



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 525 OF 2014

DIANA KATUMBI KIIO.....PLAINTIFF

VERSUS

REUBEN MUSYOKI MULI.. DEFENDANT

RULING

The Plaintiff filed the instant suit vide a plaint dated 10th April 2014 seeking a declaration that the plaintiff is the lawful owner of land title **Machakos Town Block 11/332**, a permanent injunction, an order directing the delivery of the original title to the plaintiff and an order that the defendant signs or executes any instrument necessary to facilitate the transfer of the suit property to the plaintiff.

Simultaneously with the plaint the plaintiff filed a Notice of Motion of even date expressed to be brought under Order 40 Rules 1, 2, & 4 (1) of the Civil Procedure Act and seeks the following substantive order:-

“That an order of interlocutory injunction do issue pending hearing and determination of the suit herein restraining the defendant, his agents, servants or contractors and all and each of them whether by themselves or otherwise howsoever from selling, charging, using, developing or in any other way whatsoever interfering with all that land/leasehold known as Machakos Town Block 11/332 (also known as Machakos Municipality Block 11/332) situated in Machakos Town and measuring 0.0465Ha or thereabouts.

The application is supported on the grounds set out on the body of the application and the affidavit sworn in support thereof by **Diana Katumbi Kiio**. Interalia the grounds on which the application is based include:-

- a. The suit property was validly sold to the plaintiff/Applicant by the defendant on 6/6/2003.
- b. The defendant applied for all the necessary consents to facilitate transfer of the suit plot to the Plaintiff/Applicant which were granted.
- c. The plaintiff and the defendant duly executed a Transfer of lease on 2/10/2006 and the plaintiff/applicant duly paid the necessary stamp duty.
- d. Transfer of the suit property was, however not effected as the lease term for the suit property had expired as the transfer process dragged on.
- e. The defendant applied for extension of the lease term to facilitate the transfer and the plaintiff paid all the relevant land charges/premiums and did physical follow up of the matter.
- f. The lease term was extended in or about January 2014 but the plaintiff could not re-lodge the

application for registration as the defendant hurriedly collected the new certificate of lease from Machakos Lands office and refused to hand it over to the plaintiff for purposes of registration of the transfer instruments.

- g. The defendant has threatened to sell the suit property to a third party.
- h. The plaintiff has been in possession of the suit property since 6/6/2003.
- i. The defendant has threatened to unlawfully “take over” the suit property.

The affidavit sworn in support of the application reiterates the grounds set out above and furnishes various documents to support the sale by way of the sale agreement dated 6/6/2003 marked “DKK2” and the pursuit of other documents necessary to complete the sale. From the affidavit in support of the application it is evident that the lease of 33 years from 1/1/1970 to the Defendant expired on 31/12/2002 and that the Defendant applied for the extension of the lease which was not granted and/or effectuated until the beginning of 2014 when the new certificate of lease was issued in favour of the defendant.

The Defendant in response to the plaintiff’s application and suit filed a statement of defence dated 2nd June 2014 on 9th June 2014, a notice of preliminary objection dated 2nd June 2014 also filed on 9th June 2014 and a replying affidavit in opposition sworn by the defendant on 2nd June 2014 and filed in court on 9th June 2014.

The Defendant by the defence admits having entered into an agreement of sale with the plaintiff on 6/6/2003 but denies having granted the defendant actual and physical possession of the suit property. The Defendant further in the defence states that he refunded the plaintiff the sum of Kshs.450,000/- sometimes in 2003 whereupon the plaintiff returned to him the original certificate of lease. The Defendant further by the defence stated that the claim by the plaintiff was fatally defective and was time barred and gave a notice that he would raise a preliminary objection on a point of law to have the suit struck out.

The Notice of preliminary objection filed by the defendant was in the following terms:-

“That the Notice of Motion dated 10th April 2014 and the main suit are bad in law incompetent and fatally defective as the same offends the provisions of section 4 of the Limitation of Actions Act Cap 22 of the Laws of Kenya as the plaintiff’s claim is time barred”.

