



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 124 OF 2015

JONATHAN TSUMA LEWA (Suing as the Attorney of

TSUMA WALEA MUSOLO.....PLAINTIFF

VERSUS

ANTONY MWANGI.....DEFENDANT

RULING

1. Before me for determination is the Plaintiff's Notice of Motion application dated 4th April 2018 seeking to amend the Plaintiff and the Defendant's Notice of Preliminary Objection dated 6th December 2018 contending that the suit as filed is in violation of Section 4(1) of the Limitation of Actions Act.

2. In his Complaint filed herein on 24th July 2015, Jonathan Tsuma Lewa, suing as the Attorney of Tsuma Walewa Musolo (the Plaintiff) prays for Judgment against Anthony Mwangi (the Defendant) for:-

a) A declaration that the Agreement of Sale dated February 24, 2009 between the Defendant and the Plaintiff in respect of one (1) acre of the land to be curved out of Plot No. Kilifi/Mtwapa/1709 and now known and registered as Kilifi/Mtwapa/3135 has been effectively terminated.

b) An order compelling the Defendant to unconditionally surrender and/or handover all the original completion documents submitted and/or provided by the Plaintiff and in particular the original Title Deed in respect of Plot No. Kilifi/Mtwapa/3135; and

c) A permanent injunction restraining the Defendant by himself, agents or employees from undertaking and or continuing any development, or constructions on the said plot and or occupying or remaining therein.

3. The prayers arise from the Plaintiff's contention that by the Sale Agreement aforesaid, he sold an acre of land which was to be curved out of the said Kilifi/Mtwapa/1907 to the Defendant at a consideration of Kshs 630,000/-. The Plaintiff avers that while he proceeded to transfer the property to the Defendant, the Defendant only paid a deposit of Kshs 100,000/- on the date of the sale and has thereafter refused and/or neglected to remit the balance.

4. In his Statement of Defence filed herein on 2nd September 2015, the Defendant admits that he entered into the Sale Agreement with the Plaintiff and that the parcel of land Kilifi/Mtwapa 3135 was pursuant thereto curved off, transferred to his name and that he has since built his home thereon. He however denies that the Plaintiff is entitled to the orders sought and avers that he is ready and willing to complete the transaction by paying the balance of the purchase price of Kshs 530,000/-.

5. By the Preliminary Objection dated 6th December 2018 however, the Defendant asserts that the Plaintiff's claim is time-barred by virtue of Section 4(1) of the Limitation of Actions Act (Cap 22 of the Laws of Kenya) which stipulates that actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued.

6. It is the Defendant's case that the Plaintiff's claim stems from contractual obligations arising from the Sale Agreement executed between the parties on 24th February 2009. Accordingly the Defendant submits that the Plaintiff ought to have instituted the instant suit within six (6) years of the Agreement, a period which expired on 24th February 2015, some five(5) months before this suit was filed.

7. I have perused and considered the pleadings filed herein. It is clear to me that the Plaintiff does not seek the enforcement of the Sale

Agreement or an enforcement of a right or benefit conferred by the Agreement. From the Defendant's own Statement of Defence it is evident that pursuant to the Agreement he took over the one acre suitland and constructed his home thereon even though he never completed the payment of the purchase price.

8. From the nature of the pleadings herein it is evident that the Plaintiff's claim is for recovery of the suit land on which the Defendant now resides. Such a claim falls under the purview of Section 7 of the Limitation of Actions Act where the limitation period is 12 years.

9. The Defendant's Preliminary Objection is thus without any basis and lacking in merit. It is dismissed with costs.

10. In his Notice of Motion dated 4th April 2018, the Plaintiff prays for leave to amend the Plaintiff to include all his claims against the Defendant and to have all issues between the parties resolved within the suit. I have looked at the application and the Affidavit in support. I have also looked at the Defendant's Grounds of Opposition dated 25th April 2018 which raised the same ground as above that the suit has been filed out of time.

11. Given my conclusion in regard to the Preliminary Objection, those grounds are misconceived. Having considered the Plaintiff's application, I am persuaded that those amendments are necessary for determining the real question in controversy between the parties.

12. Accordingly the application is allowed and the Plaintiff is hereby granted 14 days within which to file and serve the Amended Plaintiff. The Defendant shall have a similar period upon service to file and serve an Amended Defence should they deem it necessary.

13. The Costs of this Motion shall be in the suit.

Dated, signed and delivered at Malindi this 6th day of May, 2020.

J.O. OLOLA

JUDGE