as issues of technicalities but they needed to be dealt with on merit as they are sensitive issues. That the nature of the Preliminary Objection raised questions on the locus of the Plaintiff to bring the case. Secondly, it also raised a question on the jurisdiction of this court to grant the orders sought in the suit. He conceded that although the Preliminary Objection was not filed during the 3 days period, yet it was their prayer that the court directs that it be heard in the first instance.
8. Counsel holding brief for the Counsel for the 1st interested party submitted that her instructions were that the 1st interested party was not opposed to the application dated the 25th October 2018, filed by the Plaintiff but that they would reply to the substantive suit in this matter. Counsel also submitted that since they had been served with the Preliminary Objection in court, that they needed for time to respond to the same.

9. In rejoinder, Counsel for the Plaintiff submitted that if the court was inclined to admit the Preliminary Objection, then the same be disposed of by way of written submissions.
10. The court considered Counsel's submissions on whether or not to admit the Preliminary Objection dated the 19th November 2018 and being mindful of the provisions Article 159 (2) of the Constitution as well as Section 1A and 3A of the Civil Procedure Act and further the fact that land issues were matters where emotions were likely to run high, that it was in the best interest of justice that parties be accorded time to be heard on their allegations and pleadings.
11. The court also considered the fact that where there was an attack on its jurisdiction by way of a Preliminary Objection such as the one before it, the said Preliminary Objection ought to take precedence of any other application to the suit and as such should be heard and disposed of in the first instance. That Jurisdiction was everything and without it, a court cannot make any further step. To that effect, the Preliminary Objection dated the 19th November 2018 was admitted as properly on record and parties were directed to dispose it by way of written submissions.
12. Parties filed their written submissions to the Preliminary Objection wherein on the 20th May 2019, Counsel for the Defendants highlighted on their application to the effect that there was a High Court Civil Suit No. 413 of 2017 pending in the High Court sitting at Nairobi between the firm of Gitonga Advocate and Njoroge Kibatia and Co Advocates wherein the suit had been determined in favour of Mathenge Gitonga on 18th October 2018.
13. That a decree that had been drawn pursuant to the judgment had been enforced to the extent that the detrital amount of ksh 278,690,000/= had been paid together with interest in an interest earning account, pending the hearing and determination of an Appeal yet to be filed.
14. That the present suit was filed on 29th October 2018 which was 10 days after the determination of the Milimani suit. That the suit filed at the Milimani High court was for enforcement of a professional undertaking issued by the firm of Njoroge Kibathe Advocates to the firm of Mathenge Gitonga Advocates in the course of the performance of the 88 agreements of sale dated 30th September 2016 and entered into between the 88 farmers and Kagwe Tea Factory (the Plaintiff in this case). That it was the performance of the 88 agreements that gave rise to the suit in Milimani High Court.
15. That the copies of official searches in respect of the titles herein annexed to the Plaintiff's plaint were all registered around January 2003.
16. That parties were before the court because the Plaintiffs believed that the titles issued to the 88 farmers were wrongly issued because the suit land was public land and the 88 farmers had no right to sell.
17. Counsel condensed the 6 grounds of the Preliminary Objection into 3 grounds. The 1st ground was on the issue of jurisdiction to which Counsel submitted while relying on the case of **Motor Vessel "Lilian "S" v. Caltex Oil (Kenya) Ltd** that in the present case, the agreements, which are the subject matter of the proceedings had been effectively performed. That there was a High Court judgment that had already been issued confirming that the money must be paid. In the present case, the Plaintiffs were now purporting to invite the court to find that those same agreements were illegal null and void. It was their submission that the court's hands were tied by virtue of the judgment delivered on the 18th October 2018 and the best avenue would have been to file an Appeal.
18. Counsel submitted that the 2nd aspect on the jurisdiction was based on the provisions of Section 7 of the Limitation of Actions Act. That whereas the titles, which are the subject matter in the proceedings, were registered in January of 2003, the Plaintiffs did not go to court to seek for an annulment of the registration with effect from January 2003, but waited until the transaction had been finalized, judgment entered and the titles registered in his favour, that he came to court to state that the subject suit was public land. His submission was that the Plaintiff cannot be heard to sue out of time as they did not seek for an extension of time in accordance to the Limitation of Actions Act.
19. That the 3rd issue pertained to the locus standi to which Counsel submitted that the Plaintiff, which is a private Company, had assumed the role of the defender of public land. That under the Constitution, the rule on locus standi had been extensively relaxed allowing members of the public to sue bodes with ease.
20. Counsel relied on the case of **Mumo Matero Vs Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** to submit that what the court was dealing with was a Plaintiff who was seeking to get out of a contract to purchase land wherein the court of Appeal had held that such persons be denied the standing. That the Plaintiff had no locus to sue on behalf of the National Land Commission and other entities named in the plaint
21. Counsel also submitted that the Plaintiff's suit was Res Judicata under Section 7 of the Civil Procedure Act (sic) and should be dismissed with costs to the 2nd – 82nd Defendants.
22. The Application on Preliminary Objection was opposed by the Plaintiff whose Counsel submitted that they relied on their filed submissions dated 9th April 2019 and filed on 14th May 2019.
23. He submitted that ground No. 5 of the Preliminary Objection raised the issue of Res-judicata which he believed had been abandoned. That in respect of the other 3 grounds, the same were pure points of facts. That the case of **Manufacturing Co. Ltd -v- West End Distributors Limited (1969) EA. 696** had set a criteria upon which a Preliminary Objection should succeed to wit, that:

i) it should raise a pure point of law

ii) it should not call for evidence

iii) it cannot be raised where a fact has to be ascertained or a case of judicial discretion

