



Murichu v Mwaniki; Mungai & another (Interested Parties) (Environment & Land Case 240 of 2018) [2023] KEELC 17230 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 240 OF 2018**

A NYUKURI, J

MAY 3, 2023

BETWEEN

IRENE MUTHONI MURICHU PLAINTIFF

AND

ISAAC MATHENGE MWANIKI DEFENDANT

AND

CAROLINE WAIRIMU MUNGAI INTERESTED PARTY

SIDIAN BANK (FORMERLY K-REP BANK LIMITED) INTERESTED PARTY

RULING

1. Before court is a Notice of Preliminary Objection dated April 5, 2019 filed by the Defendant against the suit on the following grounds;
 - a. That the suit is time barred under the provisions of section 4 of the *Limitation of Actions Act* (Cap 22) Laws of Kenya and is essentially an abuse of the court process since the sale agreement was signed on October 13, 2013.
 - b. That the Plaintiff therefore has no cause of action and no leave to file suit out of time was obtained prior to the filing of the suit.
2. The Preliminary Objection was canvassed by way of written submissions. On record are the Defendant's submissions dated September 22, 2022 and the Plaintiff's submissions dated October 16, 2022.

Defendant's Submissions

3. Counsel for the Defendant relied on Sections 7 and 13 of the *Limitation of Actions Act* and submitted that as the land sale agreement which is subject of this suit, was dated October 13, 2003, the cause



of action lapsed on October 12, 2015; which is a period of twelve years. Reliance was placed on the case of *Mukisa Biscuits Manufacturing Limited v West End Distributors* [1969] EA 696 for the proposition that the Defendant's Preliminary Objection raised a pure point of law. Further, counsel referred to several cases which the court has considered including; *Edward Moonge Lengusuranga v James Lanaiyara & Another* [2019] eKLR, *Gathoni v Kenya Cooperative Creameries Ltd* [1982] KLR 104, *Alfred Mutinda Mutua v CFC Stanbic Bank Limited* Mombasa HCCA 150 of 2016 and *Iga v Makerere University* [1972] eKLR.

4. On their part, counsel for the Plaintiff conceded that a claim for land must be filed within twelve years. They further argued that the Plaintiff's claim was based on fraud and relied on section 26(a) of the Limitations of Actions Act to argue that where an action is based on fraud, the limitation period begins to run from the date the Plaintiff discovered the fraud. Counsel contended that the Plaintiff having discovered the fraud in June 2013, the time began running from that date and not before and therefore that the suit is not time barred. Counsel relied on the cases of *Justus Tureti Obara v Koipeitai Nengisoi* [2014] eKLR, *George Stephen Njoroge Macharia v Issa Mjawiri Jabiri & Others* [2022] eKLR and *Odero & Another v Ndivo* [Civil Case E105 of 2021] [2021] KEHC 289 (KLR) (Commercial and Tax) (25 November 2021) for the proposition that where the cause of action is based on fraud, the cause of action starts to run from the date the fraud is discovered.

Analysis and determination

5. I have carefully considered the Preliminary Objection and the submissions filed by the parties. The issues that arise for determination are whether the Preliminary Objection is a proper Preliminary Objection and; whether the Preliminary Objection is merited.
6. A Preliminary Objection is an objection on a pleading based on pure points of law, where facts upon which the objection is premised are not in dispute. In the case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 the court described what constitutes a Preliminary Objection as follows:

---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 a contract giving rise to the suit to refer the dispute to arbitration.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other 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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

7. The Defendant has raised the question of time limitation based on the undisputed fact that the subject matter of the suit is the land sale agreement dated October 13, 2003. A question of limitation is a question of law as it addresses the court's jurisdiction because where a claim is time barred, a court has no jurisdiction to determine it. In the case of *Bosire Ongero v Royal Media Services* [2015] eKLR, the court held that the question of limitation goes to the jurisdiction of the court hence if a matter is statute barred, the court has no jurisdiction to entertain it.



8. In the premises, considering that the question of time limitation raised herein is based on a pure point of law as there is no dispute on the date of the land sale agreement herein, I find and hold that the Preliminary Objection herein is a proper Preliminary Objection.

9. Although the Preliminary Objection filed was based on Section 4 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, the Defendant's submissions were in regard to section 7 thereof. I note that Section 4 provides for the period for filing claims based on contract, tort and other actions, while Section 7 provides for the limitation period for a claim for land. As the Plaintiff's claim herein is a claim for land, the applicable law is Section 7 of the *Limitation of Actions Act*.

10. Section 7 of the *Limitation of Actions Act* provides for the time within which a claim for land ought to be filed 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

11. However, the limitation period is extended in several instances including where fraud or mistake is pleaded. Therefore, where a cause of action is based on fraud, the *Limitation of Actions Act* provides for extension of the limitation period. Section 26 of the *Limitation of Actions Act* provides as follows;

Extension of limitation period in case of fraud or mistake.

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.

12. In the case of *Justus Tureti Obara v Peter Koipeitai* [2014] eKLR while discussing the import of section 26 of the *Limitation of Actions Act*, the court held as follows;

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.

13. I have considered the Plaintiff's claim and I note that the Plaintiff's claim is for, inter alia specific performance for a sale of land agreement dated October 13, 2003. The Plaintiff also pleaded that upon purchase of land known as Mavoko Town BLK 20/460, 461, 494, 495, 534, and 535 (suit property) from the Defendant, she took possession thereof and was waiting for the transfer in her favour when on June 18, 2013 after conducting a search on the suit property, she learnt that the suit property had been transferred to the 1st Interested Party. She pleaded that the defendant acted fraudulently in transferring Mavoko BLK 20/461 and 20/494 to the 1st Interested Party and in charging Mavoko BLK 20/534 to Sidian Bank. It is therefore clear that the Plaintiff's claim is based on fraud which is alleged to have been discovered in 2013 when she allegedly noticed interference with the suit property. While the sale agreement the subject matter of the claim herein was done on October 13, 2003, the twelve-year limitation period lapsed on October 12, 2015. However, section 26 of the Limitation of Actions Act has the effect of extending time even where it has lapsed where the claim is based on fraud which was alleged to have been discovered later; so that the period of limitation starts running from the date of discovery of the fraud. As the Plaintiff herein pleaded that the alleged fraud was discovered in 2013 and this suit having been filed in 2018, which is five years after the alleged discovery of fraud, it is my finding that the plaintiff's claim is not time barred.
14. In the premises, I find no merit in the Defendant's Preliminary Objection dated April 5, 2019 and the same is hereby dismissed with costs.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 3RD DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Maina holding brief for Mr. Thuku for Defendant/Respondent

Ms Mwangi for Plaintiff

Ms Josephine – Court Assistant