Following the filing by the Defendant of the replying affidavit and the notice of preliminary objection the plaintiff with the leave of the court filed a supplementary affidavit sworn on 23rd July 2014 on the 25th July 2014. By the supplementary affidavit the plaintiff denied the various averments by the defendant in the replying affidavit and the plaintiff reiterated the contents of her supporting affidavit. In particular the plaintiff denied having been refunded the sum of Kshs.450,000/- paid as the purchase price as alleged by the Defendant. The plaintiff further maintained she has remained in actual possession of the suit property since taking possession in June 2003 pursuant to the sale agreement and states that the Defendant duly executed the Transfer of lease as per annexure “DKK6” and that the assertion by the defendant that he never signed the transfer is false. The plaintiff in response to the claim that her action is statute barred states that the cause of action giving rise to the suit arose in February 2014 when the Defendant collected the new certificate of lease for the extended lease from the Lands Office.

The court on 17th September 2014 gave directions that both the plaintiff’s application and the defendant’s preliminary objection be heard together and invited the parties to exchange written submissions to canvass the same. The plaintiff filed her submissions dated 15th December 2014 on 18th December 2014. The Defendants submissions dated 15th January 2015 were filed in court on 20th January 2015 and the plaintiffs further submissions dated 10th February 2015 were filed on 12th February 2015.

As the preliminary objection by the defendant virtually goes to the jurisdiction of the court to entertain the present application and the suit it is incumbent on the court to consider the same first. In case the court upholds the preliminary objection the court will be duty bound to strike out the suit by the plaintiff as the court is barred from entertaining any action that is brought out of time. In that eventuality the court

would not be required therefore to consider the plaintiff's application for injunction.

The Preliminary objection

The preliminary objection by the Defendant is to the effect that the suit by the plaintiff is barred by limitation the same being founded on contract and having been brought after the expiry of 6 years from the date the cause of action accrued. The Defendant contends the plaintiffs action is brought in contravention of section 4(1) (a) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

Section 4(1) provides thus:-

4.(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.

The claim by the plaintiff is to be discerned from paragraphs 4, 5 & 6 of the plaint which are in the following terms:-

4. By a written sale agreement dated 6/6/2003, the defendant sold the aforesaid plot NO. Machakos Town Block 11/332 (also known as Machakos Municipality Block 11/332 to the plaintiff at an agreed purchase price of 450,000/- which the plaintiff fully paid to the Defendant on the aforesaid date, and upon which the defendant handed over to the plaintiff the original lease certificate on the aforesaid plot and put the plaintiff in actual and vacant possession of the said property.

5. The plaintiff avers that on the aforesaid date (6/6/2003), the defendant wrote to the Town Clerk of the Municipal Council of Machakos requesting the said council to transfer the said aforesaid plot to the plaintiff. The said council consented to the requested transfer vide a letter dated 18/6/2003.

6. The plaintiff has since the year 2003, paid all the relevant land rents and land rates on the suit property.

The sale agreement respecting the sale of the suit property dated 6th June 2003 duly executed by the plaintiff and the Defendant is not disputed. It is also not in dispute that the Defendant's lease from the county council over the suit property was for a term of 33 years from 1/1/1970 meaning that the lease expired on 31st December 2002 and hence as at 6th June 2003 when the plaintiff and the Defendant purported to enter into a sale agreement in respect of title number **Machakos Town Block 11/332** the Defendant's interest in the suit property had expired and had not been renewed and/or extended. From the documents/records annexed to the plaintiffs application, the application for extension of lease was not processed until 2007 and approval of extension was not granted until 13/11/2007. Indeed and application for the registration of transfer of the suit property dated 2nd October 2006 was rejected by the Land Registrar on the grounds that **(1) the term of the lease had expired and (2) letter of consent from the Land Officer was not attached.** The issue therefore whether the Defendant had any interest he could

have sold and transferred to the plaintiff on 6th June 2003 does arise. My view is that indeed as at that date the Defendant was not seized of any interest in the suit property that he could have properly sold to the plaintiff. The County Council had the right to extend and/or not to extend the lease and until they did so the Defendant could not lawfully contract to sell any interest in the suit property after the lease had expired. It is noteworthy that the agreement for sale was not conditioned on the Defendant being able to obtain the extension of the lease. Indeed at the time the agreement was made there was not even a pending application for the extension of the lease on the part of the Defendant.

