



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 215 OF 2001

**FRANCIS JAMES NDEGWA alias
FRANCIS ISHMAEL NDEGWA t/a
CENTRAL KENYA PRESS.....PLAINTIFF/RESPONDENT**

VERSUS

**DEVELOPMENT BANK OF KENYA LTD.
(Formerly known as DEVELOPMENT FINANCE
COMPANY OF KENYA LTD.....1ST DEFENDANT/APPLICANT
MURUGURU HOLDINGS LTD.....2ND DEFENDANT
SMALL ENTERPRISES FINANCE LTD.....3RD DEFENDANT**

RULING

The substantive suit is expressed in the amended Plaint dated 30th October 2008, in which **FRANCIS JAMES NDEGWA** alias **FRANCIS ISHMAEL NDEGWA** T/a Central Kenya Express, the plaintiff herein, has sued **DEVELOPMENT BANK OF KENYA LTD.** (Formerly known as Development Finance Company of Kenya Ltd.), **MURUGURU HOLDINGS LTD.**, and **SMALL ENTERPRISES FINANCE LTD.**, being the 1st, 2nd and 3rd Defendants respectively claiming for judgment in the following terms:

- (a) Declaration that the sale of the plaintiff's land parcel No. AGUTHI/GATITU/667/154 by the 1st and 3rd defendants or either of them is null and void.***
- (b) Order that the register of Land Parcel No. AGUTHI/GATITU/667/154 be rectified, the names of the 2nd defendant be cancelled and the names of the plaintiff and Benjamin Githinji Ndegwa be registered as the registered proprietor of the Land.***
- (c) In the alternative to the above prayers the 1st and 3rd defendants be ordered to pay adequate general damages to the plaintiff for loss of land and machineries the same to be qualified by this Honourable Court.***
- (d) Costs of this suit.***
- (e) Any further or better relief this Honourable Court may deem fit to grant.***

The Defendants each denied the Plaintiff's claim by filing their respective defences.

When the suit came up for hearing on 30th November 2010, Mr. Kiora, learned advocate for the 1st and 3rd Defendants, argued the preliminary point of law as set out in paragraph 12 of the 3rd Defendant's Defence. Basically, it is Mr. Kiora's submission that the suit as against the 1st and 3rd Defendants is time-barred hence it should be struck out. The learned advocate referred to paragraph 11 (a) of the amended Plaintiff which states that the suit property was sold in 1989. Mr. Kiora pointed out that the property was sold on 26th August 1989 and the certificate of sale was issued on 9th November 1989. It is the submission of the learned advocate that the Plaintiff's right to recover the suit property from the 1st and 3rd Defendants lapsed on 26th August 2001 by dint of *Section 7* of the Limitation of Actions Act. The 3rd Defendant was joined as a party to this suit on 29th October 2008 when the claim against it had lapsed. Miss Mwai, learned advocate for the 2nd Defendant, adopted the submissions of Mr. Kiora. Mr. Boniface Njiru, learned advocate for the Plaintiff, strenuously opposed the preliminary objection. It is Mr. Njiru's submission that the objection raised by the 1st and 3rd Defendants can only be determined upon the production of evidence. He was of the view that the 3rd Defendant should have filed a substantive application backed by affidavit evidence to have the suit struck out and or dismissed. The learned advocate further pointed out that time started to run from the year 2005 when the Plaintiff discovered that there was need to join the 3rd Defendant to this suit.

I have considered the rival submissions tendered by learned counsels from both sides. I have also taken into account the material placed before this court. This court has been urged to strike out the suit as against the 1st and 3rd Defendant because the same is time-barred. The objection is expressed in paragraphs 12 of the 1st and 3rd Defendants' defences. The Plaintiff is of the view that the preliminary objection can only be determined upon receipt of evidence. In **MUKISA BISCUIT MANUFACTURING CO. LTD =VS= WEST END DISTRIBUTORS LTD. [1969] E.A.** at P. 700 Law J.A. gave the definition of a preliminary objection as follows:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises from 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.”

I have already stated that the preliminary point is expressly stated in the 1st and 3rd Defendants defences. The cause of action is stated to have arisen in the year 1989. In paragraph 11A of the amended Plaintiff, it is stated as follows:

“11A. Sometimes in the year 1989 when the suit was still pending in the High Court, the 3rd Defendant purported to sell and to transfer the plaintiff's interest to one Francis Kamachu Warutere and Nderitu Wachira under a purported exercise of charge statutory power of sale. The said purchasers later purported to transfer the suit land to the 2nd Defendant in this suit.”

In the pleadings, the preliminary point is clear. The question to be determined is whether or not the suit is time-barred? Under *Section 7* of the Limitations Act, it is clearly stated that no action to recover land after the end of twelve years from the date on which the action accrues can be entertained. In this case the Plaintiff is seeking to recover the parcel of land known as **L.R. NO. AGUTHI/GATITU/667/154** from the Defendants. The Plaintiff and the Defendants agree on one aspect that the suit land was sold in 1989 in exercise of the 1st and 3rd Defendant's statutory power of sale. The suit to recover the land was filed on 23rd November 2001. In fact there is no dispute that the property was actually sold on 26th August 1989. The suit was filed on 23rd November 2001 when time to sue as fixed by Statute had lapsed. It has been argued by the Plaintiff's learned advocate that the preliminary objection should be rejected because he was ambushed and that there was need to present evidence. With respect, I do not think I share the Plaintiff's arguments. To begin with, there was clear and unambiguous indication by the Defendants that they would raise the objection of limitation at the hearing of this suit hence the Plaintiff's advocate cannot be heard to say he was ambushed. There is a submission that there is need to present evidence to prove

the preliminary point. I have already stated that the pleadings are clear that the cause of action arose in 1989 and specifically on 26th August 1989.

In the final analysis I find the preliminary objection to be well founded. It is upheld with the consequential order that the suit is ordered struck out and dismissed for being time-barred with costs to the Defendants.

Dated and delivered at Nyeri this 11th day of February 2011.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Kingori holding brief Miss Mwai for 2nd Defendant. No appearance for Plaintiff.