



Wahome t/a Petrum Valuers v Agro Complex (K) Limited (Environment & Land Case E396 of 2021) [2023] KEELC 926 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E396 OF 2021
OA ANGOTE, J
FEBRUARY 9, 2023**

BETWEEN

PETER KIBOI WAHOME T/A PETRUM VALUERS PLAINTIFF

AND

AGRO COMPLEX (K) LIMITED DEFENDANT

RULING

1. In the notice of preliminary objection dated March 9, 2022, the defendant has averred that;
 - a. The honourable court lacks jurisdiction to hear and determine the plaint herein and the notice of motion application both dated November 15, 2021 and filed contemporaneously, as the suit is time barred having been brought outside the statutory limitation of 6 years in view of section 4 (1) of the *Limitation of Actions Act* cap 22.
 - b. That the instant application and suit are therefore incompetent, bad in law, barred in law, an outright abuse of the court process and should be dismissed with costs to the defendant.
 - c. That in the premises, the notice of motion and plaint both dated June 12, 2020 are not properly before this court and as such this court should down its tools.
2. The notice of preliminary objection proceeded by way of written submissions. The defendant's counsel submitted that the question of limitation is a pure point of law and the same does not require ascertaining of facts.
3. The defendant's advocate submitted that the plaintiff has pleaded under paragraphs 5 – 15 of the plaint that the defendant requested him for money for the acquisition of the defendant's piece of land along Mombasa road known as LR No 22140 IR 108022 and that in appreciation of the plaintiff's contribution, the defendant resolved to include the plaintiff as a director of the defendant.



4. It was submitted by the defendant's counsel that the question as to when the cause of action arose can be answered from the pleadings and that the plaint discloses the specific date when the cause of action arose, being the date the defendant held a board meeting on October 22, 2008.
5. It was submitted that pursuant to section 4 (1) of the *Limitation of Actions Act*, the time within which a party may file a cause of action claiming an equitable relief, for which no other period of limitation is provided by the Act or by any other written law is six years.
6. It was submitted by the defendant's counsel that the cause of action in this suit is for a claim seeking equitable relief and falls within the six years limitation period and that the plaintiff ought to have filed the present suit on or before October 22, 2014. Counsel relied on numerous authorities which I have considered.
7. In response to the preliminary objection, the plaintiff averred that the period between 2008 and 2020, the defendants had been sued in civil case number 348 of 2008 and that before 2020, his relationship with the defendant was mutual. It was averred by the plaintiff that he was made to believe that all was well until civil case No 348 of 2008 was finalized and that owing to the above circumstances, the notice of preliminary objection is not merited.
8. This suit was commenced by way of a plaint dated November 15, 2021. In the plaint, the plaintiff averred that at all material times, he has financed the activities of the defendant since 2007 when he was introduced to the defendant by the late Mr Wilfred Mirigi Waweru.
9. It was averred in the plaint that by a letter of instruction dated March 9, 2007, the defendant instructed the plaintiff to sell LR No 22140; that the defendant requested the plaintiff to finance the settlement of land rent to the tune of Kshs 3,914,715/- to facilitate the issuance of the title deed and that the plaintiff agreed to finance the project by clearing the outstanding penalties amounting to Kshs 4,038,042.
10. According to the plaintiff, he was unable to sell the suit land because a suit was filed; that on October 22, 2008, the defendant resolved that in appreciation of the plaintiff's contribution, the plaintiff should be incorporated as one of its directors and that in the process, the defendant was sued by Rift Valley Machinery Services in HCCC No 348 of 2008.
11. In the plaint, the plaintiff has averred that with the conclusion of the case against the defendant, the agreement of trust between him and the defendant has been breached. The plaintiff has enumerated the particulars of breach of trust, including the failure of being paid Kshs 5,000,000 he invested in the defendant.
12. The penultimate paragraph of the plaint is for a refund of all the monies used by the plaintiff in assisting the defendant secure LR No 22140 amounting to Kshs 5,000,000 and petty cash amounting to Kshs 1,155,400/- spent on the defendant's lawyers.
13. The defendant's advocate submitted that pursuant to section 4(1) of the *Limitation of Actions Act*, the time within which a party may file a cause of action claiming equitable relief for which no other period of limitation is provided for by the Act is six years.
14. Section 4(1) of the *Limitation of Actions Act* provides as follows;
 - (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
 - (a) actions founded on contract;
 - (b) actions to enforce a recognizance;



- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

15. Section 3 of the *Limitation of Actions Act* provides as follows;

“This part is subject to part iii of this Act, which provides for the extension of the periods of limitation in the case of disability, acknowledgement, part payment, fraud, mistake and ignorance of material facts

16. In view of the provision of section 3 of the Act, the limitation period of six (6) years provided for under section 4(1) of the Act is subject to the provision of section 26 of the Act which 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:

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which-

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.”

17. The plaintiff has pleaded that “with the conclusion of the case [HCCC No 348 of 2008 Rift Valley Machinery Services v Agro Complex (K) Limited and 5 others], the agreement between him and the defendant was breached. It is the plaintiff’s case that his true position as one of the directors with one share in the defendant’s company has been sidelined and that he has been considered as just a creditor and not a director shareholder.

18. It is therefore the plaintiff’s position, as I understand it, that the breach of agreement and trust as between the two of them occurred after the decision in HCCC No 348 of 2008 was made. The plaintiff’s cause of action could therefore only arise after the decision in HCCC No 348 of 2008.



19. That being the case, and considering that it is not clear to this court when the decision in HCCC No 348 of 2008 was made, it is the finding of this court that the issue of this suit being time barred has not been proved by the defendant.
20. For those reasons, the defendant's notice of preliminary objection dated March 9, 2022 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for the Plaintiff

Ms Wambui for Kanjama (SC) for Defendant

Court Assistant – June

