



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC CASE NO. 4 OF 2021

DELILAH ONDARI.....PLAINTIFF/RESPONDENT

=VERSUS=

FRANCIS ONDIEKI ATANDI.....DEFENDANT/APPLICANT

RULING

The Defendant has raised a preliminary objection dated 12/1/2022 asking for the following orders:

- 1. THAT the suit herein is statute barred and no leave to file the same out of time was sought by the Plaintiff.**
- 2. THAT this suit is an abuse of the court process.**
- 3. THAT in the circumstances, the suit is procedurally and substantively bad in law, hence suitable to be dismissed and/or struck out with costs to the Defendant.**

This suit arises is premised on a disputed sale agreement dated 24/9/2006 where the Defendant is claimed to have agreed to carve out 5 X 100 feet from **WEST MUGIRANGO/SIAMANI/1859** which at all material times was registered in the name of the Defendant. The Plaintiff allegedly paid the agreed purchase price of Kshs. 50,000/= to the Defendant on the 24/9/2006 but has been unable to gain ownership of the suit land since then. It is in 2021 that this suit was filed for *inter alia* compensation for breach of contract and General Damages. The Defendant vehemently denies any agreement or payment made to him by the Plaintiff.

Applicant’s Submissions

Ms. Shilawatso, counsel for the Defendant/Applicant aptly states that the suit violates Section 4 of the Limitations of Actions Act which provides that actions on contract should be brought before the end of 6 years after the cause of action accrues. She added that the suit also violates Section 7 of the same Act which provides that any action on recovery of land against another person should be brought before the expiry of 12 years after the cause of action accrues. That the suit was filed in 2021 which is 15 years from the date of the alleged sale agreement demonstrates that the suit is time barred. She also stated that the Plaintiff has not sought an extension for the limitation of time.

Counsel also argued that the Plaintiff cannot allege the cause of action arose on 19/11/2021 as per a demand letter from the Plaintiff dated the same day. She emphasized that the demand letter was only a reminder and did not form part of the said agreement, hence the Plaintiff could not rely on Section 26 of the Limitations of Actions Act which 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)***
- (c)***

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:....”

The Defendant concluded by stating that the suit ought to be struck out and she relied on several authorities.

Respondent’s Submissions

Mr Biyogo, counsel for the Plaintiff/Respondent opposed the submissions and stated that the Application is bare and bereft of particulars to

enable them prepare a response to counter the said Application. However, counsel proceeded to explain that the Defendant is raising the Preliminary Objection based on disputed facts which is not the character and nature of a Preliminary Objection and relied on the case of Silvester Kaitany V Nyayo Tea Zones Development Corporation and another (2020) e KLR and also Oraro -v- Mbaja (2005) e KLR.

Counsel for the Plaintiff maintained that the Plaintiff discovered the fraud on 19/11/2021 and that is when he instructed him to write a demand letter while the Plaintiff made a report at Kisii Central Police Station against the Defendant for obtaining money by false pretense and consequently a warrant of arrest against the Defendant was issued. He stated that there is fraud which is an exception under the aforementioned Act. In conclusion, counsel submitted that the Defendant should not hide behind the provisions of Section 4 and 7 of the Limitations of Actions Act as Section 26 of the same Act provides an exception that time begins to run when the plaintiff discovers the fraud. The Plaintiff later filed further authorities in support of his submissions.

Analysis of the Law

I have considered the pleadings filed, the Preliminary Objection raised and the rival submissions made.

It is trite law that any preliminary objection should be filtered, weighed and balanced on the measurements of the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) 1 EA 696 where Law J. stated as follows:

“.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.....”

Sir Charles Newbold P. on the other hand rightly added

“ The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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.....”

Counsel for the Applicant relied on Salim Mohamed Salim Tweshe v Khalid Salim Naaman & 5 others (2020) e KLR where C.K Yano J. stated

“The cause of action in this case is indicated to have arisen on 14th May, 1983. The suit was filed on 2nd October, 2018 which was far beyond the six years period within which an action founded on contract may be brought and also beyond the twelve years within which an action may be brought for the recovery of land. From the above provisions of the law, it is evident that the plaintiff's suit herein is statute barred. In this case, the plaintiff argues that the time the cause of action accrued is contested and therefore the objection before court is not on a pure point of law. However, in my view the matters raised are purely on points of law and in particular the issue that the suit is caught by limitation of time. From the pleadings and especially the plaint, it is clear that the plaintiff's claim is grounded on a contract which arose in the year 1983. The court does not require any evidence to arrive at a finding that the suit is caught by limitation of time. Am alive to the fact that at this stage, the court cannot investigate on some facts as to when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. I am only beholden to look at the pleadings as I have done in the instant case.”

Counsel for the Respondent relied on the authority of Attorney General & Another v Andrew Maina Githinji (2016) e KLR where Nambuye J. expounded on the threshold set by sir Charles Newbold above and stated

“The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

The cases I have mentioned above have different outcomes which support the parties' cases but the common character is that in a Preliminary objection firstly facts which are pleaded by the Respondent should be correct and secondly there should be no facts to be ascertained.

The sale agreement dated 24/9/2006 as pleaded by the Plaintiff has been vehemently denied by the Defendant. The Plaintiff alleges fraud which he discovered on 19/11/2021 upon which he took steps such as instructing her counsel to write a demand letter and also reported the fraud at Kisii Central Police Station. The Defendant denies that the Plaintiff was aware on 19/11/2021 and that time started running immediately after the sale agreement. In my view, this suit requires a trial to ascertain as to when the Plaintiff discovered the fraud or the fact that he would not get any ownership and I rely on the authority of Justus Tureti Obara v Peter Koipetai Nengisoi (2014) e KLR where Okongo J. stated

“.....The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.”

It would defeat the purpose of this court as set out in section 1A, 1B and 3A of the Civil Procedure Act to not determine when the fraud was actually discovered and I refrain myself from holding a mini trial on the facts of the case in this Preliminary Objection as it would cease

being a Preliminary Objection and become a Notice of Motion for striking out the suit. Furthermore, none of the parties has demonstrated that there is a criminal case on the alleged fraud or outcome emanating therefrom.

Based on the above, I am clutching at a straw and with no stilts to stand on. The facts alleged by the Plaintiff have all been disputed by the Defendant. This is the essence of a trial and the grounds in the Preliminary Objection are not sufficient enough to strike out the suit in *limine*.

The Preliminary Objection is disallowed. Costs to abide the outcome of the suit.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 27TH DAY OF JANUARY, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: Mr. Bigogo

Defendant: Ms. Shilwatso