



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 678 OF 2017

FAITH WAMBUI MBEKE.....PLAINTIFF/RESPONDENT

VERSUS

PAUL KARANJA KANONO KUBAI.....1ST DEFENDANT/OBJECTOR

SUPERVIEW INVESTMENTS AUCTIONEERS.....2ND DEFENDANT/OBJECTOR

REGISTRAR OF LAND KIAMBU.....3RD DEFENDANT

RULING

Coming up for determination is the *Notice of Preliminary Objection* dated **11th September 2017**, filed by the 1st & 2nd Defendants/Objectors herein against the Plaintiff's Application dated **26th July, 2017**, and the entire suit. The said Preliminary Objection is raised on the following grounds:

- 1) That the instant application and the entire suit is time barred and that the claim has been mischievously filed contrary to the express provisions of the Limitation of Actions Act, and in particular section 7 thereof;**
- 2) That there is no cause of action by the plaintiff against the 1st and 2nd Defendants/Respondents;**
- 3) That as a result, the instant application and the entire suit against the 1st and 2nd Respondents/Defendants be dismissed in lamina with costs to the 1st Respondent/Defendant.**

The Plaintiff herein filed this suit on **26th July, 2017**, against the Defendants and prayed for various orders, among them being;

- a) A declaration that the plaintiff owns a share of plot no Limuru/Ngecha/T94, as currently demarcated and is not a trespasser.**
- b) That a permanent injunction be issued against the 1st Defendant not to interfere with the quiet possession and enjoyment of the plaintiff on their portion of plot No Limuru/Ngecha/T94.**

Simultaneous to the said plaint, the plaintiff also filed a *Notice of Motion* and sought for *injunctive orders* against the Defendants. The plaintiff had alleged that her late grandfather **Mbeke Gacuguma**, together with the father to the 1st Defendant bought part of the land parcel known as **Plot No. LR Limuru/Ngecha/T94**. However the father to the 1st Defendant fraudulently obtained the title for the whole piece of land without the knowledge of the other buyer, **Mbeke Gacuguma**, but the said **Mbeke Gacuguma** continued to be in occupation of his portion of land until his death in **2016**. The plaintiff further alleged that the 1st Defendant has not disputed the said occupation and that the plaintiff and her siblings lived on the suit land together with their grandfather, **Mbeke Gacuguma**. However after the death of the said **Mbeke Gacuguma**, the 1st Defendant took advantage of the said death and issued the plaintiff and her siblings a *Notice to Vacate* the suit land, claiming that they were trespassers. The said letter is dated **20th March, 2017**. She also alleged that the 1st Defendant caused them to be arrested and charged with the offence of **creating disturbance** and **forcible detainer** at **Limuru Law Courts**. The court has seen a charge sheet to that effect wherein the plaintiff and others were charged with an offence of being in possession of a piece of land, **Limuru/Ngecha/T94** belonging to **Henry Kubai Karanja** without colour of right.

It was also alleged that the 1st Defendant served them with *Notice to Vacate* the suit premises through **Superview Investments & Auctioneers**, 2nd Defendant herein. The said *Notice* was issued on **20th July, 2017**, and is attached to the plaintiff's application. Indeed the applicant was granted **30 days** from the date of the letter to vacate the suit property as she was termed a trespasser and with a warning that failure to comply, she would be removed from the suit property **Limuru/Ngecha/T94**, without further Notice.

It is evident that the plaintiff has attached photographs of erected structures on the suit property which are not new structures or developments but structures which seem to have been erected some years ago. Some of them are permanent structures like annexures *FWM 14 b & 14 c* and an iron gate *FWM 14 a*.

From the annexures to the pleadings herein it is evident that the suit land was registered in the name of **Henry Kubai Karanja**, who was the father to the 1st Defendant on **14th July, 1993**. Further, the 1st Defendant became the registered owner of the suit property on **10th July, 2017**, just a few days before a **Notice of Eviction** was issued to the plaintiff and her alleged siblings. After the alleged **Notice to vacate**, the plaintiff filed the instant suit and obtained temporary injunctive orders against the Defendants in terms of prayers no 2 wherein the 1st Defendant and/or his agents, heirs or assigns were restrained from evicting, threatening and/or interfering with the quiet enjoyment of the applicant's part of the parcel of land known as **Limuru/Ngecha/T94**. The said interim orders have been extended severally by the court.

It is against the above background that the 1st & 2nd Defendants filed the instant **Notice of Preliminary Objection** and also opposed the **Notice of Motion** dated **26th July, 2017**, vide the **Replying Affidavit** dated **22nd September, 2017**, sworn by the 1st Defendant herein **Paul Karanja Kanono Kubai**.

The instant **Notice of Preliminary Objection** is opposed by the plaintiff and the court directed the parties to canvass the said preliminary objective first through written submissions. The parties herein did comply with the above directions and filed their respective written submissions. The court has now carefully considered the rival submissions and the cited authorities, the court has also considered the relevant provisions of law and the pleadings in general and renders itself as follows:-

The court will first have to determine whether what has been raised by the 1st & 2nd Defendants meet the threshold of what a Preliminary Objection is.

A preliminary objection was described in the case of **Mukisa Biscuits Manufacturing Ltd..vs.. West End distributors Ltd, Civil appeal no.9 of 1969**, to mean:

“A Preliminary Objection consists of a point of law which has been pleaded or which arise from a clear implication out of Pleadings and which if argued as a preliminary point may dispose of the suit...It cannot be raised if any facts have to be ascertained or if what is sought is an exercise of judicial discretion”.

