REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Miscellaneous Civil Appeal 19 of 2008

SOLOMON M'RURA MATHIU……PLAINTIFF
VERSUS
STANLEY M'KIUGU M'IKIARA…....…….DEFENDANT

Preliminary objection meaning of-

R U L I N G

In a Plaint filed in court on 12th February 2009, the Plaint if sought-

(a) An order retransferring Abothuguchi/Githongo/815 back to the plaintiff

(b) A declaration that the defendant is entitled to only 1.5 acres out of the main land,

(c) Costs of this suit and interest.

The principal grounds for seeking the orders are set out in paragraph 5 of the plaint, namely that the Defendant unlawfully and fraudulently got the whole land transferred to himself on or about 7th April 1979. The fraud alleged is that the Defendant fraudulently presented a forged agreement dated 27th January 1979 while representing that it was a genuine agreement when it was actually not.

In its defence dated 3rd March 2009 and filed on 5th March 2009 the Defendant specifically denied in paragraphs 4 the particulars of fraud, and put the plaintiff to strict proof thereof. In paragraph 7 of the Defence, the defendant stated the suit is **TIME BARRED** and bad in law since according to the Plaintiff the alleged cause of action, if any, arose in 1979, that is more than 30 years ago and that the Plaintiff has all along been aware of the Defendant's registration of the suit land in the Defendant's favour.

In his Reply to Defence dated and filed in court on 19th March 2009, the Defendant offered no answer to said paragraph 7 of the Defence. So that statement of defense remains unchallenged. Following the filing of the Defence, the Defendant's counsel filed on 6th March 2009 a Notice of Preliminary Objection dated 5th March 2009, that the Plaintiff's be suit be dismissed with costs to the Defendant on the grounds that:-

(1) the suit flies in the face of Section 7 of the Limitation of Actions Act, (Cap 22, Laws of Kenya) and is clearly TIME BARRED.

(2) the plaintiff has no reasonable cause of action against the Defendant.

(3) the suit is frivolous, vexatious, legally incompetent, incurably defective, a non-starter ab initio an epitome of abuse of due process of the court.

A preliminary objection may be raised at any stage of the proceedings even orally in open court. The better practice which has acquired the status of a convention is to do so in writing by way of notice filed in Court and served on the other party so that it or they are not taken by surprise. But what is a preliminary objection on a point of law? That question was presented to the Court of Appeal for East Africa in the celebrated case of **MUKISA BISCUIT**

MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD [1969] 696. In a classic exposition of the law on the subject Law JA at p. 700 letters D – E delivered himself thus:-

"So far I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by 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".

And Sir Charles Newbold, at p.701 letter "**B"** in his characteristically strong and apposite rendition of the law (as Ringera J put it in the case of **LAXMANGHAI CONSTRUCTION VS ANSRAR BEVERAGES LTD** (**Milimani Commercial Court H.C.C.C. No. 1327 of 2001**) agreed with the speech of Law, JA and after deprecating the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection, weighed in similar vein and said-

"A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the opposite 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".

The issue in this matter is whether the Preliminary Objection has been pleaded in the Defendants Defence, or arises from clear implication out of the pleadings, and whether the point if argued will dispose of the suit. The other issue to be satisfied by the Defendant is whether all the facts pleaded by the opposite side are correct, and are not to be ascertained, and the issue are not subject to discretion of the court.

In this matter the Preliminary Objection has been pleaded by the Defendant in paragraph 7 of the Defence, that the suit is time barred. Limitation is one of the examples given by Law JA in the **Mukisa Biscuits case** (supra). The plea of limitation was not traversed by the Plaintiff in the Reply to Defence dated and filed on 19th March 2009. It is deemed to be admitted by virtue of Order VI rule 9(1) of the Civil Procedures Rules that except for allegations of damages [(Order VI rule 9(4)] any allegation of fact made by a party in his pleadings shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or joinder of issue under rule 10 operates as a denial of it.

The Plaintiff's claim is founded upon the tort of fraud. Section 4(2) of the Limitation of Actions Act provides that an action founded on fraud must be brought or instituted within 3 years. This action was not. So the claim is clearly time barred and the plaintiff is strictly non – suited.

In addition the Plaintiff's claim is recovery of land – prayers are:

(a) An order re-transferring ABOTHUGUCHI/GITHONGO/815 to the plaintiff.

(b) A declaration that the defendant is entitled to only 1.5 acres of mainland.

A claim or an action for recovery of land may only be instituted within 12 years from the date of accrual of the action. Section 7 of the Limitation of Action provides-

S.7. "Any 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."

Although the Plaintiff does in paragraph 11 of his Reply to Defence, deny the defence of limitation pleaded in paragraph 18 of the Defence the plaintiff does not offer any explanation in law which would stop the limitation clock or period from running as for instance envisaged by Section 26 of the Limitation of Actions Act which says-

S. 26. 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 would with reasonable diligence have discovered it……..

There is no pleading by the plaintiff that he discovered the fraud or mistake when he filed the present suit. From the Defence the facts of the transaction have been within the Plaintiff's, not constructive, but actual knowledge, for the last thirty or so years, or in the case of claim for recovery land, for the last 18 years. On the tort of fraud, the right expired more than 27 years ago. The plaintiff's action whether on the grounds of the tort fraud or for recovery of land simpliciter is statute – barred by virtue of having been filed well after the expiration of the periods prescribed by the Limitation of Actions Act. It is therefore a prime candidate for striking out on that ground alone.

The Plaintiff's suit may be struck out on any of the other reasons advanced by the Defence, that it discloses no reasonable cause of action against the Defendant and that it is frivolous vexatious, legal by incompetent and incurably defective and a non-starter **ab ibnitio.**

A suit which is barred by statute is no doubt a non starter **ab initio** unless it is first brought within the provisions of section 26 of the Limitation of Actions Act. As stated above, the Plaintiff's suit is statute barred and is therefore a non starter.

It is often stated that striking out a suit is a drastic measure. Indeed it is, it must be exercised sparingly and with circumspection and in the rarest of cases but when the conduct of a litigant is so glaringly contumacious in intending to keep a matter alive by endless litigation, such litigation deserves to be dealt with sternly. It is an abuse of the process of the court and contrary to justice and public policy for a party to relegate the same issue which has already been tried and decided earlier against him. Frivolous and vexatious proceedings may also amount to abuse of the process of the court specially where the proceedings are absolutely groundless.

In those circumstances, the court has power to stop such proceedings summarily and prevent the time of the public and the court from being wasted. It is realized that this is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The court should be satisfied that the suit has no chance of succeeding.

I am satisfied that this case has no chance of succeeding in light of the ground of limitation stated above, and other grounds discussed above.

For all those reasons, the Defendant's Preliminary Objection on a point of law dated 5th March 2009 and filed on 6th Mary 2009 succeeds and the plaintiff suit filed dated 7th February 2009 and filed on 12th February 2009 is struck out with costs to the Defendant.

It is so ordered.

Dated, delivered and signed at Meru this 31st day of July 2009

ANYARA EMUKULE

JUDGE