



**Murathi (Suing as legal representative of Silvano Murathi Mugane  
(Deceased)) v Mugane & another (Environment & Land Case  
E008 of 2021) [2023] KEELC 18920 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 18920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE E008 OF 2021  
A KANIARU, J  
JANUARY 25, 2023**

**BETWEEN**

**NANCY RUGURU MURATHI ..... PLAINTIFF  
SUING AS LEGAL REPRESENTATIVE OF SILVANO MURATHI MUGANE  
(DECEASED)**

**AND**

**CHARLES NJERU MUGANE ..... 1<sup>ST</sup> DEFENDANT  
JOSEPH MUTHEE MURATHI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court is a preliminary objection dated March 12, 2022. The objection targets the suit as filed and is premised on the following grounds to wit;
  - i. That the suit is time barred under section 7 of the *Limitation of Action Act* cap 22.
  - ii. That the suit is barred by section 6 and 8 of the *Land Control Act*.
2. The parties in the suit are Nancy Ruguru Murathi as the plaintiff while Charles Njeru Mugane and Joseph Muthee Murathi as the defendants. The objection is filed by both defendants. The plaintiff's case was that her late husband had purchased land from the two defendants via a sale agreement dated December 21, 2005 for Kshs 300,000/= which amount he paid in full. It was her case that pursuant to the said agreement, her husband obtained land board consent before the Land board Manyatta on September 15, 2006.
3. That the transaction did not materialize for reason that a restriction was placed on the land by Henry Ndwiga Kiura but the same was later lifted via a court order in Embu Case No 210 of 2015. It was



- argued that a decree was issued in that suit and that pursuant to the decree, the defendants were therefore holding the land in trust for the plaintiff.
4. It was said that the land had been surveyed and Henry Ndwiga Kiura evicted. However, the defendants were accused of taking possession of the land to the exclusion of the plaintiff. The plaintiff's claim was for a declaration that the defendants hold the land in trust for her, cancellation of the defendants name from the decree and the plaintiffs name be replaced, an order that the defendants transfer land parcel Gaturi/Nembure/2657 to the plaintiff, orders of eviction of the defendants, a permanent injunction and costs of the suit.
  5. The defendants opposed the suit by filing a joint statement of defence and a preliminary objection. In the defence, they denied the averments in the suit and put the plaintiff to strict proof of the allegations made. Further they argued that the suit was malicious, misconceived, an abuse of the court process, frivolous and one filed in bad faith. As for the preliminary objection which is outlined above the court directed that the same be dispensed with first.
  6. The plaintiff filed her submissions first. She submitted that the only issue for determination was whether the notice of preliminary objection was meritorious, misconceived, frivolous, vexatious and an abuse of the court process. It was submitted that the right to be heard was a fundamental right which could not be easily taken away unless there were compelling reasons to warrant such a situation.
  7. The plaintiff relied on the case of *Avtar Singh Bhamra & another v Oriental Commercial Bank*, Kisumu HCCC No 53 of 2004 where it was stated that a preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained. It was argued that the objection by the defendants had failed test as it did not germinate from the pleadings by the parties.
  8. Further reliance was made to the case of *Mukisa Biscuits Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the court defined a preliminary objection. According to the plaintiff, the defendant having denied all the averments made by the plaintiff then there were seriously contested facts which demanded a formal hearing, recording of evidence, and a delivery of judgement.
  9. Equally reliance was made to the case of *Oraro v Mbaja* [20051 IKLR 141 where it was held: that a preliminary objection needed not deal with disputed facts as it ought to derive its foundation from factual information which stands to be tested by rules of evidence. Further reliance was made to the case of *Agnes Wangari Riano v Daniel Waweru Riano* which cited with approval the case of *United Insurance Co Ltd v Scholastica A. Odera* where it was stated that a 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 disouted."
  10. In that regard it was said that the preliminary objection was without foundation, is frivolous and was only meant to vex the plaintiff and to delay the fair determination of this action. The court was therefore urged to dismiss it.
  11. The defendants equally filed their submissions, they gave a brief background of the case and relied on the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696 wherein a preliminary objection was described as 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.
  12. On the first objection on whether the matter was time barred under section 7 of the *Limitations of Actions Act*, it was submitted that an action for recovery of land should be before 12 years lapse from the date on which the right of action accrued. It was however said that section 4 (1) (a) of the *Limitation*



- of Action Act* provides that a suit for recovery on actions founded on a contract was 6 years. It was said that the agreement had been overtaken by events as per the provisions of the law.
13. The defendants relied on the case of *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited) & another* 120201 e KLR, and the case of *Edward Moonge Lengusuranga v James Lanaiyara & another* [2019] e KLR, where in both cases the court reiterated the provisions of section 7 of the *Limitations of Actions Act*. It was argued that the first defendant having bought the suit land in the year 1999 and taken possession of the same, the plaintiff herein could only seek to recover the land from the defendants within twelve years from the date of the agreement. The suit was therefore said to be time barred and the court was urged to dismiss it.
  14. On the second issue on whether the suit is time barred by section 6 and 8 of the *Land Control Act*. With regard to section 6 of the *Land Control Act*, it was contended that the land board consent ought to be six months from the date of the agreement. The defendants were of the view that the consent having been obtained on September 15, 2006 then it was inconsistent with the 6 months period provided for in the Act as the same was applied 10 Months after the sale agreement. The defendants contended that the agreement was null and void, to buttress this they relied on the case of *Simiyuyu v Watambamala* [1985] KLR 852, which cited with approval the case of *Karliri v Gitura* (supra) at P 856 where the court held that an agreement was void for failure of parties to obtain a land board consent.
  15. On whether the same offends the provisions of section (8) (1) of the *Land control Act* it was stated that the same stipulates that consent should be obtained within six months and where the same lapses one can seek an extension of that period where it considers that there is sufficient reason to do so. The plaintiff was accused of failing to seek any extension while obtaining the consent as stipulated under the act.
  16. In conclusion the defendant relied on the case of *Mehta v Shah* [1965] E.A 321, where it was held that "The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. Further it was said that equity aids the vigilant and not the indolent and the plaintiff and her deceased husband were accused of sleeping on their rights for over 16 years. The defendants pleaded with the court to allow the objection which they argued had merits.

### **Analysis and Determination**

17. I have considered the preliminary objection filed, the rival submissions by the parties and the record in general. The only issue for this court's determination is whether the preliminary objection has merits. In the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* (1969) EA 696, Law J. A. it was stated 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 implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration....."
18. Further, In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J (as he then was) stated that:
 

"A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in



any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, 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. Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

19. The nature and character of a preliminary objection is one that raises a pure point of law, the objection should not be based on factual issues, the facts therein should not be disputed and the same should not require ascertainment of facts or probing of evidence by the court. The defendant has raised two ground of objection which are both on pure points of law hence can be well determined under a preliminary objection.
20. The first objection raised is that the suit is time barred under section 7 of the [Limitation of Action Act](#) cap 22. Section 7 of the [Limitation of Actions Act](#) 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.”
21. In the suit herein the plaintiff avers that her husband bought the suit parcel of land from the defendant via an agreement dated December 21, 2005. She claims that however a restriction was placed by one Henry Kiura but the same was lifted by the court in Embu ELC Case No 210 of 2015. The plaintiff brought a claim that the decree in the case was issued in favour of the defendant but according to her, they were holding the said decree and land in trust for her late husband. The defendants while filing the preliminary objection were of the view that the case was filed 12 years from the date the parties entered into an agreement and the suit was therefore time barred. They went ahead to state that the cause of action was based on a contract and in fact the suit is time barred for having been filed more than 6 years from the date the contract was entered into.
  1. It is not a disputed fact that the agreement entered into between the plaintiff’s deceased husband and the defendants was executed in the year 2005 which is more than 12 years. However what should determine whether the suit is time barred is the date on which the cause of action accrued to the deceased person or to a person through whom it is claimed. What is a cause of action was defined by the court in the case of “cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. It also refers to a legal theory upon which a plaintiff brings suit”. See the case of *Moffat Muriithi Muchai* (suing on behalf of the *Estate of the Late Milka Njoki Muchai (deceased)*) v *Wanjiru Wanjobi Gatundu & 2 others* [2019] eKLR (supra).
22. So when exactly did the cause of action in this case accrue, is it at the time of execution of the agreement or when the transfer was to be effected, or is it when the restriction was placed or lifted by the court. I note that the parties have not belabored on this issue of the cause of action but this is the only way for this court to determine whether the suit is time barred and this can only be determined through evidence which is not forthcoming from the pleadings filed by the parties.
23. It has been held that where a preliminary objection requires the court to ascertain facts and probe evidence then such an objection cannot be determined under a preliminary objection. Though the issue of the suit being time barred is on a pure point of law, in this case it cannot be determined



without probing evidence and facts to determine when the cause of action in this case arose. In the circumstances, I find that the said objection cannot be determined at this juncture and the same fails.

24. The second issue raised is that of failure by the plaintiff's husband to obtain the Land Board Consent within the stipulated 6 months or by failing to seek extension of that period where it considers that there is sufficient reason to do so. It was said that the suit is barred by section 6 and 8 of the Land Control Act. Section 6 of the Land Control Act stipulates as follows; "each of the following transactions that is to say— (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;.... is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act".
25. Further section 8 of the Land Control Act states as follows; An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit.
26. From the records before the court, the plaintiff's husband applied for a land control board consent on September 15, 2006 which was about 9 months after the sale agreement was entered into by the parties. Does this failure to obtain consent or seek extension render the suit time barred? The Court of Appeal in its recent decision in Aliaza v Saul (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June 2022) (Judgment) has a contrary view on this. In that case Justice Mumbi Ngugi stated as follows....The failure on the part of the respondent to obtain the necessary consent from the Land Control Board within the required period of six (6) months to enable the appellant transfer the suit land into his name does not render the transaction void. Equity and fairness, the guiding principles in article 10 of the Constitution, require that the Land Control Act is read and interpreted in a manner that does not aid a wrongdoer, but renders justice to a party....
27. Justice Kiage went ahead to state "It is time, I think, that this court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the Land Control Act, an old statute of dubious utility in current times.
28. The Court of Appeal holds a contrary view from the provisions of the Land Control Act. The court has unequivocally pronounced itself on this, where it has held that failure to obtain land board consent within 6 months does not render the transaction void. Having carefully read the decision, the same would in essence apply to failure to comply with the provisions of section 8 of the Land Control Act. Based on the doctrine of *stare decisis*, I find that this decision is binding upon this court and the failure by the plaintiff's husband to obtain the land board consent does not in any way render the agreement void. The suit is therefore not time barred.
29. In conclusion, the preliminary objection filed herein lacks merit and the same is dismissed. The costs of the objection shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25<sup>TH</sup> DAY OF JANUARY, 2023.**

**A.K. KANIARU**



**JUDGE**

**25.1.2023**

