



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 36 OF 2018

HEZRON KIMELI CHERUIYOT.....PLAINTIFF/APPLICANT

VERSUS

RUSI CHEPKEMOI CHEBOCHOK.....1ST DEFENDANT/RESPONDENT

JOSEPH KIPYEGON SIGEL.....2ND DEFENDANT/RESPONDENT

MOSES KIPKOECH SIGEL.....3RD DEFENDANT/RESPONDENT

JOHN SIGEL.....4TH DEFENDANT/RESPONDENT

RULING

1. The Applicant in his application under certificate of urgency, dated 13th February 2020 sought for temporal injunctive orders against the Respondents restraining them, their agents, servants and/or any one claiming under them, from interfering, harassing, evicting, intimidating the Plaintiffs and the members of the family from suit (sic) land and/or in any manner howsoever and/or whatsoever interfering, alienating further (sic) alienating the suit land originally LR No. Kericho/Kipkuror/42 which has transformed (sic) into titles No. Kericho/Kipkuror/414, 415, 416, 417, 418, 419, 420, 421 and 422.

2. The said application was premised on the grounds on the face of it as well as on the supporting affidavit of the Plaintiff/Applicant dated the 13th February 2020.

3. Pursuant to the filing and service of the said Application, the Respondents filed their Replying affidavit and a Notice of Preliminary Objection dated the 25th February 2020 to the effect that the Plaintiff/Applicant's suit was time barred and therefore unsustainable. That further, the said agreements relied upon by the Plaintiff ran contrary to the provisions of Sections 55 and 82 (b) (ii) of the Law of Succession Act and Section 6 of the Land Control Act.

4. On 26th February 2020 the court directed that the Preliminary Objection be canvassed, in the first instance, by way of written submissions with interim orders of status quo to be maintained. As I write this ruling, only the Defendants/Respondents have complied with the court order and filed their written submissions to which I shall summarize as herein under.

5. The Respondents framed their issue for determination as being whether this case was suited and actionable to which they submitted that the Applicant's suit was founded on several sale agreements he had purportedly entered into with the Defendants/Respondents on diverse dates, being the 25th January 2005, 27th April 2008, 27th April 2010 and 11th January 2011, to purchase parcel of land known as No. Kericho/Kipkuror/42.

6. That the said agreements were entered into more than 6 years ago and therefore the Plaintiff/Applicant was barred, by operation of Section 4 of the Limitation of Actions Act, from bringing the present suit as it was beyond the statutory limitation period of 6 years. They placed their reliance on the decided case in **Diana Katumbi Kilo vs Reuben Musyoki Muli [2015] eKLR** and sought that the Applicant's suit be struck out.

7. The Respondents further submitted that the agreements relied upon by the Plaintiff/Applicant were void for lack of capacity to sell on the part of the vendors. That the original registered proprietor of the suit land No. Kericho/Kipkuror/42 one Joseph Kipsigei Birir died intestate in 1991 wherein succession proceedings to his estate were done in the year 2016 via Succession Cause No. 64 of 2016. The grant was confirmed in the year 2017. That the Agreements therefore entered between the years 2005 and 2011, long after the proprietor to the suit land had passed on and before Administration of his estate, had therefore been executed by persons who had no capacity to do so, contrary to the

provisions of Section 82 (b) (ii) of the Law of Succession Act.

8. The Respondents further submitted that the transactions relied upon by the Applicant for the sale of the suit land contravened the provisions of Section 6 of the Land Control Act since the consent from the Land Control Board had not been obtained yet the suit land was agricultural land. Reliance was placed on the decided case of **Benson Okello vs Benson Nyandiga [2019] eKLR** to buttress their submissions. Their conclusion was therefore that the suit was unsustainable and ought to be dismissed with costs to themselves.

Determination.

9. I have considered the Defendants/Respondents' application on a point of Preliminary Objection to the effect that the suit should be struck out for reasons that the cause of action being agreements/contract, upon which the Applicant/Plaintiff in the suit seeks to enforce his right as a purchaser of suit land No. Kericho/Kipkuror/42 was time barred in terms of Section 4 of the Limitation of Actions Act and secondly that persons with whom the Plaintiff/Applicant had entered into the impugned agreements had no legal capacity as vendors of the suit land.

10. There had been no response to either the Replying affidavit or the Preliminary objection.

11. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

“----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”.

12. The Matters for determination are:

- i. Whether the Preliminary Objection raised is sustainable.
- ii. Whether the said Preliminary Objection has merit and should be upheld.

13. I find the preliminary objection herein raised was on two fold hence;

- a. That the Plaintiff's suit was time barred by virtue of the provisions of the Limitation of Actions Act.
- b. That the Respondents had no legal capacity as vendors of the suit land.

14. Section 4(1) (a) of the Limitation of Actions Act provides as follows:

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,.....

