



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 678 OF 2017 (OS)**

**KENIA REALTY LIMITED..... APPLICANT**

**=VERSUS=**

**SALOME WAIRIMU MIANO, MIANO MWANGI,**

**JOSEPH KARIUKI MIANO AND**

**SUSAN WANJIKU MIANO (as Personal Representatives and Beneficiaries of the**

**ESTATE OF THE LATE ABDALLA MIANO.....RESPONDENTS**

**RULING**

1. This is the Notice of Preliminary Objection dated 26<sup>th</sup> August 2020. Take notice that the hearing of this suit, the Respondents herein shall raise a Preliminary Objection on a point of law and shall urge the court to strike out the Applicant's suit against it with costs on the grounds that by dint of the provisions of Section 4(1) (a) of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the Applicant's suit for enforcement of a contract executed on 30<sup>th</sup> January, 2009 is statute barred.

2. On the 3<sup>rd</sup> December 2020 the court with the consent of the parties directed that the preliminary objection be canvassed by way of written submissions.

**The Respondents' Submissions**

3. They are dated 16<sup>th</sup> December 2020. The essence of a preliminary objection is espoused in the renowned decision of **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**.

4. The Preliminary Objection is based on Section 4(1) (a) of the Limitation of Actions Act. The Applicant's seeks to enforce the agreement of sale dated 30<sup>th</sup> January 2009. As per clauses 7 and 10 of the Agreement, completion was to take place within twenty-four (24) months of the signing of the Agreement. The agreement should have been completed by 30<sup>th</sup> January 2011. This claim should have been filed by 30<sup>th</sup> January 2017, but the same was filed on 27<sup>th</sup> October 2017, nine months after the lapse of the six-year period.

5. They urge the court to find that the six-year limitation period established by Section 4 of the Limitation of Actions Act applies to prayers under common law as well as equitable remedies such as an order for specific performance. They have put forward the decision of the **England and Wales Court of Appeal in P&O Nedlloyd B. V. vs Arab Metals Co. & 2 Others**.

6. They urge that applicants' suit be found to be statute barred.

**The Applicant's Submissions**

7. They are dated 25<sup>th</sup> March 2021. The Respondents have taken possession of the Town House they were entitled to under the Agreement from which they have been collecting rent since the year 2016 to date despite their refusal to execute the leases as agreed.

8. The Respondents submission do not by any hint allude to their conduct as solely responsible for the delay in the resolution. The assumption of possession of the development by the Applicant and continued occupation of the same to date constitutes substantial part performance of the Agreement.

9. The Agreement has been kept alive. The Preliminary Objection is an abuse of the processes of this court and ought to be dismissed and judgment be entered in favour of the applicant in terms of the Originating Summons.

10. I have considered the Preliminary Objection herein, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this Preliminary Objection is merited.

11. I have gone through the Originating Summons dated 25<sup>th</sup> October 2017. Prayer No 3 seeks orders:-

***“That the Respondents have taken possession and occupation of the Town House developed by the Applicant. Pursuant to the said Agreement for sale in September 2016 do surrender the original Title No 1159/118, transfer and registration of leases for the respective Town Houses in favour of the Applicant”.***

12. At some point vide the Notice of Motion dated 12<sup>th</sup> November 2018, the Respondents sought to have this matter referred to arbitration pursuant to clause 22 of the Agreement for sale between the Applicant and the Respondents.

13. This court in its ruling dated 25<sup>th</sup> September 2019 declined to grant the orders sought. This court observed in paragraph 10 of the said ruling that: -

***“In his replying affidavit sworn on the 4<sup>th</sup> December 2018, David Muriuki Mambo, the Managing Director of the Applicant has given a history of this dispute. I have gone through the annexures in the replying affidavit. I am convinced that the respondents herein have no intention of resolving the dispute herein through arbitration. I am aware the Constitution of Kenya 2010, recognizes alternative dispute resolution mechanisms including arbitration. However, in the instant case, the respondents have used it to prolong this matter. The court is also alive to the overriding objective envisaged in Section 1A, 1B of the Civil Procedure Act. The applicant herein is entitled to a just and expeditious resolution of this dispute. I find that this will not be achieved by referring this matter to arbitration given the several attempts made. I find no merit in this application and the same is dismissed”.***

This court’s view has not changed. I find that this preliminary objection is yet another attempt to delay the expeditious disposal of this matter.

14. It is on record that the Respondents’ have taken possession of Town House they were entitled to under the Agreement. This fact has not been rebutted by the Respondents. I find that Preliminary Objection is brought in bad faith.

15. I agree with the Applicant’s that this Agreement for sale has been kept alive.

16. I find no merit in the Preliminary Objection and the same is dismissed with costs to the Applicant.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 29TH DAY OF JULY 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Onduso for the Applicant

Ms Njorogo for the Respondents

Phillis - Court Assistant