



Come-Cons Africa Limited v Loans & Bill Limited & 3 others (Environment & Land Case E155 of 2024) [2025] KEELC 535 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEELC 535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E155 OF 2024**

**MD MWANGI, J
JANUARY 31, 2025**

BETWEEN

COME-CONS AFRICA LIMITED PLAINTIFF

AND

LOANS & BILL LIMITED 1ST DEFENDANT

**SATWANT KAUR BHACHU (SUED AS AN EXECUTOR OF THE ESTATE OF
BALBIR SING BHACHU) 2ND DEFENDANT**

**GURDAWAR SINGH BHACHU (SUED AS AN EXECUTOR OF THE ESTATE
OF BALBIR SING BHACHU) 3RD DEFENDANT**

INDERJIT SING 4TH DEFENDANT

*(In respect of the Preliminary objection by the Defendants
to the effect that the Plaintiff's suit is time-barred)*

RULING

Background

1. The Plaintiff initiated this suit vide the Plaint dated 2nd April 2024 alleging that its property L.R No. 209/8381/3 I.R 48605 Nairobi (hereinafter referred to as 'the suit property') was fraudulently and illegally sold and transferred to the 1st Defendant through transfer documents dated 9th August, 2005. According to the Plaintiff, the sale was undertaken by its Director/Secretary without the company's resolution. In addition, despite the property being sold at undervalue of Ksh.15,000,000/=, the Plaintiff alleges that it never received the monies.
2. Subsequently, the suit property was again sold and transferred to Balbir Singh Bhachu at Ksh.14,500,000/= through a transfer dated 16th June, 2012. Following the demise of Balbir Singh



- Bhachu, the executors of his estate, the 2nd and 3rd Defendants herein transferred the suit property to the 4th Defendant. The Plaintiff alleges that the subsequent transfer was fraudulent as well.
3. Responding the Plaintiffs' case through a statement of Defence dated 17th May, 2024, the Defendants gave notice of a preliminary objection stating that;
 - a. the allegations and particulars of fraud as pleaded in paragraphs 9, 10, 14 & 17 of the plaint are time barred pursuant to Section 4(2) of the Act (Limitation of Actions Act CAP 22), which sets a time limit of three (3) years within which to institute claims founded on allegations of fraud.
 - b. the Plaintiff prayer for recovery of Land Reference Number 209/8381/3, whose ownership was transferred to the 1st Defendant pursuant to the transfer dated 9th August 2005 and registered as Number IR 48605 on 24th October 2005, over 18 years ago, is contrary to section 7, which sets a time limit of twelve (12) years for recovery of land.
 - c. The Plaintiff's claim for damages falls under section 8 of the Act which sets a time limit of six (6) years for making such claims.
 4. When the matter came for directions on 14th October, 2024, the court directed that issue of limitation of time raised in the Defendants' statement of Defence be handled first for it goes into the jurisdiction of the court. Accordingly, parties were directed to file written submissions on the issue of limitation.

Submissions by the Parties

A. Submissions by the Defendants

5. In their submissions, the Defendants assert that their objection was anchored on 3 paragraphs in the plaint filed by the Plaintiff as follows;
 - a. Paragraph 6 which avers that the suit property was transferred to the 1st Defendant on 9th August 2005;
 - b. Paragraph 9 which avers that the suit property was fraudulently transferred to the 1st Defendant on 9th August 2005; and
 - c. Paragraph 10 which avers that the gross undervaluation of the transfer value was in itself evidence of fraud.
6. The Defendants submit that their preliminary objection is founded on the provisions of the Limitation of Actions Act as hereunder;
 - i. Section 4 (1) which provides that 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.



2. An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: provided that an action for libel or slander may not be brought after the end of twelve months from such date.
3. An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.
7. The Defendants submit that the Plaintiff's claim as framed in paragraph 8 of the plaint and particularized under paragraph 10 is essentially a claim founded on an allegation of fraud to wit, that the execution of transfer document dated 9th August 2005 was done without its resolution. The suit therefore ought to have been instituted within 3 years from the date of 9th August 2005. It was instead filed 18 years after without leave of the court.
8. The Defendants further point out to the alternative prayer (i) in the plaint where the Plaintiff prays for an order to compel the 4th Defendant to reconvey the property - L.R. No. 209/8381/3 to the Plaintiff. The Defendants submit that the prayer is one for recovery of land which could only have been made before the expiry of 12 years from the date of the alleged transfer.
9. The Defendants allege that the Plaintiff is aware of the provisions of the limitations of actions act and that is why it cleverly and intentionally set out unnecessarily numerous prayers in the plaint in a cunning attempt to mislead the court. The Defendants pray that the Plaintiff's suit be struck out with costs to them.

Submissions by the Plaintiff

10. The Plaintiff's submissions are dated 25th November 2024. In the submissions, the Plaintiff affirms that its cause of action is grounded on the fraud committed by the Defendants or their agents concerning the fraudulent transfers of L.R. No. 209/8381/3. It states that time limitation can only be ascertained at the trial.
11. The Plaintiff reiterates the averments in its reply to defence to the effect that;
 - a. the proviso applicable to this instant suit is Section 26 of the *Limitation of Actions Act* which states that where an action is based on fraud of the Defendant or his agent the period of limitation does not begin to run until the Plaintiff has discovered the fraud to wit it ought to be ascertained at trial.
 - b. the prayer for recovery of land is based on the fraudulent transfer of L.R. No. 209/8381/3 and the Plaintiff was only recently made aware of fraudulent transfers.
 - c. the Plaintiff denies that the damages claimed in the plaint dated 2nd April 2024 fall under Section 8 of the *Limitation of Actions Act* Cap 22. The Plaintiff states that the damages specifically relate to the fraudulent transfers of L.R. No. 209/8381/3 and not the recovery of rent arrears under Section 8 of the Act.
12. The Plaintiff submits that the preliminary objections by the Defendants raise matters of fact rather than purely points of law. The objections by the Defendants do not meet the criteria established in the Mukisa case.
13. It is the Plaintiff's submissions that the issues raised in the preliminary objection by Defendants require examination by the court and cannot therefore be disposed of by way of a preliminary objection. The Plaintiff argues that the determination of the issues arising in the transfer of all that piece of land known as L.R. No. 209/8391/3 such as whether the same was fraudulent, the time the same was discovered



and whether there was requisite authority to transfer the same requires evidence and cannot therefore be disposed of in limine. The Plaintiff urges the court to dismiss the preliminary objection with costs.

Issues for Determination

14. Having considered the preliminary objection by the Defendant, and, the submissions by the parties, the issues for determination are:-
 - i. Whether the Defendants' preliminary objection meets the threshold of a preliminary objection.
 - ii. Whether the Plaintiff's suit is time-barred.

Analysis and Determination

Whether the Defendants' preliminary objection meets the threshold of a preliminary objection.

15. A Preliminary Objection was defined in the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696, in the following words:-

“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. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.” (emphasis added)

16. In the case of Quick Enterprises Ltd -Vs- Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999, the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

17. Further a Preliminary Objection must stem from the pleadings and should raise pure point of law. See the case of Avtar Singh Bhamra & Another -Vs- Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

18. In the case of Oraro...vs...Mbaja (2005) 1KLR 141, the Court held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

19. The Defendants' preliminary objection is on limitation of time; one of the examples given in the Mukisa case (supra). It too stems from the pleadings and is on a point of law. It meets the threshold set out in the Mukisa case (supra). The Court will therefore proceed to consider it on its merits.



Whether the Plaintiff's suit is time-barred

20. The Plaintiff affirms that its cause of action is grounded on the fraud committed by the Defendants or their agents concerning the fraudulent transfers of L.R. No. 209/8381/3.
21. Therefore taking the Plaintiff for its word, its cause of action (the act on the part of the Defendant(s) which gave the Plaintiff a cause of complaint) is the tort of fraud. Under the Limitations of Actions Act, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued unless with leave of court under section 27 and 28 of the Act.
22. Having premised its suit on the tort of fraud, which has a time-bar of three years, the Plaintiff was obligated to plead the reason why the suit is not time barred considering that the suit was filed almost twenty years after the alleged fraud just the way a Plaintiff is required to specifically indicate in their suit if filed out of time that it was filed pursuant to leave granted by the court on a certain date. It is a material fact that should be specifically pleaded under the provisions of order 2 rule 3 of the Civil Procedure Rules. The Plaintiff in this case merely states in the plaint that it was only recently made aware of fraudulent transfers.
23. The law expects a party to plead his case in its entirety not in instalments in other words to place all his cards on the table of justice. A party cannot therefore, as the Plaintiff herein purports to, be heard to say that, "I would have explained on such an issue at a later date."
24. *Mativo J (as he then was), in the case of Satya Bhama Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR, opined that;*

"Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks."
25. My analysis of the Plaintiff's case though is that it is a claim for recovery of land cleverly and intentionally crafted through the 'art and craft' of drafting pleadings as one for cancellation of transfers. That is why the Plaintiff goes to the extent of seeking a declaration of constructive trust against the 4th Defendant.
26. Under the Limitations of Actions Act, an action for recovery of land may not be brought after the end of three years from the date on which the cause of action accrued
27. I conclude by reminding the Parties that limitation of time is not concerned with the merits of the case. Lord Greene in the English case of *Hilton -vs- Sultan & Teann Laundry (1946) 1KB*, explained the point in the following words;

".....the statute of Limitation is not concerned with merits; once the axe falls, it falls and a Defendant who is fortunate to have acquired the benefit of the statute of limitation is entitled to insist on his strict rights."
28. The Plaintiff's case, from whatever angle you look at it from, is statute barred. It is hereby struck out with costs to the Defendants.

It is so ordered.

JUDGEMENT DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 31ST DAY OF JANUARY 2025.



M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Omuga for the Defendants

Ms. Wangui for the Plaintiffs

Court Assistant: Mpoye