15. Section 7 of the Limitation of Actions Act provides:

“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

16. From the above captioned provisions of the law it is clear that Section 4(1) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya prescribes the limitation period for the institution of suits in regard to the causes of action founded on contract to which the limitation period is six years.

17. Section 7 of the Limitation of Actions Act, on the other hand provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the Plaintiff ought to have sought to recover the land from the Defendants/Respondents within twelve years from the date on which the right of action accrued to him.

18. The summation of the Defendants/Respondents' Preliminary Objection is that this matter was based on a sale contracts for the purchase parcel of land known as No. Kericho/Kipkuror/42, which contracts were executed on diverse dates, being the 25th January 2005, 27th April 2008, 27th April 2010 and 11th January 2011. Essentially therefore, the Plaintiff/Applicant's cause of action arose when the Defendant/Respondent's herein allegedly sold to him the suit land.

19. That subsequently the Plaintiff filed the present suit on the 11th May 2018 which was 13 years, 10 years, 8 years and 7 years respectively which was way outside the 6 years set under the Limitation of Actions Act for seeking relief.

20. On this issue the Respondents /Defendants have thus hinged their preliminary objection on the fact that the Plaintiff/Applicant's cause of action was time barred because the suit was brought after the expiry or lapse of the period of limitation.

21. In the case of **Gathoni –vs- Kenya co-operative Creamers Ltd (1982) KLR 104 Potter, JA** stated the rationale of the Law of Limitation as follows:-

“The law of limitation of actions is intended to protect Defendants against unreasonable delay in bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

22. Further in the case of **Rawal –vs- Rawal (1990) KLR 275 Bosire, J** (as he then was) stated 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 had lost evidence for his defence from being disturbed after a long lapse of time’.

23. The issue of limitation goes to the jurisdiction of court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. And even if the issue of limitation is not raised by a party to the proceedings, since it is a jurisdictional issue, the court cannot entertain a suit which it has no jurisdiction over. See **Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998**.

24. Jurisdiction is everything, without which, a court of law downs its tools in respect of a matter before it the moment it holds the opinion that it is without it. (See **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] eKLR**. See also the Court of Appeal decision in **Owners and Masters of Motor Vessel “Joey” vs Owners and Masters of the Motor Tugs “Barbara” and “Steve B.” [2008]1EA 367** where, echoing the decision in the case of **Owners of Motor Vessel “Lillian S”**, the Court of Appeal held, inter alia:

“The question of jurisdiction is threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step.....”

25. Jurisdiction cannot be conferred by parties to a dispute. It is the Constitution or other written laws that confer jurisdiction on courts. Jurisdiction cannot be decided by an erroneous decision. See **Carmella Wathugu Karigaca vs Mary Nyokabi Karigaca CA 30 of 1995**.

26. In the case **Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR**, the Court of Appeal held that:

‘The Act does not help persons who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.

27. The Respondents/Defendants have also raised a preliminary objection to the effect that the Plaintiff/Applicant's suit involved a cause of action founded on contracts between parties who had no capacity to enter into the same.

28. From the pleadings herein attached, it is not in dispute the parcel of land No. LR No. Kericho/Kipkuror/42 was registered to one Kipsigei Arap Birir who passed away on the 14th October 1991. It is also not in dispute and was specifically admitted in the plaint dated the 10th May 2018 and amended on the 13th February 2020 that the Applicant herein bought part of the suit land on various dates between the years being the 25th January 2005, 27th April 2008, 27th April 2010 and 11th January 2011, which was after the death of the original proprietor and before letters of administration had been taken out in respect of the deceased's estate to which effect therefore nobody had the right to dispose of or interfere with the said property whatsoever.

29. Section 45 of the Law of Succession Act provides as follows:-

(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.

(2) Any person who contravenes the provisions of this section shall—

(a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and

(b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.

30. Section 55 of the Law of Succession Act stipulates that:-

“No grant of representation, whether or not limited in its terms, shall confer power to distribute any capital assets

constituting a net estate, or to make any division of property unless and until the grant has been confirmed as provided by section 71.”

31. Having considered the evidence before me as well as the exhibits herein produced, it clearly emerges that **Section 55 of the Law of Succession Act was not complied with before these properties were transferred.**

32. The sale agreement therefore did not pass title to the Plaintiff/Applicant herein and the same was incapable of being enforced. I therefore hold and find that the Defendant/Respondents did not hold a valid title to the suit property to enable them to sell and/or transfer the same to the Plaintiff. Indeed the Defendant/Respondent herein intermeddled with property of deceased person and did not hold a valid title to the suit property to sell and transfer the same to the Plaintiff. In the circumstance thereof, I find that the Plaintiff's suit commenced through a plaint dated the 10th May 2018 and amended on the 13th February 2020 is unenforceable.

33. The Preliminary Objection is therefore well founded and is upheld. The suit is not sustainable on account being statute barred under the Limitation of Actions Act and also for being unenforceable. It is herein struck out and dismissed with costs to the Defendants/Respondents.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF APRIL 2021

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE