



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Wanjihia v Kirubi & 2 others (Environment & Land Case
E007 of 2023) [2024] KEELC 4979 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E007 OF 2023**

**JG KEMEI, J
JUNE 27, 2024**

BETWEEN

MARGARET MWIHAKI WANJIHIA APPLICANT

AND

ANTHONY MAINA KIRUBI 1ST RESPONDENT

JOHN GATU KIRUBI 2ND RESPONDENT

LAND REGISTRAR, THIKA 3RD RESPONDENT

RULING

1. Vide a Complaint dated 19/8/2023 the Plaintiff herein claimed that on 28/11/2015 she entered into a sale agreement with the 1st and 2nd Defendants for a purchase of 36 plots to be hived from Juja/Komoblock 1/29. That consequently the Plaintiff paid the 1st and 2nd Defendants' consideration of Kshs. 2,160,000/= and took vacant possession of the said plots. The Plaintiff claims that the Defendants failed to effect transfer of the 36 plots in her name despite numerous requests for the same. To enforce her rights, she proceeded to file Nairobi ELC No. 607 of 2015 but the case against the 1st, 2nd, 3rd and 4th Defendants therein was struck out in 2018 and 2022 for want of service. Her attempt to reinstate the suit was dismissed on 25/4/2023 prompting her to file a fresh suit, the instant one.
2. Further the Plaintiff avers that she has discovered fraudulent attempts by the 1st and 2nd Defendants to sell the same plots to third parties. She urges the Court inter alia to order a permanent injunction against the 1st and 2nd Defendants from dealing in any way with the 36 plots and specific performance of the sale agreement dated 28/11/2015.
3. Resisting the Plaintiff's claim the 1st Defendant filed his memorandum of appearance dated 11/10/2023 through the firm of Kimani & Muriithi Associates. He also filed his statement of defence dated 12/10/2023 and contemporaneously filed a Preliminary Objection dated 19/10/2023, the subject of this Ruling.



4. The Preliminary Objection urges the Court to strike out the proceedings in limine on ground that; -
 - “1. The Court lacks jurisdiction to hear and determine the suit since the cause of action, in so far as it seeks to enforce a contract, is statute barred pursuant to Section 4 of the Limitation of Actions Act.”
5. On 8/5/2024 directions were taken and parties elected to canvass the Preliminary Objection by way of written submissions.
6. Supporting the Preliminary Objection, the 1st Defendant filed submissions dated 18/4/2024 whereas the Plaintiff’s submissions in rebuttal are dated 31/5/2024.
7. The 1st Defendant submitted that the cause of action is based on contract. That upon 90 days lapsing, the vendors allegedly failed to transfer the plots to the Plaintiff. As a result, the Plaintiff’s right to sue crystallized in light of the said breach and thus the cause of action arose on 26/2/2006. That section 4 (1) Limitation of Actions Act (LAA) limits the period of a cause of action based on contract to six years; accordingly, the Plaintiff’s right to sue expired on 26/2/2012, being 6 years after the right to sue accrued. Consequently, the Court lacks jurisdiction to entertain the suit as filed and it should be dismissed with costs in light of the celebrated case of Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1.
8. On the other hand, the Plaintiff contended that the 1st Defendant’s reliance on Section 4 (1) of the LAA is wrong and misplaced. That the correct provision in this case is Section 7 of the LAA which provides; -
 - “7. Actions to recover land
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.”
9. The Plaintiff argued that she duly entered into a sale agreement with the Defendant and discharged her obligation under the contract by paying the purchase price, however the Defendants breached the sale agreement by failing to surrender the completion documents to effect transfer of the 36 plots in the Plaintiff’s name and instead proceeded to sell them to other third parties. That to buttress her rights, the Plaintiff filed Nbi ELC Suit No. 697 of 2015 which was not determined but the Court directed her to file a fresh suit. That based on Section 26 of the LAA and the decision in Justus Tureti Obara v Peter Koipeitai [2014] eKLR, the Plaintiff discovered fraud sometime in June 2015 and the cause of action would lapse in June 2027. That the issue of fraud is a question of fact and not a pure point of law as required of a Preliminary Objection as it was held in the case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696. The Court was urged to dismiss the Preliminary Objection with costs.
10. The Black’s Law Dictionary, 10th Edition defines a Preliminary Objection as; -
 - “... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”
11. The parameters of consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal



in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:

“ 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.”

12. At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

13. For a Preliminary Objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit. See the case of [David Karobia Kiiru v Charles Nderitu Gitoi & Another](#) [2008] eKLR.

14. The Supreme Court in Petition No. 7 of 2013 [Mary Wambui Munene v Peter Gichuki Kingara and Six Others](#), [2014] eKLR stated that ‘jurisdiction is a pure question of law’ and should be resolved on priority basis. Accordingly, jurisdiction goes to the root of a matter and as such it is a pure point of law. In the case of celebrated case of [Motor Vessel ‘Lilian S’](#) (*supra*) it was stated thus;

“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.”

15. A perusal of the Complaint dated 29/8/2023 shows that the cause of action herein stems from a sale agreement for purchase of various plots of land demised in the suit property. The sale agreement was entered on 28/11/2005. According to the 1st Defendant the cause of action is based on contract and applying Section 4 of the [LAA](#), the time frame of 6 years lapsed on 26/2/2012. The Plaintiff refutes the said submission and maintains that her action is premised on recovery of land which is guided by Section 7 of the [LAA](#) and coupled on discovery of fraud allegedly committed by the 1st Defendant.

16. For the Court to determine the veracity or otherwise of the rival positions on the cause of action, it must call and analyze evidence on what is the cause of action and when did it accrue. Such analysis ousts the laid down parameters of a pure point of law. I rely on the holding of Ojwang J (as he then was) in case of [Oraro v Mbaja](#) [2005]eKLR that:

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”



17. Consequently, the Preliminary Objection is unmerited. It is for dismissal with costs to the Plaintiff.

18. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Warutumu HB Waithaka for Plaintiff

1st, 2nd and 3rd Defendants – Absent but served

Court Assistant – Phyllis

