



REPUBLIC OF KENYA



**Gichari & another v Muchiri (Environment and Land Case
E010 of 2023) [2024] KEELC 1519 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE E010 OF 2023**

**LN GACHERU, J
MARCH 20, 2024**

BETWEEN

GRACE WANJIRU GICHARI 1ST PLAINTIFF

PETER MUCHIRI GAKURU 2ND PLAINTIFF

AND

STEPHEN MAINA MUCHIRI DEFENDANT

RULING

1. Vide a Notice of Preliminary Objection, dated 7th December 2023, the Defendant/ Objector sought an Order for striking out the entire suit on the following grounds:
 - a. That the suit herein is time-barred by dint of Section 4(1) (a) of the *Limitation of Actions Act* as the same is predicated on a contract purportedly done on 28th July 1977.
 - b. That the suit herein is time-barred by dint of Section 7 of the *Limitation of Actions Act* having been instituted 46 years from the date the cause of action is alleged to have arisen.
 - c. That the suit herein is bad in law as it offends the provisions of Order 37 Rule 7 of the *Civil Procedure Rules, 2010*.
 - d. That the entire suit is incompetent, sham, vexatious, malicious and an abuse of the due process of this Court.
2. On 13th December 2023, the Court issued an Order that Status Quo to be maintained and further directed that the Defendant/ Objector's Notice of Preliminary Objection, be canvassed by way of written submissions.



3. The Defendant/Objector filed his written submissions on 24th January 2024, wherein he framed several issues for determination as follows:
 - “(a) Whether the present Preliminary Objection is merited.
 - (b) Whether the present suit is time-barred by dint of Sections 4(1) and 7 of the [Limitation of Actions Act](#) being predicated on a contract purportedly executed on 28th July, 1977.
 - (c) Whether the suit herein is bad in law as it offends the provisions of Order 37 Rule 7 of the [Civil Procedure Rules, 2010](#).
 - (d) Whether the entire suit is incompetent, sham, vexatious, malicious and an abuse of the due process of the Court.
 - (e) Who should bear the costs of the suit?”
4. It is the Objector’s submissions that the current Preliminary Objection is premised inter alia on limitation of actions, which constitutes a pure point of law, as was held in the case of [Sobanlaldurgadass Rajput & Another v Divisional Integrated Development Programmes Co. Ltd](#) [2021]e KLR.
5. Reliance was placed on the decisions of the Court in the case of [Mukisa Biscuit Manufactures Ltd v Westend Distributors](#) [1969] E.A. 696; [Oraro v Mbaja](#) [2005] 1 KLR 141; [Simba Platinum Ltd V Simba Coach Limited & Another; Asba Wanjiku Ali \(Interested Party\)](#) [2021]e KLR, to fortify the position a Preliminary Objection does not deal with disputed facts in the suit.
6. Citing the decision of the Court in [Alba Petroleum Limited v Total Marketing Kenya Limited](#) [2019]e KLR, the Defendant/ Objector submitted that the Plaintiffs’ suit is time-barred pursuant to Section 4(1) of the [Limitation of Actions Act](#), as it is founded on a contract for the sale of land. It was also submitted that the present cause of action being premised on failure to transfer the suit property, needs to have arisen in year 1983, at the latest, which is six (6) years from 1977, when the contract for disposal of the suit property is alleged to have been executed.
7. It was further submitted that according to Section 7 of the [Limitation of Actions Act](#), an action for recovery of land cannot be brought after the lapse of twelve (12) years from the date the right of action accrued. As the alleged agreement for disposal of the suit land is dated 28th July 1977, it was argued that the limitation period thereof lapsed on 28th July 1989; while, having regard to the other agreement dated 10th February 1982, its limitation period lapsed on 10th February 1994.
8. In the alternative, the Defendant/ Objector submitted that the cause of action would have arisen on 23rd October 1989, when a grant of Letters of Administration in respect of the estate of the late Daudi Kirunga Muchiri, was confirmed in favour of his wife Cecilia Wanjiku. The Defendant cited the holding of the Court in the case of [Benson Oketch Okello v Benson Nyandiga Onguru](#) [2019]e KLR in support of the foregoing position.
9. Further the Defendant/ Objector submitted that the Plaintiffs are not entitled to the protections set out under Section 26 of the [Limitation of Actions Act](#), because they failed to plead particulars of fraud against the Defendant herein, as held in the case of [Julius Kirima Kariuki v Kamau Mwangi & 3 Others](#) [2019]e KLR.
10. Further that the Plaintiffs’ alternative prayer for adverse possession is not brought by way of Originating Summons making it fatally defective, as held by the Court in the case of [Violet Omusula Sikenyi v Vincent Kamari](#) [2006]e KLR.



