



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 497 OF 2015

NJAU INVESTMENTS LIMITED.....APPELLANT

VERSUS

MARY NDERITU RIENYE.....1ST RESPONDENT

LEAH WANJIRU NDERITU Being sued as the administrators to the estate of

ANDREW NDERITU RIENYE (Deceased).....2nd RESPONDENT

(Being an appeal from the Ruling of Hon M. Chesang (Mrs) Resident Magistrate

in CMCC No 1030 of 2005 at Nairobi on 27th September 2015)

JUDGMENT

INTRODUCTION

1. In her Ruling of 27th September 2015, the Magistrate Hon M. Chesang (Mrs) Resident Magistrate, upheld the Respondents' Preliminary Objection that the Appellant's suit was time barred and thus struck out its plaint.
2. Being dissatisfied with the said Ruling, the Appellant filed its Memorandum of Appeal dated 23rd October on 26th October 2015. It relied on four (4) grounds of appeal.
3. Its Written Submissions were dated 7th January 2019 and filed on 8th January 2019 while those of the Respondents were dated 7th March 2019 and filed on 30th April 2019.
4. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

5. The Appellant contended that its claim from one Andrew Nderitu Rienye (hereinafter referred to as "the deceased") who was represented by the Respondents as administrators to his Estate in the case in the Magistrates' Court was for a sum of Ksh 700,000/=.
6. It stated that it paid the deceased the said sum of money in 1993 as purchase price of land known as Title No 1023 Eastleigh in Nairobi (hereinafter referred to as "the Subject property"). However, it subsequently came to learn that the subject property had been registered fraudulently in the name of the deceased.
7. It was emphatic that its Plaint was for a refund of the said sum which it averred was fraudulently and knowingly obtained from it by the deceased.
8. It averred that because its claim was based on fraud, as per Section 26 of the Limitations of Actions Act Cap 22 (Laws of Kenya), time only started to run from the time when the fraud came into his knowledge and not from the date it entered into the contract with the deceased.
9. It stated that the Learned Magistrate erred when she held that it had not disclosed in its Plaint when the fraud was discovered for the reason

that it was not possible to plead everything in the Pleint and that it was clear from the Witness Statement of Titus G. Njau that it discovered the fraud in 2004.

10. It placed reliance on the case of **Justus Tureti Obara vs Peter Noipetai Nengisoi [2014] eKLR** where Okongo J held that the question of when fraud is discovered is a matter to be ascertained during trial.

11. It was emphatic that the issue of when it became aware of the fraud could only have come out during its witness's evidence.

12. On their part, the Respondents argued that there was no rejoinder in the form of a Reply to their Defence in which they had raised the issue of the Pleint having been time barred under the Limitations of Actions Act.

13. They were categorical that the Plaintiff's claim was for a refund of Kshs 700,000/= and that since it was not in dispute that the agreement for the purchase of the subject property was entered into in 1993, its claim was time barred as was contemplated in Section 4(2) of the Limitations of actions Act because for tort of fraud, the suit ought to have been filed within three (3) years.

14. They contended that the proceedings in **Kibera Criminal Case No 2283 of 1994 Republic vs Jane Wamburu Githinji vs Justus Nyamu Gatundu** showed that the accused persons therein were convicted in 1997 for having defrauded the deceased by selling him the subject property.

15. It was their averment that the deceased had acquired the said subject property for valuable consideration in 1993 and that he was not part of the fraud because he was not aware of the same.

16. They argued that the said criminal proceedings were not pending at the time of the demise of the deceased and averred that the proceedings were not instituted within six (6) months of them being issued with the Certificate of Confirmation of Grant on 5th December 1997 but were instead commenced in 2005.

17. Section 4(1) and (2) of the Limitations of Actions 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;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

18. Further, Section 26 of the Limitations of Actions Act states that:-

“Where, in the case of an action for which a period of limitation is prescribed,

either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid;

or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

(i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed;

or

(ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

19. To establish whether the Appellant’s *Plaint* dated 2nd February 2005 was *prima facie* time barred under the Limitations of Actions Act, this court perused the Record of Appeal.

20. In the said *Plaint*, the Appellant had contended as follows:-

1. That sometime in the year 1993 the deceased entered into a sale agreement with the Plaintiff whereby the deceased purportedly sold all that parcel of land known as Title number 1023 section 3 Eastleigh-Nairobi to the Plaintiff for the purchase price of Kenya Shillings seven hundred thousand “read Kshs 700,000/=.”

2. Pursuant of the said agreement the Plaintiff advanced the full purchase price to the deceased who received and acknowledged receipt of the said purchase price of Kshs 700,000/=.

3. It later turned out that the deceased had no interest of property in the said parcel number 1023 Section 3 Eastleigh-Nairobi as the said parcel of land was registered in his name fraudulently.

4. By purporting to sell a parcel of land which the deceased did not have an interest in, the deceased acted fraudulently and knowingly obtained money towards a parcel that he could not transfer.

PARTICULARS OF FRAUD BY THE DECEASED

a. Obtaining consent to transfer fraudulently.

b. Purporting to effect a transfer without an interest to the said parcel of land.

c. Executing the sale agreement with the knowledge of not having property to the subject of the sale.

d. Obtaining Kshs 700,000/= from the Plaintiff fraudulently without the capacity to effect the transfer.

