



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 1458 OF 2005**

**VIJAY KUMAR MANDAL.....PLAINTIFF**

**VERSUS**

**RAJINDER KUMAR MANDAL.....DEFENDANT**

**RULING**

The defendant/applicant filed a chamber summons dated 14<sup>th</sup> August 2006 under Order VI rule 13 (1) (b) and (d) Civil Procedure Rules (old rules) and Limitation of Actions Act, Cap 22 of the Laws of Kenya, seeking the following order:-

That the plaint herein be struck out on the ground that:

- a. The plaintiff's claim is time barred under section 4(1) (a) of the Limitation of Actions Act Cap 22 of the laws of Kenya as more than 6 years have lapsed from date of performance of the "Agreement" dated 18<sup>th</sup> April 1996 in accordance with its terms. It is scandalous, frivolous and vexatious and an abuse of the process of the Court.

The application is supported by the affidavit of Rajinder Kumar Mandal dated 14<sup>th</sup> of August 2006. He depones as follows; that he is sued by the plaintiff Vijay Kumar Mandal on matters arising from an agreement made on 18<sup>th</sup> April 1996 between himself, the plaintiff and 3 other parties referred to by the plaintiff in paragraph 3 of his plaint. That in this suit the plaintiff prays for execution of all documents and performance of such acts or things to completely effectuate the said agreement. That the agreement concerns transferring immovable properties valued by Lloyd Masika Limited at Kshs.40,852,000/- in 1995. Clause 4 of the agreement states that " completion of the said transfers shall be effected within 60 days of the execution of this agreement by the parties" That this time limit was not adhered to. That more than 6 years have elapsed from the time stipulated for performance of the agreement. In fact almost 12 years lapsed between the date of the agreement and the date this suit was filed. He is advised by his advocates, that this suit is time barred under the limitation of Actions Act. That the plaintiff's advocates have also confirmed this by their letter dated 18<sup>th</sup> June 2003 addressed to his advocates wherein they also confirm that "*the claim if any under the said agreement.....is time barred under the Limitation of Actions Act*". RMK2. That it appears that the plaintiff's advocates are now blowing hot and cold when it suits their client, and thus grossly abusing the Court process. That this suit is frivolous and scandalous and should be dismissed.

The plaintiff/respondent was served by way of registered post as per the affidavit of service filed in court on the 4<sup>th</sup> of April 2013. The plaintiff filed no reply to the application dated 14<sup>th</sup> of August 2006. I have carefully perused the Court file. The plaintiff filed suit on the 6<sup>th</sup> December 2005. At paragraph 3 he refers to a deed of family settlement on 18<sup>th</sup> day of April 1996 which he refers to as the agreement between the estate of Ved Prakash Mandal, estate of Prem Prakash Mandal, Rajinder Kumar Mandal, Vijay Kumar Mandal and Anil Kumar Mandal and Prem Prakash Mandal.

The plaintiff avers that the parties are registered as proprietors as tenants in common in equal shares in the properties mentioned at page 2 of the plaint. The plaintiff alleges that the defendants defaulted to perform their part of the agreement despite being requested severally to do so and is therefore in breach of its obligation and conditions of the agreement as stated at paragraph 9 of the plaint. The plaintiff prays for

a declaration that the defendant to execute all documents and do all such acts or things to completely effectuate the said agreement or in the alternatively, an order that the defendant does do all things necessary for the said arbitration to take place for the arbitrators' final determination. He also seeks a delivery up of the said deed of exchange duly executed and signed by the defendant and on refusal or neglect to do so, all documents, acts and things necessary to completely effectuate the said agreement be signed executed and done by the Registrar or Deputy Registrar of this Court, all necessary and consequential accounts, directions and inquiries and damages for breach of contract in lieu of or in addition to specific performances.

The plaintiff's claim is based on the agreement dated 18<sup>th</sup> April 1996. The applicant submission that the suit is time barred is valid as under the Law of Contract Act a claimant suing for a breach of contract has six years within which to file suit. The plaintiff's suit was filed on the 6<sup>th</sup> of December 2005 way beyond the six years. He filed suit 3 years after the limitation period had passed. This is an abuse of the court process. The defendant raised this issue in the defence. I find that the application has merit and I strike out the plaint dated 8<sup>th</sup> of April 2005 filed in Court 6<sup>th</sup> of December 2005. The applicant is awarded costs of the application and suit. This is a fairly old matter and the defendant should proceed with his counter claim after compliance with order 11 of the Civil Procedure Rules. 2010.

Orders accordingly

Dated, signed and delivered this 31<sup>st</sup> Day of May 2013

**R. E OUGO**

**JUDGE**

**In the presence of:**

.....**Defendant /Applicant**

.....**Plaintiff/Respondent**

.....**Court Clerk**