24. He submitted that the case of **Orara vs Mbaja [2005] eKLR** supported their submission. That grounds 5, 6 and 7 were pure points of facts and that was why they could not be Preliminary Objections because they required to be ascertained.

25. Further that the suit was not statute barred because it was clear from the pleadings filed in court that the same was founded on a contract. That the particulars of breach of contracts had been provided in the plaint, where it had been clear that the relationship between the Plaintiff and the 1st – 82nd Defendants had been established pursuant to agreements of sale which were executed on 30th September 2016. That a cause of action under contract would only be statutory barred if it had been filed 6 years after cause of action arose. That in the present suit, the cause of action arose on 25th October 2017.

26. That although it been submitted that the subject suit had been determined in Nairobi High Court Civil Case No.413 of 2017, yet what the court had not been told was that the issue in dispute had been on a professional undertaking between Advocates which was different from the present suit which was based on the capacity of the 1st – 82nd Defendants to sell portions of land that were in dispute. That whether or not there was a decision in Nairobi High Court Civil Case No. 413/17, the same could not affect the decision of this court. That a professional understanding was a separate issue from an agreement for sale.

27. That in Nairobi High Court Civil Case No. 413 of 2017, the judgment was to the effect that “the issue of contract are to be raised before the ELC Court”. That they had filed a Notice of Appeal in Nairobi High Court Civil Case No. 413 /2017 where they had requested for the proceedings of the High Court.

28. On the second limb, Counsel submitted that the same was bent on jurisdiction on the presumption that the suit is barred. That indeed although it was correct that an action to recover land could not be brought after the lapse of 12 years, yet the illegality referred to was in regard to a legal Notice No. 151 of 2001.

29. That there was a dispute as to whether the legal notice had actually de-gazetted the suit properties, which were public land, into private land. It was their take that that legal notice did not de-gazette the suit properties and that when an issue of illegality and limitation of time was raised in a suit, time would start running when such illegality is made known to the party who is filing the suit.

30. That on 25th October 2017, the Plaintiff was able to establish that legal Notice No. 151 if 2001 had not de-gazetted the suit properties which they had purchased from the Defendants. That is when the time started running.

31. On the issue as to whether the court lacked jurisdiction to declare the property public land, Counsel submitted that it was misleading for the Defendants to submit that they (Plaintiff) was trying to usurp the powers of the National Land Commissioner. That the titles had been registered in the names of the Defendants before they were subsequently registered to the Plaintiff which is a private entity and the suit property is therefore private. They relied on the case of **R vs. National Land Commissioner Ex Parte Cecilia Chepkoech Leting & 3 Others [2016] eKLR** where it had been held that the Environment and Land Court had jurisdiction to investigate and determine the legality of a title.

32. That although the court had the jurisdiction to extend time other than what is provided for under Section 27 of the Limitation of Actions Act, yet this suit was filed within time and therefore there was no need to seek for leave. Counsel urged the court to dismiss the Preliminary Objection with costs to the Plaintiff.

33. The 1st Interested party’s position was similar to that taken by the Plaintiff. In addition, Counsel submitted on whether the suit was statute barred on two questions:

(i) When the cause of action arose.

(ii) Whether the issue of the case being statute barred arises from the validity of the excision from public to private or whether it is an issue of breach of contract

34. That the issue in question was purely a monetary claim that resulted from a breach of contract. That the illegality was discovered on the 24th October 2017 which meant that the suit would be statute barred six years from 25th October 2017. That to state that the suit is statute barred at this stage would be to deny the Plaintiffs a right to access to the court as guaranteed under Article 50 (i) of the Constitution.

35. The 2nd limb of the Preliminary Objection was the issue of locus standi which was defined in the case of **Alfred Njau & 5 Others vs. City Council of Nairobi [1983] eKLR** to mean- “the right to appear in court.” That whether or not a party had the requisite standi would depend on the nature of claim in court. In the present case, the claim was purely a monetary claim arising from a contract of a sale of property by the Defendants to the Plaintiff which property is public land. That the Plaintiff, by virtue of being party to the sale contract gave him the locus standi to bring suit before court on any issue arising from the contract.

36. On the 3rd limb which touched on the jurisdiction of the court, Counsel submitted that the court’s jurisdiction was provided for under Article 162 (2) (3) of the Constitution as read with Section 13 of the Environment Land Court Act.

37. That Section 13 of the Environment Land Court Act gave the court power to hear and determine disputes therein therefore, from the above provision of law, the court had the jurisdiction to hear and determine cases relating to land use and occupation to which in the present case did not amount to an appeal for setting aside the decision of the High Court in Civil Case No. 413 of 2017. That the court had jurisdiction to interrogate the legality of title where such challenges were placed before it.