11. It was further submitted that, applying the test set out in the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 (2009)e KLR 229, the Plaintiffs' suit is incompetent, a sham, vexatious malicious and an abuse of the due process of the Court.
12. In opposition to the Preliminary Objection herein, the Plaintiffs filed their written submissions on 16th February 2024, and set out three (3) issues for determination, as follows:
 - (a) Is the Notice of Preliminary Objection merited?
 - (b) Is the Plaintiff's suit time-barred by dint of the *Limitation of Actions Act*?
 - (c) Does the Plaintiff's suit offend Order 37 Rule 7 of the *Civil Procedure Rules*?
13. The Plaintiffs submitted that they instituted the current suit in their capacity as the respective administrators of the Estates of Joseck Macharia Kimani and Gichari Thuku. Further, that the Defendant/ Objector obtained title to the suit property on 2nd February 2022, by way of transmission as the administrator of the estate of his mother Cecilia Wanjiku Kirunga, following grant of Letters of Administration issued on 30th August 2021, and confirmation of the same on 13th October 2021.
14. It was the Plaintiffs further submissions that the present Preliminary Objection replicates another Notice of Preliminary Objection mounted by the Applicant in Nakuru Succession Cause No. 154 of 1989, which was dismissed by the Court vide a Ruling dated 2nd February 2023. The aforesaid Ruling was annexed as part of the Plaintiffs/ Respondents' submissions. They also submitted that the current Preliminary Objection, is similarly unmerited as the rival issues raised in the suit are incapable of resolution through the narrow test of a Preliminary Objection.
15. The Plaintiffs further submitted that applying the test established in the case of *Mukisa Biscuit Manufactures Ltd v Westend Distributors* [1969] E.A. 696, this Court should not allow the present Preliminary Objection because the issues raised in the suit are complex and the rival facts presented in the suit are contested by the parties. In the event, it was submitted that the matter calls for a full trial where the parties will ventilate their issues fully and fairly and adduce the necessary evidence.
16. In response to the contention that the suit is time-barred by dint of Sections 4(1)(a) and 7 of the *Limitation of Actions Act*, the Plaintiffs/Respondents' position is that their claim is founded on the fact that they inherited the suit property from their predecessors-in-title. Accordingly, they argued that the Defendant's/Objector's computation of six (6) years from the date of the sale agreement of suit land does apply to them as they are inheritors and not purchasers of the suit property.
17. Further, it was submitted that the Defendant/Objector only gained a defensible interest in the suit land on 2nd February 2022, when he acquired the title deed thereof. That the Defendant/ Objector is precluded from raising the question of computation of six (6) years from 1977, because at the time he held no defensible interest in the suit property.
18. Replying to the issue raised by the Defendant/Objector that their prayer for adverse possession offends Order 37 Rule 7 of the *Civil Procedure Rules*, the Plaintiffs submitted that Order 37 Rule 7, is not couched in mandatory terms as was held by the Court in the case of *Patrick Ndegwa Munyua V Benjamin Kiiru Mwangi & Another* [2020].
19. It was also submitted, that the prayer for adverse possession is an alternative prayer and there exist five (5) other prayers presented to the Court by the Respondents by way of Plaintiff. Further, that pursuant to the provisions of Article 159(2)(d) of the *Constitution* of Kenya, the doctrine of "Overriding Objective of Litigation" has emerged within Kenya's legal system and enjoins the Court to handle cases fairly, swiftly and in a cost-effective manner and without undue regard for procedural technicalities.



20. The above is the argument for and against the instant Notice of Preliminary Objection, and the accompanying written submissions which this court has carefully read and considered. The first issue that this court should consider is whether the objection raised herein meets the criteria of what constitutes a Preliminary Objection.
21. According to *Black's Law Dictionary* 11th Edition, a Preliminary Objection is an objection that if upheld would render further proceedings before the tribunal impossible or unnecessary. Courts have variously defined Preliminary objection as one that consists of a point 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.
22. The definition of Preliminary Objection is further found in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

“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”.

Further Sir Charles Nebbold, JA stated 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 fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

23. It is also clear that a Preliminary Objection cannot be raised where facts have to be ascertained. Further, Preliminary Objection if upheld will dispose of the matter preliminarily.

See the case of *Quick Enterprises Ltd v Kenya Railways Corporation*, Kisumu High Court Civil Case No.22 of 1999, the Court held that:-

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

See also the case of *Lemitei Ole Koros & another v Attorney General & 3 others* [2016] eKLR, Munyao, J stated as follows:

“Where facts are not contested, the court is able to make a determination of law on the preliminary objection, but where facts are in contest, then automatically, the issue falls out of the ambit of a preliminary objection. It would be improper for a court to make a contested determination of fact within a preliminary objection.”



24. The Defendant / Objector has averred that the suit herein is time barred or statute barred, as the Sale agreement in issue was allegedly executed in 1977. It is clear that limitation of action is a point of law, which can dispose of a suit. See the case of *Iga v. Makerere University* [1972] EA it was held:

“A plaint which is barred by limitation is a plaint barred by law. A reading of the provisions of Section 3 and 4 of the *Limitations Act* Cap 70 together with Order 7 Rule 6 of the *Civil Procedure Rule of Uganda* which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

25. The issue of limitations goes to the jurisdiction of the court as was held in the case of *Sobanladurgadass Rajput and another v Divisions Integrated Development Programmes Co Ltd* (2021) eKLR where the Court held;

“The question of limitation is a question that goes to the jurisdiction of this Court. It is a clear point of law, which if argued as Preliminary Objection point may dispose of the suit.”

See also the case of *Bosire Ongero v Royal Media Services* [2015] eKLR, the court stated that;

“The question of limitation touches on the jurisdiction of the court, which means that if a matter is statute barred, the court would lack jurisdiction to entertain it. I therefore find and hold that the preliminary objection raised in the instant case is on a point of law, and the same is validly and properly taken.”

26. Further, the Defendant/ Objector has alleged that the suit herein offends the Provisions of section 37 rule 7, of the *Civil Procedure Rules*, as a claim for adverse possession ought to be brought through an Originating Summons. This is a pure point of law.

27. Consequently, the court finds that the objection raised by the Defendant/Objector herein is a pure point of law, which if upheld may dispose of the suit. Therefore, the court finds and holds the Notice of Preliminary Objection herein meets the criteria of what is a Preliminary Objection as described in the *Mukisa Biscuits case* (supra).

28. Having settled the criteria, the next issue is whether the instant Preliminary Objection is merited. For this determination, the court will have to answer the questions of whether the suit herein is time barred, and whether the suit herein should be defeated for failure to bring it through an Originating Summons.

29. The genesis of this Preliminary Objection is the Plaintiff dated 22nd November 2023, wherein the Plaintiffs have sought for the following Orders:

- 1) A declaration that the late Joseck Macharia Kimani and Gichari Thuku legally and properly acquired the suit property LR.No.LOC.8/Gatara/412 by way of purchase and that the same belongs absolutely to their respective estates, and should be registered in the joint names of the Plaintiffs.
- 2) In the alternative, a declaration that the Defendant’s title to LR No. Loc.8 /Gatara /412 that is occupied and utilized by the Plaintiffs and their families has been extinguished, and that the Plaintiffs have acquired title to the suit property by way of adverse possession.



- 3) That the name of the Defendant be cancelled and/or deleted from the proprietorship section of parcel LR No.LOC.8/Gatara/412, and that the property be registered in the joint name of the Plaintiffs, with production of the original title by the Defendant for purposes of the said registration being dispensed with.
 - 4) A permanent injunction restraining the defendant by himself, his servants, agents, employees or any party claiming title under him from trespassing onto, appropriating, constructing upon, using and/or in any other way interfering with the Plaintiff's and their families' quiet possession and use of the suit property LR No.LOC.8/Gatara/412.
 - 5) Any other relevant Order or remedy that the Honourable court may deem appropriate and justifiable in the circumstances.
 - 6) Costs of the suit.”
30. The Plaintiffs contended that land parcel number LR No.LOC.8/Gatara/412 (the suit property), was originally owned by David Kirunga Muchiri (deceased), who relocated to Nakuru County from Githambo area of Murang'a County in the 1950s, prior to the enactment of the [Land Consolidation Act](#) 1960. They also contended that despite the absence of David Kirunga Muchiri from Githambo area during 1960-62, when the exercise of land consolidation was underway, he was allocated two parcels of land namely, LR No. LOC.8/Matharite/313 and LR/No/LOC/Gatara/412. It was also alleged that the deceased went back to Murang'a in 1972, and disposed of land parcel number LR No. LOC.8/Matharite/313, by sale to his cousin Gichari Thuku, and executed a transfer thereof on 15th November 1972.
 31. Further, the Plaintiffs contended that the deceased returned to Murang'a in 1977, and sold land parcel number LR NO/LOC8/Gatara/412, to Joseck Macharia Kimani, and Gichari Thuku, through a sale agreement dated 27th July 1977. The said David Kirunga Muchiri (deceased), passed away on 6th August 1977, and was buried LR No. LOC.8/Matharite/313, which parcel of land he had sold to Gichari Thuku.
 32. It was their further contention that the joint purchasers of the suit land, Joseck Macharia Kimani and Gichari Thuku, took possession of the said parcel of land in 1977 and proceeded to engage in cultivation therein until their deaths in 1988 and 1996, respectively. That even with their demise, their respective families have continued to utilize the suit property to date.
 33. The Plaintiffs also averred that Cecilia Wanjiru Kirunga, widow of David Kirunga Muchiri, filed for and obtained a Grant of Letters of Administration in respect of the estate of her husband in Succession Cause No. 154 of 1989 (Nakuru High Court), without disclosing to the Court that the suit property had been sold off to Joseck Macharia Muchiri and Gichari Muchiri, by her husband prior to his demise.
 34. They also alleged that the said Cecilia Wanjiru Kirunga died in 2008, and the Defendant/ Objector is her son who obtained Letters of Administration in regard to the estate of his mother; and the same were confirmed on 13th October 2021, whereby, the suit property was allocated to him vide Nakuru Chief Magistrate's Court Succession Cause No. E527 of 2021.
 35. Further, that the Defendant/ Objector subsequently obtained a title deed to the suit land issued in his name and immediately began harassing the Plaintiffs demanding that they vacate the suit property. That the High Court (Nakuru) issued an order in Succession Cause No. 154 of 1989 (the Estate of David Kirunga Muchiri), restraining the Defendant/ Objector herein from interfering with the Plaintiffs' possession and use of the suit property pending the determination of the main suit.



36. The Court has brought out the above background of this case in order to determine what is the cause of action herein. Is the cause of action herein enforcement of the sale agreement entered in 1977, or rights accrued due to the actions of the Defendant herein of attempting to evict the Plaintiffs from the suit land?
37. The court has considered the Plaintiffs prayers in their Plaint dated 2nd November 2023, and has noted that their reference to the Sale agreement of 1977, is to give the background of the reasons why the Plaintiffs have found themselves in occupation of the suit property. The cause of action revolves around the actions of the Defendant/Objector herein of attempting or threatening to evict the Plaintiffs from the suit land.
38. Having been threatened to vacate the suit property, the Plaintiffs have come to court seeking a declaration that Joseck Macharia Kimani(deceased) and Gichari Thuku(deceased), who are the Patriarchs of the Plaintiffs herein legally purchased the suit property from the late Daudi Kirunga Muchiri, the original proprietor of the suit land.
39. There are two issues herein for determination being; -
- i. whether the suit herein is statute barred by dint of sections 4(1)(a) and 7 of the *Limitation of actions act*;
 - ii. whether the suit offends the provisions of Order 37 rule 7 of the Civil Procedure Rules.
40. On whether the suit herein is statutory barred, the court finds that indeed section 4(1) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya prescribe the limitation period for institution of suits in regard to various causes of action. In regard to causes of action founded on contract, the limitation period is 6 years, whereas in regard to recovery of land, the limitation period herein is 12 years.
41. The court earlier had stated that for determination on whether the suit is caught by limitation of action, the court has to determine the cause of action herein. The case of *Edward Moonge Lenguuranga v James Lanaiyara & Another* (2019) eKLR, defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. For a cause of action herein to be determined, it is important to look at the averments and the prayers sought in the Plaint.
42. There is no doubt that question of limitation of action goes to the jurisdiction of the court. Where a suit is time bared, the court has no jurisdiction to hear it, See the case of *Bosire Ongera v Royal Media Services* (2015)eKRL,
- “The issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.”
43. Section 4(1)(a), of the *Limitation of Action Act*, provides as follows;
- “(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—
- a. actions founded on contract.”