The plaintiff in her submissions states that the plaintiff's cause of action arose in February 2014 when the Defendant obtained the certificate of lease in respect of the renewed/extended lease and declined to hand the same to her to complete the transfer transaction. The defendant counters that the suit is founded on the sale agreement dated 6/6/2003 and asserts that the suit is unmaintainable having been brought out of time. The plaintiff further argues that as there is a contest in regard to when the cause of action arose this removes the matter from the realm of preliminary objection as it ceases to be objection on a **"pure point of law"** as an inquiry would be brought into play to attempt to make a determination in regard to the contested facts. The plaintiff refers the court to the often cited case of **Mukisa Biscuit Co. –vs- west End Distributors (1969) EA 696** to buttress her argument where **Sir, Charles Newbold, P.** stated thus:-

"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".

In the same case Law, JA while considering what constitutes a preliminary objection stated as follows:

"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 may dispose of the suit".

I have anxiously considered this matter and I have reviewed the affidavits in support of and in opposition together with the parties submissions and the inescapable fact is that the sale agreement dated 6th June 2003 is central to these proceedings. It is the contract that brought the plaintiff and the Defendant together. Without the agreement dated 6th June 2003 there would be no cause of action. The suit by the plaintiff has its foundation in this sale agreement. The plaintiff's suit against the defendant is for all practical purposes seeking the enforcement of the agreement between the parties dated 6th June 2003 never mind the fact that this agreement could not in real terms be enforced against the Defendant when it was entered into because the Defendant did not then hold any interest in the suit property as the lease he held on the property had actually expired and had not been renewed.

The fact that the Defendant subsequent to the agreement for sale applied for and obtained approval for the extension of the lease did not renew the agreement for sale which at any rate was not expressed to have been entered into in contemplation of the renewal of the lease in favour of the Defendant. The plaintiff no doubt was casual in the manner he entered into the contract and had she exercised due diligence she would have become aware that the Defendant had no property to sell to her as his lease had expired.

The plaintiff in the suit seeks to enforce her right as a purchaser and the plaintiffs claim against the Defendant does not arise in any other manner other than through the agreement for sale dated 6th June 2003 and it is my finding that the cause of action is founded on this contract and that being the case the plaintiff ought to have instituted the instant suit within 6 years of the date of the agreement for sale. In terms of section 4(1) (a) of the Limitation of Actions Act, the plaintiff ought to have brought the instant suit within 6 years from the date of the agreement. The suit by the plaintiff is simply statute barred and cannot be maintained. I agree with my brother Judge **E. Obaga, J** in the case of **Richard Toroitich –vs- Mike K. Lelmet & 3 others (2014) eKLR** who in upholding a preliminary objection held that the issue of limitation is not one of a mere technicality but rather one that goes to the jurisdiction of the court to entertain the suit. **Obaga, J** cited with approval **Hon. Justice Nduma's** holding in the case of Industrial

court of Kenya at **Nairobi in Cause NO. 34 of 2010** where in dismissing the plaintiff's case **Nduma, J** referred to the decision in the case of **Director Ltd –vs- Samani (1995-1998) IEA 48** where the court held:-

“No one shall have the right or power to bring an action after the end of six years from the date a cause of action accrued, in an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is based on contract six years after the cause of action arose or any application to extend such time for bringing of the action based on contract”.

I am in agreement with the position taken by the Honorable judges in the cases I have referred to. Being satisfied that the plaintiff's cause of action accrued from the contract entered into between the plaintiff and the Defendant on 6th June 2003 I am persuaded that the plaintiff's instant suit is statute barred and that the suit is unsustainable. I accordingly uphold the preliminary objection by the Defendant and hereby order the suit as well as the notice of motion struck out with costs to the Defendant.

Order accordingly.

Ruling dated, signed and delivered this **19th** day of **June**, 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

.....For the Plaintiff

..... For the Defendant