



**Gachui v Kamonjoh & another (Environment & Land Case
E179 of 2021) [2024] KEELC 175 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E179 OF 2021
MD MWANGI, J
JANUARY 25, 2024**

BETWEEN

JAMES GACHENGU MACHARIA GACHUI PLAINTIFF

AND

EPHRAIM MATHENGE KAMONJOH 1ST DEFENDANT

CAROLINE WAIHERA KAMONJOH 2ND DEFENDANT

RULING

In respect of the 2nd Defendant's preliminary objection dated 26th May, 2023

Background

1. The 2nd Defendant herein, raised a preliminary objection against the Plaintiff's suit alleging that it is barred in law on the grounds that: -
 - a. The entire suit is fatally defective as the cause of action is based on a contract of sale and by virtue of the provisions of Section 7 of the *Limitations of Actions Act*, Cap 22, the same is time barred having been brought outside the statutory limitation of 12 years.
 - b. Without prejudice to paragraph 1, the Plaintiff's suit is incompetent, bad in law, barred in law, an abuse of the court process thus rendering it fatally and incurably defective and should therefore, be dismissed with costs to the 2nd Defendant.

Court's directions

2. The Court's directions were that the preliminary objection be canvassed by way of written submissions. The objector was on 24.10.2023 granted 14 days to file and serve her submissions. She did not comply. On 22.11.2023, the objector was granted a further 14 days within which to file and serve her submissions. The time lapsed on 7th December, 2023. The objector did not file any submissions;



the Plaintiff too. I will proceed to consider the preliminary objection notwithstanding the absence of submissions by the parties.

Issues for determination

3. The sole issue for determination is whether the preliminary objection by the 2nd Defendant is merited.

Determination

4. A Preliminary Objection as held by the Supreme Court of Kenya in the case of *Hassan Ali Jobo and Another v Suleiman Said Shabbat and 2 Others* (2014) eKLR 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 needs to be ascertained or if what is sought is the exercise of judicial discretion.”

5. Looking at the objection by the 2nd Defendant, the second point in the objection, considering the above definition, cannot qualify to be a preliminary objection. It does not refer to any particular law that has been offended by the Plaintiff's suit. It is too generalized and therefore opaque.
6. The only point to consider is the first point that raises the issue of time bar under the provisions of Section 7 of the *Limitation of Actions Act*. The objector asserts that the Plaintiff's cause of action is grounded on a contract and is therefore time barred.
7. In order to decide on the preliminary point, the court will have to look at the plaint filed in this matter. The plaint is dated 14th December, 2020.
8. The Plaintiff pleads that he entered into an agreement for sale of parcels of land known as LR No. 1490/90 & LR No. 1490/96 with the Defendants. The two parcels were to be amalgamated first and then subdivided into 2 equal portions designated as portions A and B. The Plaintiff was to acquire title for portion B.
9. The Plaintiff avers that he paid the purchase price as agreed but the Defendants requested him to await the completion of the process of amalgamation and subdivision for him to acquire title for his designated portion. The Plaintiff nonetheless took possession of the portion and has been living on it since the 26th May 1998.
10. The Plaintiff asserts that he later on learnt that the Defendants had transferred part of LR No. 1490/90 to some other persons in spite of their agreement with him and the fact that he was in possession of part of the land comprising LR No. 1490/90 and 1490/96. The plaintiff alleges breach of the agreement and accuses the defendants of fraud which he has particularised at Paragraph 10 of the Plaintiff.
11. The Plaintiff further alleges that the Defendants have never laid claim of ownership of the land and he has lived peacefully on it without any disturbance since 1998. Amongst the prayers that the Plaintiff seeks in his suit is an order that he has acquired prescriptive rights of ownership by way of adverse possession over all that property known as LR No. 1490/90 and 1490/96.
12. A claim for adverse possession is a legitimate claim recognized under the law, more specifically the *Limitation of Actions Act* upon which the objector based his preliminary objection on. To succeed in a claim for adverse possession, a Claimant needs to prove exclusive possession of the land openly without any interruption for a period of not less 12 years, having either disposed the owner or by discontinuation of possession by the owner on his own volition.



13. I think the objector had not keenly perused and interrogated the plaintiff's suit before filing the preliminary objection otherwise, he would not have raised the Preliminary Objection which was not only improper but unnecessary.
14. The Preliminary Objection by the 2nd Defendant is overruled and dismissed with costs to the Plaintiff.
It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mlemwa h/b for Ms. Nang'ame for the 2nd Defendant

Mr. Bismanah for the Plaintiff

N/A for the 1st Defendant and Interested Parties

Court Assistant: Yvette

M.D. MWANGI

JUDGE