44. The purpose of limitation of actions is to bar stale suits and protect Defendants from unreasonable claims. See the case of *Alba Petroleum Limited v Total Marketing Kenya Limited* (2019)e KLR, where the court held;

“The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

45. The Defendant/ Objector has averred and submitted that the Plaintiffs cause of action is the enforcement of the Sale agreement dated 27th July 1977, between Daudi Kirunga Muchiri (deceased) and Joseck Macharia Kimani and Gichari Thuku, both deceased. It was his submissions that since the cause of action is founded on contract, then the said action could have arisen in 1983, or 1989. That this suit has been brought after 46 years, and is thus time barred.

46. These allegations and averments have been opposed by the Plaintiffs, who have submitted that their cause of action is not based on a claim for purchase of the land from Daudi Kirunga Muchiri, but on the fact that they have inherited the suit property from their Patriarchs who purchased the same from the said Daudi Kirunga, and thus are entitled to the prayers sought.

47. Indeed, this court had perused the pleadings, and has noted that the Plaintiffs have alleged that they have lived on the suit land for long, having found themselves on the suit land by virtue of being dependants and/or beneficiaries of the initial purchasers. That the Defendant/ Objector became the registered owner of the suit property on 2nd February 2022, and thereafter, he threatened to evict the Plaintiffs from the suit land, by sending them a demand letter to vacate the suit land.

48. From the averments contained in the Plaint, the cause of action accrued from the time the Defendant/ Objector herein attempted to evict the Plaintiffs from the suit land in the year 2022. The cause of action herein is not the enforcement of the sale Agreement of 27th July 1977. Therefore, section 4(1) (a) of the *Limitation of Actions Act*, does not apply herein. This suit is not statutory barred by dint of section 4(1) (a) of the *Limitation of Actions Act*.

49. The next question is whether the suit herein is also statutory barred by virtue of Section 7 of the *Limitation of Actions Act*, which provides as follows;

“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.”

50. From the above provisions of law, a suit for recovery of land should be brought before expiry of 12 years. See the case of *Sobanladurgadass Rajput and another v Divisions Integrated Development Programmes Co Ltd* (2021) eKLR where the Court held;

“Section 7 of the *Limitation of Actions Act* provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. Therefore, in regard to the agreement of 8th December, 2007, the limitation period lapsed on 8th December 2019. On the second agreement of 25th January 2008, the limitation period lapsed on 25th January, 2020. Essentially therefore, the Plaintiffs’ suit having been filed on 7th July 2020, was filed out of time.”



51. For the above objection, the Defendant relied on the case of *Benson Oketch Okello v Benson Nyandiga Onguru* (2019) the court held as follows;

“It emerges from the foregoing analysis that...That instant suit is barred by dint of sections 4 and 7 of the *Limitation of Actions Act* (Cap 22) and Sections 6 of the *Land Control Act*(Cap 302). I concur with the Defendant counsel that the suit is non suited. It discloses no reasonable cause of action and constitutes an abuse of the due process of the court. Wherefore, I find the Preliminary Objection on points of law...cogent and merit. I uphold the same. The Plaintiff’s suit by way of a plaint dated 19th March 2014 is hereby struck out with costs to the Defendants.”

52. However, this court finds that the Plaintiffs are the ones in possession of the suit land. The Plaintiffs have brought a claim to be declared as owners of the suit land by virtue of adverse possession, for having lived on the suit land for over 12 years. The Plaintiffs have not sought to recover the land from the Defendant/ Objector, but to be declared as owners, based on the fact that they are allegedly beneficiaries of the original purchasers, and by dint of having lived on the suit land for more than 12 years. Therefore, their claim is not barred by dint of section 7 of the *Limitation of Actions Act*.

53. Having alleged as they have in their Claim, the Plaintiffs should be allowed to avail their evidence and prove their case on the usual standard of balance of probabilities. The Defendant/Objector obtained defendable interests in the year 2022, and 12 years are not yet over. The Plaintiffs are within the time limit for bringing claims for recovery of land.

