



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 248 OF 2014

NEDIM MOHAMED IBRAHIM.....PLAINTIFF

- V E R S U S -

ABDULBASIT SALEH MUHSIN.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

RULING

1. The matter coming for ruling is the Preliminary Objection raised by the 1st defendant in opposition to the plaintiff/applicant's notice of motion dated 6th October 2014 and the entire suit. The 1st defendant contends the suit is time barred under the provisions of Section 4 (2) as read with Section 26 of the Limitation of Actions Act Cap. 22 Laws of Kenya. The 1st defendant submits that on the suit land stands a fully furnished residential house which has been there from 2003 to date which fact the plaintiff was fully aware of or could with reasonable diligence discovered the alleged fraud if any. The 1st defendant further submitted that even if the fraud was discovered on 30th September 2011, this suit is still time barred.

2. The Preliminary Objection is opposed by the plaintiff relying on his pleadings on record. The plaintiff submits that a point of objection is not a pleading and since the 1st defendant has not filed a defence within the prescribed timelines, they are barred from raising a Preliminary Objection. Further that the present objection does not meet the threshold of a preliminary objection as set out in the *Mukisa Biscuits* case. According to the plaintiff, he discovered the fraud on 16th August, 2012 when he opted to sell the plot not on 30th September 2011 which is the date of the forged transfer instrument.

3. Both parties cited case law which I have had occasion to read. The 1st defendant referred this court to;

a] *The Limitation of Actions Cap. 22*

b] *Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd. (1969) E.A. 696.*

c] *Public Service Club (Registered Trustees) vs Mary Wangeci Kethi & 3 others (2014) eKLR*

The plaintiff cited the following;

a] *Limitation of Actions Act*

b] *Civil Procedure Act and Rules*

c] *Benson Kibugi Rigui vs Anselimy Aerodi Abenjira (2008) eKLR*

d] *Justus Tureti Obara vs Peter Koipeitai Nengisoi (2014) eKLR*

4. It is admitted that the claim is based on the tort of fraud. From my analysis of the submissions and pleadings filed by the parties, the dispute is when did time begin running? The 1st defendant submits times began running either from 2003 when the 1st defendant took occupation of the residential house known as “*Kitungu Saumu*” which is on the suit premises or on 30th September 2011 date of the transfer instrument. The plaintiff submits he discovered the fraud on 16th August, 2012 which is the period to be taken to as when time began to run. Section 4 (2) of the Limitation of Actions Act provides;

"An action founded on tort may not be brought after the end of three years from the date when the cause of action accrued."

Section 26 further states that

"The period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it."

5. In the plaint filed in court on 7th October 2014 at para 4 the plaintiff said he purchased the suit land on 6th February 2001. The plaintiff continued that ***"the defendant acting fraudulently caused the suit property to be transferred to his name through a forged transfer dated 30th September 2011 purportedly for a consideration of Kshs. 8 million at a time when the plaintiff had secured an agreement for sale of Kshs. 30,000,000 and 700,000 had been paid as deposit."*** He went ahead to plead the particulars of fraud. Besides the date when the plaintiff purchased the land and the date on the forged transfer form, no date is mentioned in the plaint when the fraud was discovered. The 1st defendant is yet to file his defence and therefore has only the replying affidavit stating when time began to run in contesting the plaintiff's claim.

6. I have perused the replying affidavit filed and in paragraph 8 thereof, the 1st defendant deposes that ***"in 2003 the plaintiff voluntarily elected to grant him and his brother physical possession of the suit property."*** This deposition then contradicts the submission by the 1st defendant that had the plaintiff been diligent, he would have discovered the fraud as early as 2003. The contradiction in the courts view is to establish if the possession was voluntarily given initially, at what point was the consent revoked by the plaintiff. This court opines it is a contradiction which cannot be resolved at an interlocutory stage and hold it as a fact which requires the matter to proceed to trial to be proved. Further a transfer document dated 30th September, 2011 is mentioned to also constitute when time began to run against the plaintiff. The copy of certificate of title annexure *NMII* in the plaintiff's affidavit shows the registration was effected in favour of the 1st defendant on 7th September 2012. This raises another question as to whether this suit can be said to be time-barred when change of ownership took place on 7th September 2012. In my view this date on the title documents lend credence to the plaintiff's submission that he discovered the fraud on 16th August 2012 when he opted to sell this land to a 3rd party. The 1st Defendant used the transfer instrument although dated earlier to effect transfer much later. The court cannot make a decision per se on the objection as it is founded on facts requiring proof. This can only be done during a full hearing. In the case of *Mukisa Biscuits supra*, Sir Charles Newbold stated that a preliminary objection cannot be raised if any facts have to be ascertained or if what is sought is the exercise of judicial discretion. On the second case law of *PSC vs Mary Wangai supra* cited by the 1st defendant, the issue of limitation was dealt with after the matter was heard on its merits, therefore not relevant in the present scenario.

7. In conclusion, I find that the preliminary objection raised is not purely a point of law as there are disputed facts which require proof by way of adduction of evidence. The parties herein require to be given an opportunity to prove when time began to run. The preliminary objection is therefore found to be without merit and I dismiss it with costs.

Dated and delivered at Mombasa in open court this 17th day of February, 2015.

A. OMOLLO

JUDGE

17.2.2015