



Patel & another v Victoria Commercial Bank Limited & 2 others (Environment & Land Case E392 of 2021) [2022] KEELC 12726 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E392 OF 2021
EK WABWOTO, J
SEPTEMBER 30, 2022**

BETWEEN

NARENDRA KUMAR RAMANBHAI PATEL 1ST PLAINTIFF

GEETA NARENDRA KUMAR PATEL 2ND PLAINTIFF

AND

VICTORIA COMMERCIAL BANK LIMITED 1ST DEFENDANT

ASHWIN RAMANBHAI PATEL 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

RULING

1. This Ruling is in respect to the 1st Defendant's Preliminary Objection dated April 19, 2022. The Preliminary Objection is raised on the following grounds:
 - i. The Plaintiffs' suit as against the 1st Defendant whose cause of action is founded on alleged breach of statutory duty of care and negligence is statute time barred by virtue of Section 4(2) of *Limitation of Actions Act*
 - ii. That the suit against the 1st Defendant is fatally incompetent, incurably bad in law and the same should be struck out or dismissed with costs to the 1st Defendant.
2. Section 4(2) of the *Limitation of Action Act* Chapter 22 law of Kenya. Section 4(2) of the *Limitation of Actions Act* states that:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:



Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”

3. The facts of the case are that on September 11, 1997, the Plaintiffs being the owners of the suit property- LR No 209/5227 charged the property to the Victoria Commercial Bank Limited (1st Defendant) for purchase of land for Kenya Shillings Two Million Five Hundred Thousand shillings only (Kshs. 2,500,000/-).
4. Following the Plaintiffs relocation to the United States in 2001, they instructed the 2nd Defendant to collect rent from the suit property and pay the monthly loan instalments to the 1st Defendant. In 2001, the 1st Defendant released the security documents to the 2nd Defendant and proceeded to discharge the property.
5. The 1st Defendant submitted that any claim founded on breach of fiduciary duty is tortious nature and ought to have been filed within 3 years of such discovery. They further reiterated that they acted rightfully based on instructions from the Plaintiffs to discharge the property following the remittances made by the 2nd Defendant.
6. In submissions dated July 15, 2022, the Plaintiffs relied on Article 50 of *the Constitution*, Section 4(1) and Section 26 of the *Limitation of Actions Act*. They submitted that there was a duty of care based on contractual relationship between the Plaintiff and 1st Defendant and that the cause of action arose in 2016, when they discovered the fraud by the 2nd Defendant.
7. Having perused the written submissions, it is evident that the issues for determination before this Court are;
 - i. Whether the threshold to raise a Preliminary Objection has been met?
 - ii. Whether the Preliminary Objection is merited?
8. It is trite law that a Preliminary Objection must be raised on a point of law as reiterated in the case of *Mukbisa Biscuits Manufacturing Co. Ltd V. West-End Distributors Limited* (1969). E.A 696. Having raised the objection on a specific provision of the law, the preliminary objection would be alive and within the jurisdiction of this court.
9. In the case of *Gathoni -vs- Kenya co-operative Cremires Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows: -

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”
10. Section 26 of the *Limitation of Actions Act* provides:

“Where, in the case of an action for which a period of limitation is prescribed, either:

 - (a)) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
 - (b) the right of action is concealed by the fraud of any such person as aforesaid; or
 - (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or



the mistake or could with reasonable diligence have discovered it.”[Emphasis Mine]

11. With regard to whether the Preliminary objection is merited, the question before this Court is to determine when the cause of action accrued. In *B Mathayo Obonyo v South Nyanza Sugar Company Ltd*, Majanja J. was guided by the Black’s Law Dictionary (10th Edition) and stated as follows:

“The word “accrue” means ‘to come into existence as an enforceable claim or right’...To hold that the cause of action accrues at the end of the contract period is inconsistent with the meaning of the legislative language and in particular the ordinary meaning of the term, “accrue...It is the breach that gives rise to the cause of action. ...the right to sue for breach of contract arose when one of the parties failed to meet its obligations under the contract”

12. It is an undisputed fact that a contractual relationship was formed between the Plaintiffs and the 1st Defendant in the year 1997. The release of the security documents is also not disputed to have taken place in 2001. In this instance, the cause of action would have accrued in 2001 upon the release of documents however the Plaintiffs posited the occurrence of a fraud which was discovered in 2016.

13. The case is hinged upon performance of the contract. To my mind, all claims arising in the suit undoubtedly stem from the contract, therefore, the cause of action would arise from contract entered between the parties. On the aspect of fraud as pleaded by the Plaintiff, Section 26 of the Limitations of Actions Act would therefore act as a perpetual shield against it being time-barred. The Court is guided to uphold the spirit of law that protects its citizens in quagmires perpetuated by fraud.

14. In the foregoing, I find the preliminary objection dated 19th April 2022 is unmerited and hereby do dismiss the same with costs.

15. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

E. K. WABWOTO

JUDGE

In the presence of: -

Ms. Aisha for the Plaintiffs.

Ms. Wangari for the 1st Defendant.

N/A for the 2nd and 3rd Defendants.

Court Assistants; Caroline Nafuna and Philomena Mwangi.

E. K. WABWOTO

JUDGE