54. The second issue is whether the suit is bad in law as it offends the provisions of Order 37 Rule 7 of the *Civil Procedure Rules*, which provides as follows:

“(1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons”

55. For the above proposition, the Defendant relied on Section 38 (1) & (4) of the *Limitation of Actions Act*, which provides as follows;

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2)

(3)

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

56. However, the Plaintiffs opposed the said objection and submitted that the prayer for adverse possession is an alternative prayer, and there are five (5) other prayers and thus the claim ought not to have been brought as an Originating Summons.



57. It was their further submissions that Order 37 Rule 7 is not couched in mandatory terms. They relied on the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another* (2020) eKRL, where the court held that;

“In fact, it is no longer a requirement that adverse possession claims be commenced by way of originating summons. Case law now allows one to commence them by plaint or even counterclaim”.

58. The court had indeed considered the provisions of Order 37 rule 7 of the *Civil Procedure Rules*, and it is clear that a claim for adverse possession ought to be brought to court by way of Originating Summons.

59. It is not in doubt that disputes that are brought to court through Originating Summons are unlikely to be of any substantial disputes of facts. They are not supposed to be protracted in nature. However, given the lengthy of the averments and even history of this claim herein, this is not a simple dispute of facts. The dispute herein has rightly been brought to court through a Plaint, as there are likely to be substantial disputes of facts.

60. Further, the prayer for Adverse possession is not the main prayer, it is an alternative prayer, and thus could not have been brought separately through an Originating Summons. The bringing of this suit through a Plaint would not at all affect the substantive justice, as the Defendant has an opportunity to respond to the claim and avail the evidence. Article 159(2)(d) of the *Constitution* requires the court to administer justice without undue regard to technicalities.

61. Further, it is evident that this objection herein is on “want of Form”, but not substance of the claim. The court will be guided by the provisions of sections 1A & 1B of the *Civil Procedure Act*, on the overriding objectives of the Act, which enjoin the court to facilitate litigations in an expeditious, proportionate, fairly and with less expense. Therefore, failure to bring a claim for adverse possession through an Originating Summons should not be used to defeat the suit. The suit should proceed for hearing and be decided on merit.

62. The Defendant/Objector had also alleged that the suit is incompetent, sham vexatious and an abuse of the court process. For this submissions, the Defendant relied on the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR. Where the court held:

“the term abuse of Court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive”.

63. The Plaintiffs opposed that objection too and urged the court that it should not shut the Plaintiffs out of the seat of justice. The court has considered the pleadings herein and the previous determinations arising from the dispute herein. It cannot be said that the Plaintiffs have no cause of action. They have allegedly been faced with an eviction from the suit property, wherein they allege that they have lived for long. They should be allowed to ventilate their claim in court of law, and the same be decided on merit.

64. Striking out suits preliminarily is a draconian measure, which should be allowed only as last resort and when the suit is so hopeless and cannot be salvaged, even by an amendment. Courts have held that where there is a semblance of cause of action, parties should be allowed their day in court.



65. In the case of *D.T. Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1, the Court held as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment of. If a suit shows a mere semblance of a cause of action provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

66. Similarly, in the case of *Peter Ngugi Kibiri v Esther Wangari* [2015]e KLR the Court of Appeal stated as follows:

“Practical and substantive justice dictate that it is prudent that the dispute between the parties be resolved and determined through full hearing on the merits”

67. Further, in the case of *Republic of Peru v Peruvian Guano Company* 36 Ch Div 489 at pages 495 and 496, the Court held that striking out is a drastic remedy to be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution.

68. Having carefully analyzed the Notice of Preliminary Objection herein and the rival written submissions, together with the cited authorities and relevant provisions of law, the court finds it not merited. The suit herein should proceed for hearing and be decided on merit.

69. The upshot of the foregoing is that the Court finds and holds that the Notice of Preliminary Objection dated 7th December 2023, is not merited and the said objection is hereby dismissed entirely with costs the Plaintiffs herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 20TH DAY OF MARCH 2024.

L. Gacheru

JUDGE

Delivered online in the presence of:

Mr. Gacheru H/B for Mr Kimani for Plaintiffs

Absent for the Defendant/ Objector

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

20/03/2024