5. The Plaintiff’s claim against the defendants who are the administrators to the estate of the deceased is for Kshs 700,000/= being the sum of money fraudulently obtained by the deceased from the Plaintiff particulars whereof have been fully set out hereinabove together with interest at the prevailing bank rates with effect from 1993 till payment in full.

21. In the said *Plaint*, the Appellant had sought the following reliefs:-

a. The sum of Kshs 700,000/= obtained fraudulently.

b. Interest on (a) above at commercial rates with effect from 1993.

c. Costs of the suit.

22. In Paragraph 9 of their Defence, the Respondents stated as follows:-

“The 1st and 2nd Defendants wish to state that the Plaintiffs suit is bad in law and the same is time barred and an abuse of the court process and they will at the appropriate time apply for the same to be struck out or raise a Preliminary Objection to the same.”

23. The Appellant did not file any Reply to the Defence. However, in his Witness statement, Titus G. Njau stated as follows:-

1. That later and while the said case was pending for hearing and determination and around the year 2004, I was served with pleadings for NAIROBI HCCC NO.768 OF 2004 by one Mary J. Njeri who had sued the Plaintiff company herein and who was seeking cancellation of the Plaintiff’s title on the ground that Andrew Rienye who sold the suit property to the Plaintiff’s company did not have a good title as the suit property was transferred to him by fraudster and who were charged in Kibera Criminal Case No 2283 of 1994.

2. That upon receiving the said court papers, I instructed my Advocates to apply for the proceedings of the said Criminal Case No 2283 of 1994 and upon receiving the same I realized it was true the person who transferred the suit property to the said Andrew Rienye were indeed fraudsters and they were actually charged in court in the said Criminal Case and therefore the title that was transferred to the said Andrew Nderitu Rienye was therefore not a good title and therefore the said Andrew Nderitu Rienye could also not pass a good title to the Plaintiff.

3. That subsequently the Plaintiff instructed its Advocates herein to file the current suit seeking for refund of the purchase

price the same being Kshs 700,000/= that had been paid towards purchase of the suit property.

5. That at the time of filing the current suit Andrew Nderitu Rienye had already passed on and therefore the Plaintiff had to sue the Administrators and the legal representatives of the said Andrew Nderitu Rienye.

24. Order 2 Rule 10(1) (a) & (2) of the Civil Procedure Rules states that:-

(1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing-

(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.”

25. It was evident from the Appellant’s Plaintiff that it had pleaded particulars of fraud. What it failed to do in Paragraph 4 of its Plaintiff was to specifically state when it discovered that the deceased had no interest in the said parcel of land. Notably, the use of the words “it later” meant that the Appellant subsequently came to learn that the deceased had no interest in the subject property.

26. In view of the fact that Titus G. Njau had already stated in his Witness Statement that the Appellant learnt of the alleged fraud in 2004, the Learned Magistrate ought not to have upheld the Respondents’ Preliminary Objection for the reason that that was a matter of evidence that could only be determined during trial.

27. Whether the Appellant could prove that fact in view of the Respondents’ assertions that the criminal proceedings at Kibera were concluded in 1997 was a different case altogether. It was in a fact a matter of evidence to be adduced during trial.

28. Bearing in mind that Section 26 of the Limitations of Actions Act was clear that in a case of fraud time started running from the time the person relying on that defence came to know of the fraud, the Learned Magistrate ought to have allowed the matter to proceed to trial and not terminate it prematurely. In this regard, this court agreed with the holding of Okongo J in Justus Tureti Obara vs Peter Noipetai Nengiso (supra) that the question of when fraud was discovered was a matter of evidence.

29. Having considered the parties’ Witness Submissions, this court came to the firm conclusion that the Learned Magistrate erred in law in making a determination that the Appellant’s suit was time barred when the facts on the face of the court record were not clear or showed otherwise.

30. Indeed, a Preliminary Objection on the competence or otherwise of a claim on account of it being time barred under the Limitations of Actions act ought only to be made in the clearest of the cases and where no other argument could be raised other than that claim was statute barred. It was not so for this case in view of the Witness Statement of Titus G. Njau.

31. Terminating a matter *in limine* is a draconian step and should only be done as a last resort as every litigant ought to have his day in court, no matter how hopeless his case looks to his opponent and the court.

32. The Learned Magistrate ought to have considered all the pleadings that the Appellant had filed just to ascertain herself that there was no piece of evidence that would have saved the Appellant’s case such as if there was an admission that the suit was time barred.

DISPOSITION

33. For the foregoing reasons, the decision of this court was that the Appellant’s Appeal that was lodged on 26th October 2015 was merited and the same is hereby allowed. The Respondents will bear the Appellant’s costs of the Appeal.

34. The effect of this decision is that the Ruling of the Learned Magistrate that was delivered on 27th September 2015 is hereby set aside and/or vacated and in its place, it is hereby directed that the Appellant’s Plaintiff dated 2nd February 2015 be and is hereby reinstated.

35. It is hereby directed that the lower court file be placed before the Chief Magistrate at the Chief Magistrate’s Court Milimani Commercial Court for mention on 8th October 2019 for further orders and/or directions.

16. It is so ordered.

DATED and DELIVERED at NAIROBI this 24th day of September 2019.

J. KAMAU

JUDGE