38. That the 1st Interested Party still lay claim over the suit property as it formed part of Marmanet Forest, which is public land and therefore the 1st – 82nd Defendants had no capacity to enter into an agreement for sale with the Plaintiff or any other party because doing so consisted of an unlawful, illegal or corrupt scheme.

39. That in regard to the last limb of Res Judicata, the same was contented. The suit was properly before court and the court ought to proceed and determine the same in the interest of justice. Counsel prayed for te dismissal of the Preliminary Objection.

Analyses and Determination

40. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd – v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“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.”

41. The Defendant/Applicant’s Preliminary Objection inter alia was condensed into 4 issues herein above which issues I shall base the matters for determination.

i. That the court lacked jurisdiction to determine the suit for reasons that:

- a) That this matter was Res judicata the Nairobi High Court Civil Case No. 413 of 2017
- b) That the court would be sitting on an appeal from the judgment
- c) That the court would be usurping the powers of the National Land commission and

ii. That the Plaintiff’s suit was Statutory barred by dint of Section 7 of the Limitations of Action act.

42. On the first issue on jurisdiction, the court of Appeal in the case of **Owners of the Motor Vessel “Lilian “S” v. Caltex Oil (Kenya) Ltd [1989] KLR1** held as follows:

“...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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

43. It was the Defendants’ submission that the court lacked jurisdiction over this matter was for reason that despite there being a High Court judgment in Nairobi High Court Civil Case No. 413 of 2017 confirming that the money must be paid, in the present case, the Plaintiffs were now purporting to invite the court to find that those same agreements were illegal null and void. In essence therefore this matter was Res judicata the judgment delivered on the 18th October 2018 in Nairobi High Court Civil Case No. 413 of 2017.

44. The test in determining whether a matter is *Res Judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

The matter in issue is identical in both suits;

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

45. I have gained sight of the judgment delivered in Nairobi High Court Civil Case No. 413 of 2017 in an Originating Summons dated the 3rd October 2017 as well as the matters framed for determination and I am inclined to agree with the Plaintiff’s submission that the same was based on the enforcement of a profession undertaking between the firms of Peter Mathenge Gitonga T/A Mathenge Gitonga & Co Advocates and Njoroge Kibatia & Moses Maina Karuga T/A Kibatia & Co Advocates wherein the court was not enjoined to inquire into the legality or otherwise of the original cause in which the undertaking was given. That the final determination of the said Originating Summons was that;

.....the defendant honors their professional undertaking given on the 6th February 2017 to the plaintiff by paying Ksh 278,690,000/ together with the interest as from the time the sum was due for payment.....

46. The present suit filed on the 29th October 2018 is hinged on various sale agreements for of land between the Plaintiff and 1st to 82nd

Defendants were the Plaintiff has alleged breach of the said agreement as the Defendants did not have capacity to enter into the sale agreement in the first instance.

47. Clearly from a glance of the facts surrounding the proceedings in the Nairobi High Court Civil Case No. 413 of 2017, there is no doubt that the issues determined in the previous case were not the same as the issues being sought to be determined in the subsequent case. Secondly, it comes out clearly that the parties in the previous suit were neither the same nor litigating under the same title as the parties in the present suit.

48. Lastly I find that although the previous case was determined by a court of competent jurisdiction, and its decision was a finality, yet having found that there was a distinction of issues and parties in the previous case, the issue as to whether this court will be sitting this court will sitting on an appeal from the judgment is so remote so to speak.

49. The Defendant also submitted that by the court proceeding to hear the suit, that it would be usurping the powers of the National Land Commission if it makes a declaration as to whether the property was public land or not. With due respect, I find that this line of Preliminary Objection flies in the face of the established principles in the **Mukisa Biscuits Manufacturing Co. Ltd (supra)** as it was a point on facts that required probing of evidence to establish whether the land was public or private and therefore was incapable of being handled at a preliminary level.

50. The Defendant also raised an objection that the Plaintiff's suit was Statutory barred by dint of Section 7 of the Limitations of Action Act. It is not in dispute that the issue arising in the present matter were based on a claim that resulted from a breach of contract. It is also clear from the pleadings filed in court at paragraph 8 of the Plaint that relationship between the Plaintiff and the 1st – 82nd Defendants had been established pursuant to agreements of sale which were executed on 30th September 2016.

51. The provisions of Section 4(1)(a) of the Limitations of Action Act provide that:

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

52. *(a) actions founded on contract;*

53. The provisions of Section 7 of the Limitations of Action Act provide that:

An action may not be brought by any person to recover 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.

54. A cause of action under contract would only be statutory barred if it had been filed 6 years after cause of action arose while that of recovery of land may not be brought after the expiry of 12 years. In the present suit, the cause of action arose on 25th October 2017 and was therefore was not time barred.

55. From the above analyses, I find that the Preliminary Objection dated the 12th March 2019 lacks merit and the same is herein dismissed with costs.

Dated and delivered at Nyahururu this 29th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE