



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2882 OF 1993

MACHARIA KAGIO PLAINTIFF

VERSUS

KURIA NJOROGE & ANOTHER DEFENDANTS

R U L I N G

This is the defendants application dated 30.7.99. The applicants pray for another under Order VI Rule 13(1)(a) CPRules that the suit be struck out on the ground that it discloses no reasonable cause of action. The grounds of the application are stated on the body of the application as follows:-

- (i) There is no pleaded agreement of sale of the suit property and if any the said agreement is to time barred under the provisions of the limitation of Actions Act and that extension of time was not pleaded.
- (ii) The plaint is lacking in material facts contrary to the provisions of Civil Procedure Rules.

At the hearing of the application defendants counsel submitted that plaintiff relies on an oral agreement contrary to Section 3(3) of the Law of Contract Act. He further submitted that the suit is time barred as the agreement was entered into in 1972.

I have perused the amended plaint. It is true that plaintiff seeks to recover a plot he bought from first defendant by an agreement dated 9.2.72. The present suit was filed in June, 1972.

As regards the lack of a memorandum in writing plaintiff filed his list of documents on 13.1.2000 showing, inter alia, that he is replying on an agreement of sale in writing dated 9.2.72. He has attached a copy of that agreement. It will be the duty of the trial Judge to decide whether or not that agreement is a valid agreement of sale.

Further, plaintiff has in para 15,6,7 of the Amended plaint pleaded acts of part performance of the agreement. He avers that first defendant gave plaintiff vacant possession, that plaintiff duly and constructed the foundation and that plaintiff started putting up a commercial building. Plaintiff's list of documents also shows that he paid some money to Muranga County Council as a result of the agreement of sale.

I am satisfied that plaintiff is relying on a written agreement of sale and that consent such agreement of sale is not existing, plaintiff has pleaded acts of part performance which prima facie make the contract of sale of the plot enforceable in court.

On the question of the limitation, it is true that the suit was filed over 20 years after the date of the agreement for sale. First defendant filed his defence on 30.5.94. He did not plead the defence of limitation.

The defence of the 2nd defendant is dated 21.7.93. The 2nd defendant did not also plead the defence of limitation. By order VI Rule 4(1) CP Rules, the relevant statute of limitation among other things, should be specifically pleaded in the defence. As the defendants have not specifically pleaded the relevant statute of limitation as mandatory required by the rules, they cannot prima facie rely on the limitation of actions act.

Secondly, by Section 39(1)(b) of the limitation of actions act, the period of limitation does not run if the person attempting to plead limitation is estopped either by equitable or promissory estopped from doing so .

Had first defendant pleaded the defence of limitation and relied on the limitation of Actions Act in his defence we do not know what perily the plaintiff could have made.

It is probable that plaintiff could have raised the defence of estopped. Plaintiff's pleads that he was given vacant possession construction the foundation and started erecting a building. He has been paying County Council rates and the documents in his list of documents show that he has been paying county council rates up to 1995. It is probable from the foregoing that plaintiff may raise the defence of estoppel which in the circumstances would not be frivolous.

Had first pleaded limitation, plaintiff would have replied and in his reply he could have probably pleaded estoppel. It is probable that if the defence of estoppel had been raised the plaintiff could have convinced the trial judge at the hearing of the suit that time does not run from 1972.

In the circumstances I dismiss the application with costs to plaintiff.

E. GITHINJI

JUDGE

15.10.2001

Mr. Kinuthia for 1st defendant present

Mr. Ngunjiri holding brief for Kaai for plaintiff present

Mr. Kinuthia

I apply for certified copy of the proceedings and Ruling. I also seek leave to appeal.

ORDER

1. If leave to appeal is required it is hereby given.
2. Proceedings and ruling to be typed and certified copies

E. GITHINJI

JUDGE