



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE NO. 296 OF 2014

ZACHARIA MBURU CHEGE.....PLAINTIFF

VERSUS

NAKU DWELLERS LTD.....1ST DEFENDANT

GILBERT KABAGE t/a PATA COMMERCIAL ENTERPRISES... 2ND DEFENDANT

RULING

1. The 1st Defendant filed a Preliminary Objection dated 10/11/2021 on the following grounds:

- 1. That the Plaintiff's claim against the 1st and 2nd Defendant is statutorily time barred having been brought to court through an amended Plaint dated 1st April 2015 on an alleged contract for sale of land dated 17th March 2005 contrary to the provisions of section 4 (1) (a) of the Limitations of Actions Act chapter 22 Laws of Kenya.**
- 2. That the Plaintiff's claim was filed out of time without leave of the court.**
- 3. That by filing this case out of time without leave of the court the action is in itself incompetent and does not confer jurisdiction to this Honourable court to hear it.**

2. The 1st Defendant sought that its Preliminary Objection be sustained and that the suit be struck out with costs to the 1st Defendant. Its submission is that the genesis of the plaintiff's claim is that on 17/3/2005, the 2nd defendant representing himself as an agent of the 1st defendant procured the plaintiff to enter into an agreement with him as such agent for the sale by the 1st defendant to the plaintiff of **Parcel Nos 6, 13 and 14** being proposed subdivisions of a greater parcel known as **Nakuru Municipality Block 7 /7** at a consideration; that in breach of that agreement the 1st defendant has wrongfully failed and/or refused to complete the said sale and further attempted to repudiate the authority of the 2nd defendant.

3. According to the pleadings the plaintiff's claim is premised on contract, and the defendant's defence dated 10/4/2015 opposed the claim on the basis of statutory time bar under **Section 4(1) of the Limitation of Actions Act CAP 22**; later on it filed the instant notice of preliminary objection being addressed in this ruling.

4. The 1st defendant avers that its plea is a pure point of law; that **Section 4(1) of CAP 22** bars the bringing of the action after 6 years; that the cases of **Thika High Court ELC No 65 Of 2020 Hannah W. Mburu Vs Simon Nyutu Mararo & 3 Others** and **Kisii HC Civil Appeal No 83 Of 2018 Joseph Odira Ombok Vs South Nyanza Sugar Company Ltd** support this position. The 1st defendant's further submission is that **Clause 3** of the agreement stipulated that the purchaser shall pay the balance of the purchase price as soon as the subdivision is approved and take possession of the plots free from any encumbrance and that the approval was expected to take less than **6 months**. Consequently, at the expiry of the 6 months following the date 17/3/2005 the plaintiff had only 6 years to lodge his claim against the defendant and he ought to have lodged his suit not later than 16/9/2011.

5. The 2nd defendant, citing the decisions in the *locus classicus* case **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors Ltd 1969 Ea 696**, **Hassan Nyanje Charo Vs Khatib Mwashetani & 3 Others SC APP no 23 of 2014**, **Martha Karwirwa Anthony Vs Barclays Bank Of Kenya Ltd 2019 e KLR**, and **Joseph Odira Ombok Vs South Nyanza Sugar Company Ltd 2018 eKLR** supported the 1st defendant's submissions and sought that the suit should be struck out for being statutorily time barred.

6. On the part of the plaintiff, it was urged in response that the preliminary objection lacks merit and that it should be dismissed. Agreeing

with the defendants that the basis of the claim is contract, the plaintiff urged that the cause of action arose when a breach of the contract occurred and that the plaintiff stated in his witness statement filed in court that in or around **October 2014** the 1st defendant intended to sell the suit property to a 3rd party; that the knowledge of the breach came to the plaintiff in **October 2014** and that is the time that the cause of action arose and the claim is therefore not statutorily time barred the suit having been filed on **27/10/2014**.

