



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
THIKA LAW COURTS
ELC.43 OF 2017
(FORMERLY KERUGOYA ELC.84 OF 2016)

JOHN MUIKAMBA GITAU.....PLAINTIFF/APPLICANT

-VERSUS-

THE TRUSTEES CARITAS MARIANA

HOLY FAMILY CHILDREN'S HOME, THIKA.....1ST DEFENDANT/RESPONDENT

REV. FR BATHRAND NWACHUKWU.....2ND DEFENDANT/RESPONDENT

RULING

BACKGROUND

The Plaintiff herein **John Muikamba Gitau** filed this suit on **14th June 2016**, against the Defendant and sought for various orders. Among the orders sought is a declaration to the effect that land parcel **No.Block 23/1108**, situated within **Thika Municipality**, belongs and/or is owned by the Plaintiff absolutely and consequently entitled to vacant possession.

In the Plaint, the Plaintiff had averred that on or around **10th May 2002**, he purchased the suit property, **Thika Municipality Block 23/1108**, from **Daniel Wainaina Kanoga** (now deceased). That they entered into a sale agreement which was executed by all the parties and that at the time of purchase, there were no development and Plaintiff was given vacant possession. He further averred that he allowed the Defendants to utilize the suit property vide a licence agreement dated **29th August 2004**, executed by himself and the Defendants. It was his further allegation that vide a letter dated **20th April 2005**, issued through **M/S Kago Gachiri & Co. Advocates**, he demanded a vacant possession of the suit property from the Defendants. He also alleged that without any authority or consent from the Plaintiff, the Defendants constructed and/or erected permanent development on the suit property and therefore the said developments are illegal and that amounts to unlawful utilization and irregular acquisition of the Plaintiff's suit property. Further that despite demand, the Defendants have failed to render vacant possession of the suit property to the Plaintiff and thus this suit.

The Plaintiff took out summons to enter appearance and served them upon the Defendants.

Instead of entering appearance and filing Defence, the Defendants herein filed a Notice of Preliminary Objection on the following grounds:-

1) The Court is bereft of jurisdiction to hear and determine a suit which is statute barred and time barred, there being no requisite leave sought before filing, hence the suit is wrong in law, it offends the provisions of Section 7 as read together with Section 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya.

2) The right of action does not accrue against a beneficial owner of the subject parcel of land known as Thika Municipality Block 23/1108 hence it is incompetent having offended the provisions of Section 16 of Limitation of Actions Act Cap 22, Laws of Kenya.

3) There is misjoinder of the Defendants in the instant suit as they were not parties to the sale agreement dated 10th May 2002, by the Plaintiff. The suit remains an abuse of the court process as envisaged under Order 2 Rule 15 (a-d) of Civil Procedure Rules, 2010.

4) The documents relied on by the Plaintiff are subject to further scrutiny by the department of CID, by a qualified forensic document examiner on their authenticity, veracity and credibility.

The Court directed the parties to canvass the instant **Notice of Preliminary Objection** by way of written submissions. In compliance thereof, the **Law Firm of Mungai Kalande & Co. Advocates** for the Plaintiff filed their written submissions on **20th September 2017**, and submitted that the Preliminary Objection herein does not meet the threshold of what a Preliminary Objection is as described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696**, where the Court held that:-

“So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear pleadings and which if argued as a preliminary point may dispose of the suit....further it was held that 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 facts has to be ascertained or if what is sought is the exercise of judicial discretion”.

On the part of the Defendants, the **Law Firm of Ham Lagat & Associates Advocates** filed their written submissions on **21st November 2017**, and urged the Court to allow the Preliminary Objection.

The court has now carefully considered the instant Notice of Preliminary Objection and the written submissions. The Court has also considered the cited provisions of law and the decided cases and it will render itself as follows;-

Is the Notice of Preliminary Objection raised by the Defendants a Preliminary Objection as was so described in the **Mukisa Buscuits case(supra)**?

It is evident that a Preliminary Objection raises pure point of law which is capable of disposing off the suit preliminarily. It cannot be raised if any facts have to be ascertained.

The Court has considered the four grounds raised by the Defendants. Apart from ground **No.1** on jurisdiction and the allegations that the suit has been barred by statute, all the other three grounds cannot be determined without ascertaining facts. Therefore grounds **No.2,3** and **4** are not pure points of law as they are not capable of disposing off the matter preliminarily without calling for evidence thus ascertaining facts from elsewhere. See 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.”

See also the case of **United Insurance Co. Ltd...Vs...Scholastica A. Odera, Kisumu HCCA No.6 of 2005**, where the court held that:-

“A Preliminary Objection must be based on a point of law which is clear and beyond doubt and Preliminary Objection which is premised on facts which are disputed cannot be used to determine the whole matter as facts must be precise and clear to enable the court to say the facts are not contested or disputed.”

Therefore, this Court will only deal with point **No.1** only as the other three grounds are not pure points of law and thus not falling within the threshold of what a Preliminary Objection is.

On ground **No.1**, the Defendants have alleged that this Courts has no jurisdiction. Jurisdiction is important and without jurisdiction, the Court has no option but to down its tools. See the case of **Owners of the Motor Vessel ‘Lillian S’...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

“...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”.

Further, the issue of jurisdiction has to be raised at the earliest opportunity and it is a pure point of law. See the case of **Ndimu...Vs..Ndimu & Another (2007) EA 269**, where the Court held 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 straight away....more importantly, the issue of jurisdiction is a pure point of law which can be raised at any time and it is better raised at the earliest possible opportunity”.

In the instant suit, the Preliminary Objection has been raised before the filing of Defence and thus this ruling. The Defendants have alleged that the suit is statute and time barred and no requisite leave was obtained before filing the suit. It was the Defendants’ allegations that the suit has offended the provisions of Section 7 as read with Section 17 of the Limitation of Actions Act. Section 7 of the Limitation of Actions Act reads as follows:-

“An action may not be brought by any person to recover land after the end of 12years from the date on which the right of action accrued to him and if it first accrued to some person through whom he claim to that person”

Further, Section 17 of the said Act reads as follows:

“Subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

The Defendants have alleged that the cause of action arose in the **year 2002**, whereas the suit was filed in the **year 2016**. Indeed no action can be brought for recovery of land after expiry of 12 years from the date at which the cause of action accrued. However in the Plaintiff, the Plaintiff has alleged that he allowed the Defendants to utilize the suit property as licencees vide a licence agreement dated **29th August 2004**.

Further that he gave the Defendants Notice to vacate on **20th April 2005**. Indeed the cause of action accrued as from **20th April 2005**, when the Plaintiff gave a Notice to vacate to the Defendants. The suit herein was filed on **14th June 2015**, which was within a period of **11 years** after the right of action accrued to the Plaintiff. The suit is therefore not barred by time or by statute. This Court has jurisdiction to hear and determine the suit herein based on the available evidence and on merit. The Preliminary Objection herein is therefore without basis and it is not merited.

Having now carefully considered the instant **Notice of Preliminary Objection** dated **30th June 2016** as filed by the Defendants, the **Court finds it not merited and it is consequently dismissed entirely with**

costs to the Plaintiff herein.

It is so ordered.

Dated, Signed and Delivered at Thika this **18th** day of ***December 2017.***

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Applicant

No appearance for Defendants/Respondents

Diana - Court clerk.

L. GACHERU

JUDGE

18/12/2017

Court – Ruling read in open court in the presence of John Muikamba Gitau, the Plaintiff and absence of his advocate and the Defendants.

L. GACHERU

JUDGE

18/12/2017