Further in the case of **Nitin Properties Ltd vs Jaqjit Singh Kalsi & Another, Civil Appeal No. 132 of 1989 EA 257**, the court held that;

“A preliminary objection raises pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of judicial discretion”.

Further, the court will also take into account that a preliminary objection must stem and germinate from the pleadings filed by the parties and must be based on a pure point of law with no fact to be ascertained”. See the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank Kisumu HCCC No. 53 of 2004**.

The court in deciding whether the issues raised herein meet the threshold of what a preliminary objection is will also be persuaded by the findings, in the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu, HCCC No.22 of 1999**, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

The 1st & 2nd Defendants have stated that the suit herein is time barred as it was brought out of the express provisions of the **Limitations of Action Act Cap 22 Laws of Kenya**. In their submissions, the 1st & 2nd Defendants stated that there is no cause of action against them. The issue of whether a suit is time barred or not is a matter of law and this is a pure point of law. The same also stems from the pleadings and if a suit is time barred, it cannot stand and so the said **Preliminary Objection** is capable of disposing the suit preliminarily. Therefore the court finds that the 1st and 2nd defendants **Notice of Preliminary Objection** has met the threshold of what is described in a **Preliminary Objection** as stated in the **Mukusa Biscuits case (supra)**.

The next issue is whether the said preliminary objection is merited.

In the submissions filed by the 1st and 2nd Defendants, it was submitted that the plaintiff's suit cannot stand as it is based on contracts which were allegedly executed in **1968**. It was further submitted that a claim based in contract cannot be brought to court after lapse of 6 years as stated in **section 4 of The Limitation of Actions Act, Cap 22 Laws of Kenya**. The 1st & 2nd Defendants relied on the case of **Richard Toroitich vs Mike Lemet & 3 Others (2014) eKLR** which quoted the case of **Michael Maina Nderitu vs Kenya Power & Lighting Co Ltd & Another**, where the court held that;

“No one shall have the right and power to bring an action after the end of six years from the date on which a cause of action accrued in an action founded on contract”...

However the court finds that the plaintiff herein only raised the issue of her grandfather having purchased the suit property in 1968 to set the background of the case. The plaintiff is complaining of the alleged action of the 1st Defendant which arose from the time he issued a demand

letter to the Plaintiff to vacate the suit property and the further issuing of Notice to vacate on **20th July, 2017**. The 1st Defendant became the registered owner of the suit property herein on **10th July, 2017** a few days before a **Notice to Vacate** the suit property was issued to the plaintiff on **20th July, 2017**. The court finds that the action complained of herein came into being in **2017** and therefore the plaintiff's suit is not caught by **Limitation of Actions Act**, and therefore not time barred.

On whether the plaintiff has any cause of action against the 1st and 2nd Defendants, it is evident that she is complaining about the threat to evict her and her siblings from the suit property before her claim is ascertained by a court of law. That is sufficient cause of action and the court finds that indeed the plaintiff herein has a cause of action against the 1st and 2nd Defendants given that she has alleged that her siblings and herself have lived on the suit property all their lifetime until the death of their grandfather, **Mbeke Gacuguma**.

Further the court will take into account that striking out a suit is a drastic remedy which is only invoked in very plain and obvious cases and that jurisdiction must be exercised with extreme caution. See the case of **DT Dobie & Company (K) Ltd Vs Joseph Mbaria Muchina & Another, Civil Appeal No 37 of 1988**, where the Court held that:-

“A pleading will not be struck out unless it is demurable and something worse than demurable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim or in such affidavit as he may file with view to amendments and must not dismiss an action merely because the story filed in the pleadings was highly improbable and one which it was difficult to believe could be proved----.

A court of justice should aim at sustaining a suit rather than termination it by summary dismissal”.

Further the court is alive to the fact that pleadings should only be struck out in very clear cases and a court of justice should aim to sustain a suit rather than terminate it by summary dismissal. That is the spirit of **Article 159(2)(d) of the Constitution** which provides that:-

“Justice shall be administered without undue regard to procedural technicalities.”

Having now considered the instant **Notice of Preliminary Objection** raised by the **1st and 2nd Defendants**, the court finds it **not merited** and being guided by **section 3A of the Civil Procedure Act**, the court further finds that the necessary order that the court should make herein in ensuring that end of justice is met is to disallow the said **Notice of Preliminary Objection**.

Consequently, the court finds the 1st and 2nd Defendants **Notice of Preliminary Objection** dated **11th September 2017** not merited. The said preliminary objection is hereby dismissed entirely with costs to the plaintiff.

The substantive **Notice of Motion** dated **26th July, 2017** to be set down for hearing expeditiously and be decided on merit.

It is so ordered.

Dated, Signed and Delivered at Thika this 9th day of March 2018.

L. GACHERU

JUDGE

In the presence of

Mr Mochere for Plaintiff/Respondent

Mr Kahuthu holding brief for Mr Awour for 1st & 2nd Defendants/Objectors

N/A for 3rd Defendant

Lucy - Court clerk.

Court – Ruling read in open court in the presence of the above stated advocates and absence of the 3rd Defendant.

L. GACHERU

JUDGE

9/3/2018