



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 17 OF 2014**

**RICHARD TOROITICH.....PLAINTIFF**

**VERSUS**

- 1. MIKE K. LELMET**
- 2. ELISHEBA C. LELMET**
- 3. PAULINE J. LELMET**
- 4. ESTHER J. LELMET.....DEFENDANTS**

**RULING**

1. At the hearing of a notice of motion dated 1st April, 2014, counsel for the parties agreed to argue a preliminary objection raised by the respondent based on written submissions.

2. The Preliminary Objection is based on the following grounds;-

***(a) The plaintiff's suit is based on alleged contracts of sale between the years 2003 and 2005 is time barred having been filed after the lapse of the statutory limitation period.***

***(b) The plaintiff's suit violates a ruling of the High court dated 20/12/2011 in Kitale High Court Misc. Civil Application No. 65 of 2010 Republic -versus- Cherangani Land Disputes Tribunal & another Ex-parte. Mike Kiptoo Lelmet interested party Richard Toroitich, where the learned Judge noted that the limitation period had lapsed and suo moto extended time for the respondents for 60 days effective from 20/12/2011 (the date of the said ruling); and which order of extension in terms of the said ruling lapsed 60 days thereafter.***

***(c) The land the subject of this suit being agricultural land, the plaintiff's suit is bad in law in terms of section 7 of the Land Control Act ( Cap 30 Laws of Kenya) for want of consent of the land control board, within the prescribed 6 months which made the said transaction of sale null and void ab initio and unenforceable.***

***(d) No demand or notice to file this suit was ever issued by the plaintiff to the defendants before the filing of this suit as required by the law hence this suit also violates the Civil Procedure Rules of 2010.***

3. The plaintiff in his pleadings contends that he purchased 5 acres from one William Cheruiyot Lelmet

now deceased through two agreements entered into between 2/4/2003 and 12/1/2005.

4. The defendants are administrators of the estate of the late William Cheruiyot Lelmet.

5. In or around the year 2010, the plaintiff herein filed a claim at the Cherangani Land Disputes Tribunal seeking the 5 acres which he bought from William Cheruiyot Lelmet. William Cheruiyot Lelmet died on 20/5/2005. It would appear that he succeeded in his claim before the Tribunal. The verdict of the Tribunal was adopted as a judgement of the court vide Kitale Chief Magistrate's court Land Case No. 15 of 2010.

6. The first defendant in this case and who was the respondent in the claim in the Tribunal filed Kitale High Court Misc. Application No. 65 of 2010 seeking to quash the Tribunal verdict. The verdict of the Tribunal was quashed by the High Court in a ruling delivered on 20/12/2011. The judge having noticed that the plaintiff was already time barred acted suo moto and gave an order extending the time for filing a suit by 60 days. The Judge however indicated that if there was no suit filed within 60 days, the orders were to lapse.

7. The plaintiff did not file a suit within the 60 days given. The defendants now contend that the suit herein is time barred and cannot therefore be sustained. The plaintiff's claim is based on two contracts of sale. The Limitation of Actions Act provide that no claim based on contract can be filed after 6 years. The plaintiff has brought his case after 9 years from the date of the last contract signed on 12/1/2005. The latest time the plaintiff should have filed his case is in early 2011. The plaintiff filed the claim 3 years after the time for filing it had lapsed. The plaintiff had been given a lifeline by the court when the limitation period was extended by 60 days. He never seized the opportunity to file his case.

8. The plaintiff's counsel submits that the issue of jurisdiction can only be raised during the full trial. The same is the case with the defendants' contention that the transaction never received consent of the land control board as required and as such is null and void and therefore unenforceable. The plaintiff's counsel further submits that the issues being raised are mere technicalities which can be overlooked.

9. I have looked at the authorities provided by the counsel for the defendants. Of importance is the case of Mukisa Biscuit manufacturing Co. Ltd -Vs- West End Distributors Ltd (1969) E.A 696 where Law J at Page 700 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 off the suit”.***

10. In the present case, the defendants have not only raised the issue of Limitation in the defence but also given notice of the same. It is clear that the contracts were made between 2003 and 2005. The six year Limitation expired in early 2011. Later in 2011, justice Muketi extended the period by 60 days. This extension was conditional upon the suit being filed within that time. This never happened. The plaintiff's suit is therefore caught up by limitation. The plaintiff counsel's argument that this is a matter which can be raised at the hearing has no merit. The issue of limitation of time is not a matter of procedural technicality which can be overlooked. A decision from the industrial court of Kenya Nairobi in Cause No. 34 of 2010 Michael Maina Nderitu -Vs- Kenya Power and Lighting Co. Ltd & another was provided. In that case Justice Nduma in dismissing the plaintiff's case quoted from the case of Director Ltd -Vs- Samani [1995 – 1998] 1EA 48 where it was held as follows;-

***“No one shall have the right or power to bring an action after the end of six years from the date on which 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 agree with the observations of justice Nduma when he said in his judgement that the issue of limitation is not a mere technicality but a jurisdictional one. On this ground alone this suit cannot be sustained. I do

not have to go to the other grounds in the notice of preliminary objection. The preliminary objection is hereby upheld. The plaintiff's suit as well as the notice of motion dated and filed in court on 01/04/2014 are hereby struck out with costs to the defendants. The defendants are at liberty to fix their counter-claim for hearing and determination.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of May, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Professor Sifuna for Plaintiff and Mr Karani for M/S Arunga for defendant. Court Clerk Kassachoon.

**E. OBAGA**

**JUDGE**

**28/5/2014**