



REPUBLIC OF KENYA

High Court at Kitale

Civil Case 15 of 2009

AVALINA HOLDINGS LTD.....APPLICANT.

VERSUS

THOMAS LIVASIA WIJENJE.....DEFENDANT.

R U L I N G.

(ON PRELIMINARY OBJECTION DATED 9TH JUNE, 2009)

Basically, the plaintiff's claim against the defendant is for the defendant to complete the transaction of sale of and to transfer to the plaintiff the suit land measuring fifty (50) acres to be curved from L/R. No. 1936/3 commonly known as Witok farm and in the process, the defendant do cause and complete a survey, procure title thereof, execute necessary documents, satisfy conditions requisite for registration and transfer the suit land to the plaintiff.

The plaintiff also claims general damages from the defendant for loss of use of the suit land from the time the defendant violently and forcefully, in the year 2004, removed and/or displaced the plaintiff, its agents/servants from the suit land until the date of restoration of the plaintiff onto the suit land to enable peaceful and quiet possession of the land by the plaintiff.

The entire claim is opposed by the defendant on the basis that there was an agreement between the plaintiff and the defendant for the sale of the suit land. The said agreement was made on 4th August, 1988 and consent of the Land Control Board to sub-divide the land was issued on 1st December, 1988 but the plaintiff waited for more than twelve (12) years to institute this suit for specific performance.

It is the defendant's defence that the suit is time-barred and that the court would have no jurisdiction to order specific performance of a contract which is invalid. The defendant denies having evicted the plaintiff from the suit land and contends that the plaintiff slept on his rights.

The defendant's statement of defence dated 9th June, 2009 was filed contemporaneously with his notice of preliminary objection to the plaintiff's application dated 3rd December, 2008.

the objection was anchored on five grounds but at the hearing thereof, the defendant abandoned all the grounds save ground three which challenges the validity of this suit on the basis that the claim is time-barred by dint of section 7 of the Limitation of Actions Act (Cap 22 LOK) in that the cause of action arose in December, 1989 (sic) whereas the prescribed twelve (12) years period ended in January, 2002 and the suit was filed on 4th February, 2009.

It was the defendant's argument that the claim is for recovery of land based on a contract made on 4th August, 1988 which received the Land Board Consent on 1st December, 1988 but the suit land remained

untransferred to the plaintiff thereafter. The defendant argued that the suit is time-barred since the plaintiff waited upto February, 2009 to file this suit thereby going against the provisions of section 7 of the Limitation of Actions Act.

In response to the foregoing, the plaintiff argued that the case of action arose in the year 2004 when it (plaintiff) was evicted from the suit land by the plaintiff. In any event, it is not clear as to when the cause of action arose. Besides, issues relating to cause of action are not clear points of law and ought not be determined by way of a preliminary objection. **Mukisa Biscuit Manufacturing Ltd vs. West End Distributors Ltd 1969 EA 696** and **Patrick Nganga Kamau vs. Isaac Kibero Kawere NBI HCCC No. 343 of 2003** were cited by the plaintiff in support of its arguments.

Having considered the arguments advanced by both sides, it is apparent that the actual date when the cause of action accrued is crucial to the determination of this objection.

Under section 7 of the Limitation of Actions Act, a person may not bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. The pleadings herein indicate that the suit land was purchased by the plaintiff from the defendant sometime in the year 1988. Thereafter, the plaintiff took possession and remained peaceful thereon up-to the year 2004 when it (Plaintiff) was allegedly dispossessed of the land by the defendant in a forceful and violent manner. All along, sub-division and transfer of the land to the plaintiff had not been formally undertaken. Consequently, this suit was filed against the defendant for him to specifically perform his part of the contract by surveying the suit land as per the proposed sub-division plan in order to facilitate the transfer of the land to the plaintiff.

If viewed from the point of view of the agreement entered between the plaintiff and the defendant on the 4th August, 1988, it would follow that the suit would be time-barred in so far as it is founded on contract. It would also be time-barred if it is taken to be an action to recover land (see, section 4 (1) and section 7 of the Limitation of Actions Act.)

However, if viewed from the fact that the plaintiff had taken possession of the land immediately after the sale agreement and that it continued with that possession while awaiting for a formal transfer of the land to itself upto the year 2004 when it was evicted therefrom by the defendant, it would follow that the cause of action was triggered by the alleged eviction of the plaintiff from the suit land which it had purchased and occupied thereby reserving its right over it. Its (plaintiff's) claim against the defendant would essentially be for purposes of consolidating and enforcing its right over the suit land by compelling the defendant to expeditiously facilitate the process of transferring and registering the suit land in the name of the plaintiff.

It is evident from the foregoing that cause of action would be both a point of law and fact. In the circumstances, it may not be treated as a pure point of law which may be determined by way of a preliminary objection without leading evidence. Consequently, the present objection in as much as it relates to the period when the case of action arose is lacking in merit.

On the periphery, the defendant has raised an issue pertaining to the procedure or manner in which this suit was brought. However, the issue does not fall within the ambit of the notice of preliminary objection and in particular ground three of the objection.

In sum , this preliminary objection is dismissed with costs to the plaintiff.

[Read and signed this 16th day of October, 2012.]

[In the presence of Mr. Abubakar for plaintiff and Mr. Ngeiywa h/b for Samba for defendant.]

J.R. KARANJA.

JUDGE.

