



Arnoldi suing through his Attorney Thomas Ferrucio Secondi Arnoldi v Muramba (Environment & Land Case 9 of 2022) [2022] KEELC 14853 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 9 OF 2022
MAO ODENY, J
NOVEMBER 17, 2022**

BETWEEN

**ROBERTO ARNOLDI SUING THROUGH HIS ATTORNEY THOMAS
FERRUCIO SECONDI ARNOLDI PLAINTIFF**

AND

LISTONNY THOYA MURAMBA DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated March 4, 2022 by the defendant/ applicant seeking the following orders;-
 - a. Spent
 - b. The suit be struck out or dismissed with costs to the defendant as the plaint is merely vexatious and discloses no reasonable cause of action; or is otherwise time barred and therefore an abuse of court process.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Defendant's Submissions

3. Counsel relied on the grounds of the face of the application and submitted that the plaintiff's action is based on agency (para. 4 of the plaint), contract for sale of land (para. 5 and 6) and failure of an agent to account to the principal.
4. Counsel submitted that the agency and the sale of land are not disputed save that the complaint the subject of this claim ought to have been filed before the High Court by dint of order 37 rule 3 as the Environment and Land Court has no jurisdiction to hear and determine the claim as it does not involve the use or occupation of or titled to land.



5. Mr S.M. Kimani submitted that this is purely contractual claim for money reportedly received by an agent hence the High Court, or a subordinate court with enhanced pecuniary jurisdiction is well suited to hear and determine the matter and not the ELC, is the court with jurisdiction to entertain and determine the claim.
6. Counsel relied on the case of *Sabeb vs. Hassanally* [1981] eKLR (Nairobi CA Civil Appeal No 28 of 1980) where the court stated that where a new law or statute (in this case it is *the Constitution*) creates a new court with new jurisdiction, new remedies, and new forms and new procedures for approaching the new court, the court is obliged to follow the new law or statute and nothing else, until the law is amended or repealed.
7. It was counsel's further submission that the Plaintiff who sues as a 'recognised' agent of the donor of the power of attorney, had to seek leave to institute such proceedings, by dint of order 9 rule 2 (a) which approval is mandatory which must be obtained before commencement of any action.
8. According to counsel, the plaintiff has brought the action before the ELC court, in his own name, without an application for approval of court of the 'agency relationship' created or ensuing the donation of the alleged powers of attorney in his favour hence this suit should be struck out as it is incompetent and vexatious.
9. Mr. Kimani also stated that if the action is based on the agreement for sale of land dated September 20, 2013 or the powers of attorney donated to the defendant on September 12, 2013, then, the latest date on which the plaintiff could present a claim was September 19, 2019, by dint of section 4 (1) (a) of the *Limitation of Actions Act*.

Plaintiff's Submissions

10. Counsel gave a brief background to the case and stated that the Plaintiff is the registered and absolute owner of all that parcel of land known as Kilifi/JlmBa/400 situated in Watamu measuring approximately 1.8 Ha, having purchased it from the original owners and registered in his name in December 4, 2008.
11. That subsequently on September 12, 2013 the plaintiff appointed the defendant to be his attorney vide power of attorney registered as P.A 1498 on 20th september 2013 and that sometimes in October 2013 the defendant entered into a sale agreement for the suit property at a purchase price of Kenya Shillings Twenty-Six Million (KShs 26,000,000/=) and duly executed the agreement for sale and transfer documents as the plaintiff's attorney.
12. Counsel further stated that despite successful sale and transfer of the suit property to the purchaser, and defendant duly acknowledging receipt of the full purchase price and has failed to submit the said proceeds to the plaintiff who is the rightful donor of the said power of attorney and owner of the suit property.
13. Mr. Gicharu listed the following issues for determination: -
 - a. Whether the Power of Attorney entered into on 12th september 2013 and registered on 20th september 2013 was valid and its effect.
 - b. What was the duty of the donee with respect to the said power of attorney registered on September 20, 2013 in the sale transaction?
 - c. Whether the pleadings are vexatious and discloses no reasonable cause of action.
 - d. Is the claim time barred pursuant to section 4 (1) and (3) of *limitation of action Act*.



