



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL CASE NO. 27 OF 2009

**LEONIDAH INJETE SHILOYA (Suing as the Administrator of
the Estate of)
SIPELLAH KHASATSILI).....PLAINTIFF**

VERSUS

EDWARD LAZARUS WERE.....DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection before me is premised on the contents of paragraph 6 of the Statement of Defence dated 18.5.2009 and filed in court of 20.5.2009. In that paragraph, the Defendant has pleaded that the Plaintiff's claim is time-barred and in submissions before me, Mr. Anziya, Advocate for the Defendant, has stated that the cause of action according to paragraph 4 of the Plaint arose in 1978 when the Defendant was registered as proprietor of the suit land and so in accord with S.7 of the Law of Limitations Act, the suit ought to have been filed by 2007 and not 2009. The suit being out of time, he has submitted, then it ought to be struck off.

2. The response by Mr. Ondieki for the Plaintiff is that the suit was not filed out of time because there were proceedings between the parties during the intervening period and that when the fraud was discovered, the present suit was filed. In any event, that the Constitution enjoins all courts to hear and determine all suits on their merits and to avoid delving into technicalities.

3. I have perused the Amended Plaint dated 30.3.2009. At paragraph 4, 5A and 6, the Plaintiff averred as follows;

"4. That sometime in the year 1978, the late Sipellah sold to the Defendant 2 acres at a total

consideration of Kshs14,000/=.

5(A). That the plaintiff by virtue of illiteracy and ignorance, the Defendant cheated her to sign some transfer forms which she did not understand what they were for, thinking that they were for survey and subdivision, and also gave a copy of her ID, which the Defendant used in illegally and fraudulently transferring the whole parcel of land to himself. (sic)

Particulars of fraud:

(a) The defendant never took the late Spellah Khasatsili to the Land Control Board for its consent.

(b) The defendant misrepresented to the late Spellah that a copy of her ID was meant to assist in subdivision and survey.

(c) The defendant fraudulently presented to the late Spellah transfer forms as application for survey forms which indeed were not.

6A. The plaintiff's claim against the defendant is for an order declaring that the Transfer and registration of land parcel No. Kakamega/shamberere/924 is null and void hence the registration be cancelled and the Plaintiff be registered as the owner."

4. I have also seen an extract of title for the disputed land and it shows that it was initially registered on 16.7.1975 in the names of Khasatsiri Chiteba and on 25.9.1977 it was transferred to one Sipera w/o Khasatiri and on 8.2.1978, it was transferred to Edward Lazarus Were and on 2.3.1995, a caution was registered in favour of Sabela Khasatsiri.

5. I also note that parties were before the Kabras Land Disputes Tribunal and in an undated decision, the land was awarded to amongst others, the Plaintiff. That award was later upheld by the Western Provincial Land Disputes Tribunal on 10.6.2003.

6. It is now trite that a Preliminary Objection cannot be upheld on contested facts and that is why in **Mukisa Biscuits Manufacturing Co. Ltd. Vs West End Distributors Ltd. [1969] E.A. 696**, it was held as follows;

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

7. I wholly agree and inspite of previous proceedings between the parties to this suit, pleadings bind them. I have elsewhere above reproduced the relevant paragraphs in the Amended plaint. What is sought to be done at the end of the suit is the cancellation of the "transfer and registration" of the suit land in the Defendant's names. I have said that the said actions were undertaken prior to and/or on 8.2.1978. That is

when the offending action arose and S.7 of the Limitation of Actions Act provides as follow;

“S.7 – An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

8. Reading the above section clearly, it matters not that the present plaintiff discovered the alleged fraud later than 8.2.1990 when the time expired because Sabela Khasatsiri ought to have claimed the land back to herself before her demise (I note from the grant of letters of administration issued on 10.3.2008 that she died on 25.8.2004, fourteen (14) years after time had lapsed).

9. Mr. Ondieki’s gallant attempt at grasping onto the Constitution for sustenance of the suit is desperate and cannot sway this court to rule that life can be breathed into the suit.

10. In the event, since the suit is statute time-barred, it is hereby struck off with costs to the Defendant.

11. Orders accordingly.

Delivered, dated and signed at Kakamega this 17th day of March, 2011.

ISAAC LENAOLA

J U D G E