



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 172 OF 2011
LIMITATION OF ACTION ACT

A claim in fraud, time begins to run when the plaintiff discovers the fraud.

HAUSER PATRICK GEORGE.....PLAINTIFF

VERSUS

ISAAC NJUGUNA NJOROGE.....DEFENDANT

RULING

The defendant has raised a preliminary objection dated 5th July 2011. It is in two limbs.

- “1. That the suit is a non-starter and is caught up by the limitation of actions act.**
- 2. the claim herein can only lie for accounts and a refund of money unaccounted for and unutilized and not one for restraining orders or injunction or declarations.”**

The defendant’s counsel submitted that the plaintiff’s claim should fail because it is a claim in contract for the purchase of land which was not in writing. This he said was contrary to section 3 (3) of the Law of Contract act Cap 23. He also submitted that the suit should fail because it was time-barred by Limitation of Actions Act Cap 22. Further that there was no privity of contract between the plaintiff and the defendant and the plaintiff’s claim therefore could not succeed. By those submissions it becomes clear that the defendant’s learned counsel did not advance any argument in regard to the second limb of the preliminary objection. The court will therefore assume that that objection was abandoned.

The plaintiff’s learned counsel in response stated that the transfers of the parcels which are the subject of this suit were done in March 2007. That it therefore follows that the action was not time-barred by section 7 of Cap 22. Further he stated that the plaintiff had pleaded fraud in his plaint and accordingly section 26 of Cap 22 addresses the defendant’s objection. In respect to the objection by the defendant in relation to cap 23 the plaintiff submitted that his claim was for the defendant to account for land he was supposed to buy for the plaintiff with money that the plaintiff had supplied.

The plaintiff’s claim is that he gave the defendant a total of 65,500 Swiss Francs. The defendant had agreed to buy for the plaintiff land in Mombasa with that money whilst the plaintiff was residing in Switzerland. The plaintiff by paragraph 8 of the plaint pleaded thus:

“The plaintiff avers that he was rudely shocked when, sometimes in 2007, the defendant gave him two (2) title deeds for Subdivision No. 10076 (Original No. 3631/6) Section II Mainland North and

Subdivision No. 10078 (Original No. 3631/6) Section II Mainland both with approximate measurements of 0.2010 hectares purporting that the same were the properties purchased with the money sent to him by the plaintiff as hereinabove stated.”

The plaintiff averred in that plaint that the defendant was fraudulent in failing to have all the parcels of land which were purchase with his money in his name. The plaintiff pleaded in his plaint:

“Upon purchasing the aforesaid property in the manner hereinabove stated the defendant while knowing that he had purchased the said property on behalf of the plaintiff and that he was holding the same in trust of the plaintiff, fraudulently and without consulting, informing and/or in any manner whatsoever seeking the plaintiff’s authority, caused the subject property to be subdivided into the following plots i.e.:-

(a) Subdivision No. 10074 (original No. 3631/4) Section II MN which was fraudulently transferred to the defendant on 22nd March, 2007.

(b) Subdivision No. 10076 (Original No. 3631) Section II MN which was transferred and registered in favour of the plaintiff on 22nd March, 2007.

(c) Subdivision No. 10077 (Original No. 3631/7) Section II MN which was fraudulently transferred and registered in favour of the defendant on 22nd March 2007.

(d) Subdivision No. 10078 (Original No. 3631/8) Section II MN transferred and registered in favour of the plaintiff on 22nd March, 2007.

(e) Subdivision No. 10079 (Original No. 3631/9) Section II MN fraudulently transferred and registered in favour of the defendant on 22nd March, 2007.”

With those pleadings in mind, does the objection raised by the defendant have any basis? Section 3 (3) of Cap 23 provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

The plaintiff’s claim is not based on disposition of interest in land. It is essentially based in the contract between the plaintiff and the defendant where the plaintiff gave money to the defendant on the agreement that the defendant would buy him land. It follows the above section is not applicable. That agreement was entered on the year 2004. This case was filed in the year 2011. It would seem that by virtue of section 4 (1) (a) of Cap 22 that the plaintiff’s claim is time-barred. The Limitation of Actions Act limits the period within which an action in contract ought to be brought to court to six years. But as it would be recalled from the portion of the plaint reproduced above, the plaintiff pleaded fraud on the part of the defendant. Section 26 of Cap 22 provides that where a claim is based on the fraud of the defendant the period of limitation does not begin to run until the plaintiff discovers the fraud. The plaintiff in this plaint

at paragraph 8 stated that he discovered the alleged fraud in the year 2007. The suit was filed in the year 2011. It follows that from 2007 to 2011 only 4 years had passed. The plaintiff's action therefore is not caught by the 6 year rule. The first limb of the preliminary objection does therefore fail. And so does the second limb because the court has found that the plaintiff's claim is based on the alleged agreement between the plaintiff and the defendant. The issue of privity of contract, not being there between the parties, does not arise. The preliminary objection by the defendant is therefore dismissed with costs to the plaintiff.

DATED and DELIVERED at MOMBASA this 25th day of April, 2012.

Mary Kasango
JUDGE