- e. Whether the Court should grant the prayers sought.
14. On the first issue whether the power of attorney was registered and valid, counsel relied on section 4 of the *Registration of Documents Act* cap 285 and submitted that it is not disputed that the plaintiff was appointed and authorized the defendant herein to be his attorney, to transact all businesses and affairs of his and so to do all things necessary to be done for properly and efficiently conducting the business of the Plaintiff in respect to property known as title no. Kilifi/Jimba/400.
15. Counsel submitted that the aforesaid power of attorney registered on September 20, 2013 stated as follows: -
- “... hereby appoint, authorise Listonny Thoya Murambaa holder of Kenya ID Card No. xxxx and P.O. Box Number 419, Watamu in Republic of Kenya as my attorney (hereinafter called "Attorney") to transact all businesses and affairs of the "Grantor" and do all things necessary or do all things to be done for properly and effectively conducting the business of the Grantor (but without limiting the generality of the foregoing) with respect to property known as title number Kilifi/Jimba/400... ”
16. Mr. Gicharu submitted that the plaintiff's suit is competent and that he had the right to institute this suit on behalf of the Plaintiff who was the owner of the suit property sold by the donee, and that the power of attorney dated September 12, 2013 granted to the defendant allowed him to act lawfully and in good faith with regard to the property of the Donor.
17. Counsel relied on the provisions of section 26 of the *Limitation of Actions Act* and stated that time does not run in actions founded on fraud until the Plaintiff has discovered the fraud or the mistake which he could not have discovered through reasonable diligence.
18. Counsel therefore urged the court to dismiss application and relied on the case of *Madison Insurance Company United v Augustine Kamanda Gitau* (2020] eKLR where the court held that a matter is said to be vexatious when it has no foundation, no chance of succeeding; or the pleading is brought merely for purposes of annoyance; it is brought so that the party's pleading should have some fanciful advantage or where it can really lead to no possible good.
19. Similarly counsel cited the cases of *Edward Moonge Lengusuranga v James Lanaiyara & another* (2019) eKLR and *Telkom Kenya Limited v Kenya Railways Corporation* (2018) on section 4 (1) of *Limitation of Action Act* an submitted that the plaintiff's claim is not time barred.

Analysis and Determination.

20. The issues for determination are whether this court has jurisdiction to hear and determine this case, whether the suit is time barred and whether it should be struck out.
21. Counsel for the Applicant submitted that the case involves agency therefore it should be heard in the subordinate court with pecuniary jurisdiction or High Court as the Environment and Land Court does not have such jurisdiction. Counsel further stated that the matter does not involve use and occupation of land.
22. Section 13 of the *Environment and Land Court* provides for the jurisdiction of the court that is envisaged under article 162(2) (b) which reads:
13. Jurisdiction of the court



1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of its jurisdiction under article 162(2)(b) of *the Constitution*, the court shall have power to hear and determine disputes—
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
 3. Nothing in this Act shall preclude the court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under articles 42, 69 and 70 of *the Constitution*.
 4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.
22. The claim emanates from a Sale Agreement which was entered into with the authority of the plaintiff to the defendant who executed the instructions as per the power of attorney. The defendant has not disputed that there was such power of attorney which was duly executed. What he claims is that the suit is time barred and filed in the wrong court. The pleadings show that the claim is in respect of sale of property known as title No. Kilifi/Jimba/400. It is not a commercial transaction.
23. From the above provisions of section 13 of the *Environment and Land Court Act*, I find that this court is clothed with the jurisdiction to hear and determine this case.
24. Further it should be noted that courts should sparingly strike out cases unless it is an outright abuse of court process. Litigants should not steal a march against the other party and all the issues that they want dealt with can be canvassed during the full hearing. Why is the defendant not amenable for a full hearing, is there anything that he does not want to be adjudicated upon? If he has a good defence, the court will still be able to hear him at the opportune time. The courts are also cognizant of the fact that they should not drive litigants from the seat of justice.
25. In the case of *Kivanga Estates Limited vs. National Bank of Kenya Limited* [2017] eKLR the court held that: -
- “It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require



that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations. ”

26. On the issue whether the suit is time barred, the purpose of the Law of Limitation was stated in the case of *Mehta v Shah* (1965) E.A 321, as follows; -

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

27. Section 7 of the *Limitation of Actions Act* provides as follows;

“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.”

28. The issue before this court is one arising out of a land transaction on Kilifi/ Jimba/400 where the Defendant entered into a Sale Agreement for the suit property for purchase of Kenya Shillings Twenty-Six Million and duly executed the agreement for sale and transfer as the Plaintiff’s attorney vide the power of attorney that was duly registered in October 2013. The plaintiff also pleaded fraud.

29. Section 26 of the *Limitation of Actions Act* provides as follows;

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:

30. In the case of *Justus Tureti Obara vs Peter Koipeitai* [2014] eKLR wherein J. Okong’o held that; -

“I am in agreement with the plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the *Limitation of Actions Act*, cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the *Limitation of Actions Act*, cap. 22, Laws of Kenya provides that where an action is based on the fraud of the defendant or his agent, the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.”

31. I have considered the application, the submissions by counsel and find that the application lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF NOVEMBER, 2022.



M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

