

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
HCCC 31 OF 2003

HENRY NJERUPLAINTIFF

VERSUS

AGRICULTURAL FINANCE CO-OP.....DEFENDANT

RULING ON A PRELIMINARY OBJECTION

1. The Preliminary Objection herein has been raised by Counsel for the Defendant. His argument is that at paragraph 4 of the Plaintiff it is averred that the parties' relationship commenced on 5.10.1977 when the Defendant advanced Ksh.10,000/= to the Plaintiff and the title for land parcel No. Gatari/Nembure/1934 given as security. Further at paragraph 6 thereof, that the land was sold in a Public Auction upon default of repayment by the Plaintiff. It is agreed that sale was effected on 16.8.1979. Counsel argues that since the claim in the Plaintiff is for nullification of that sale, and 24 years have since lapsed, then the suit is statute time-barred under Section 7 of the Law of Limitations Act.

2. A second point raised but whose basis was initially unclear but clarified in the reply was that at paragraph 9 of the Plaintiff, mention is made of a suit, **HCCC 2993/1979 (Nairobi)** between the parties which was dismissed. I am told that under Section 8 of the Civil Procedure Act as read with Order 16 and Order 9 B Rule 7 of the Civil Procedure Rules, this suit is not sustainable and should be struck out. Paragraph I shall dispose of the second Objection fairly quickly. It is unclear whether HCCC 2993/1979 (Nairobi) was dismissed for want of prosecution as pleaded in paragraph 9 of the Plaintiff or for non-attendance as submitted by Counsel for the Defendant. The issue is no longer one of law but of fact. Where facts are disputed, a Preliminary Objection must fail and so this one does. (**See Mukisa Biscuits Manufacturing Co. Ltd is West End Distributions Ltd [1969] E.A 696.**)

3. Turning to the question of limitation of time, I am in agreement with Counsel for the Plaintiff that the prayer for a declaration that the sale of all that parcel of land, Title No. Gatari/Nembure/1934 on 16th August 1979 was null and void ab initio is per se not a claim for land strictly. It is simply a declaration and when sought in a judgment, the end result is a declaratory judgment. This has been defined to mean a judgment of the court the purpose of which ***"is to establish the rights of the parties and express the opinion of the court on a question of law without ordering anything to be done. The distinctive characteristic of a declaratory judgment is that it stands by itself, and no executory process follows as a matter of course."*** (**Law Dictionary, Bamon's Legal Guides by Steven H. Gifis, 1994.**)

4. I have not been told by Counsel for the Defendant that declarations in the manner defined above, have a statutory time limit; Land claims are indeed limited by Section 7 of the Act as submitted but the claim in this suit is not a claim for land

. 5. The Objection must fail and I hereby disallow it with costs to the Plaintiff.

Orders accordingly.

Dated and delivered in open court on this 16th day of December 2004.

I.LENAOLA

JUDGE

Presence of ;-

Mr. Momanyi for Wayang'o for Defendant

N/A for Plaintiff.

I.LENAOLA

JUDGE