7. The plaintiff further states that the above facts are demonstrated by the documents included among his bundle of intended exhibits and the letter the plaintiff wrote to the defendant and the letter written by Ngigi Mbugua, advocate for the 1st defendant in the instant suit show the time the cause of action arose was the year **2014**. It is also urged that the 2nd defendant's letter dated **13/2/2014** purports to discontinue the subdivision of the land and to terminate the agency. The plaintiff cited the cases of **Joseph Odira Ombok Vs South Nyanza Sugar Company Ltd 2018 eKLR, South Nyanza Sugar Company Ltd Vs Dickson Aoro Awuor, 2017 eKLR**, and urged the court to dismiss the preliminary objection and proceed to the hearing of the main suit.

8. In the *locus classicus* case of **Mukisa Biscuits (supra)** the Court stated as follows:

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.” (Emphasis mine.)

9. As the success of the plaintiff's case is predicated on proof of breach of contract and not on the admitted contract *per se*, the exact time of breach becomes quite essential for the purpose of determining if the preliminary objection raised by the 1st defendant herein has merit. In this court's view if any facts pleaded by the parties regarding the time of breach of contract in this case have not been ascertained to be correct, then there would be no preliminary objection to be determined.

10. I have examined the pleadings in this case and I have confirmed that the plaintiff seeks specific performance and general damages for breach of contract and an alternative claim for breach of warranty, thus suggesting that the defendants or one of them wants to breach or repudiate the agreement.

11. It would appear as though the plaintiff is vague in **paragraph 10** regarding the time of breach. However it must be recalled that the plaintiff was given possession of the sold land and that while he was in such possession the defendant is expressed at **paragraph 11** of the plaint to have intended to sell the same land to a third party at an enhanced price. I do not see any pleading in the original plaint or the amended plaint giving the specific date of breach and possibly that is the reason that the plaintiff submits that the evidence lies in the documents filed in support of the plaint.

12. However in the amended plaint, it is quite apparent from **paragraph 11a) (c)** that part of the particulars of breach is *entering into a sale agreement for the same land with a third party*.

13. No succour then is to be obtained from a perusal of the 2nd defendant's defence and it is only upon the perusal of the 1st defendant's defence that it is found that the 1st defendant admits to have disposed of his interest in the suit land to a third party on **12/3/2015**. I do not find any reply to defence on record and the plaintiff is presumed to have joined issues with the defendants on their respective defences. Besides the plaintiff has pleaded in the reply to the amended defence of the 2nd defendant filed on **22/3/2018** that the cause of action arose immediately the agreement was breached, without stating any date.

14. According to the principle in **Mukisa Biscuits Case (supra)** this court is obliged to confine itself to the contents of pleadings in determining a preliminary objection; it may not go outside those pleadings to seek information as that would oust that objection from the realm of preliminary objection. Therefore, whether the documents mentioned by the plaintiff as supporting the preliminary objection bear the truth or not is not relevant to bring the court to a proper conclusion of this preliminary objection. Such evidence can only be adduced and its probative value challenged at the hearing. On the other hand the 1st defendant's act of selling to a third party a parcel that it had earlier sold to the plaintiff may amount to a breach of contract to the detriment of the plaintiff. The only date of disposal available from the pleadings is that given as **12/3/2015** by the 1st defendant who is the one the plaintiff alleges to be in breach while the suit was filed in **2014**; consequently I would not be able to hold that as the date of the proper cause of action and this is where the submission by the plaintiff that there are documents evidencing threats by the 1st defendant to sell the suit land to a third party becomes relevant and only so to the point of compelling this court to conclude that there is no material in the pleadings upon which the preliminary objection can be upheld since the facts regarding the actual date of breach and manner of breach lies in documentary evidence beyond reach at this *in limine* stage of proceedings.

15. Owing to the foregoing, the defendants' preliminary objection which is clearly incapable of writing *finis* to the present legal battle between the parties, must fail.

16. Consequently, I hereby find that the preliminary objection dated **10/11/2021** lacks merit and the same is hereby dismissed with costs. The costs of the preliminary objection shall be borne by the defendants in equal shares in any event. The main suit herein shall be listed for mention for fixing a hearing date on **2/2/2022**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 25TH DAY OF JANUARY, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU