



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1063 OF 2013

JOSEPH OLTIIYIAYIA PARTEROI

Alias OLTIIYIAYIA OLE PARTEROI1ST PLAINTIFF

WILLIAM WILSON PARTEROI

Alias WILLISON PARTEROI.....2ND PLAINTIFF

(BOTH THE LEGAL EXECUTORS TO

THE ESTATE OF THE LATE PARTEROI MUKUE (DECEASED)

-VERSUS-

UNITED INSURANCE COMPANY LIMITED.....1ST DEFENDANT

(UNDER STATUTORY MANAGEMENT)

KENYA RE-INSURANCE CORPORATION LIMITED...2ND DEFENDANT

RULING

The ruling herein is on a preliminary objection by the Defendants dated 9th September 2013, the grounds of which are that the Plaintiffs have filed the instant suit and application in disregard of the provisions of Sections 4(2) the Limitation of Actions Act (Chapter 22 of the Laws of Kenya), and that the entire suit and the remedies sought are statutorily barred.

The Defendant's objection was raised after the Plaintiff had filed a suit herein by way of a Plaint dated 4th September 2013 seeking orders of a permanent injunction against the Defendants to restrain them from dealing with the property known as Land Reference number Kajiado/Olchoro Onyore 4798 (hereinafter "the suit property"), and a cancellation of the registration of the said property in the Defendants' names. The Plaintiffs also sought a recall of the original title to the suit property and issue of a new title to themselves.

The Plaintiffs in addition filed a Notice of Motion dated 4th September 2013, in which they sought orders of a temporary injunction restraining the Defendants from dealing with the suit property pending the hearing and determination of the suit herein.

The Plaintiff's claim in summary is that they are the administrators of the estate of the late Parteroi Ole

Mukue (hereinafter “the Deceased”) who died on 10th December, 2007, and that prior to his death, the Deceased realized that his original certificate of title to the suit property had been stolen, and the suit property had fraudulently and illegally sub-divided, transferred and eventually registered in the name of the 1st Defendant herein. The Plaintiffs further state that it has now been drawn to their attention through an advertisement published in “The Daily Nation” newspaper of 23rd August 2013, that the Defendants intend to cause the suit property to be sold for tender to the highest bidder to their detriment and prejudice.

The parties were directed to file written submissions on the preliminary objection. The Defendants’ counsel filed submissions dated 23rd September 2013, wherein he argued that paragraphs 8, 9 and 10 and prayers 2 and 3 of the Plaintiff’s plaint dated 4th September 2013 show that the Plaintiff’s claim is entirely based on alleged fraud. In addition, that the particulars of fraud are to be found at paragraph 8 of the Plaint. The counsel submitted that this position is reiterated in the Plaintiff’s supporting affidavit sworn on 4th September, 2013 in support of the motion dated 4th September, 2013 seeking temporary injunctive reliefs.

The Defendants’ counsel contended that it is trite law that fraud is a tort, and that under section 4(2) the Limitation of Actions Act, a claim based on tort cannot be instituted after the lapse of three (3) years. It was submitted by the counsel that the Plaintiffs herein having been aware of the purported fraud from the year 1998, almost over fifteen (15) years from the date cause of action accrued, and that this renders the entire suit statute barred and unmaintainable in law.

The Plaintiff’s counsel filed submissions dated 16th September 2013 and argued therein that under Section 26 of the Limitation of Actions Act the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake. Further, that in the instance case the fraud was discovered after 2007.

I have read and carefully considered the submissions by the parties to preliminary objection raised by the Defendants. The main issue before this court is whether the said objection is on a point of law, and if so, whether it has merit and should be upheld. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, it was held 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.”

I am of the opinion that in order to determine the question of whether this suit is time barred, one needs to establish certain facts, including when the cause of action accrued, and whether the running of time was suspended at any one time before the suit was filed. A plea of limitation of actions is therefore better suited to be raised as a Defence and not as a preliminary objection, as it is not a pure point of law as explained in the decision in **Mukisa Biscuit Manufacturing Company vs West End Distributors Ltd (supra)**. The Defendants’ preliminary objection therefore fails for this reason.

The costs of the preliminary objection shall be in the cause.

Dated, signed and delivered in open court at Nairobi this 30th day of January , 2014.

P. NYAMWEYA

JUDGE