



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 50 OF 2020

SOHANLALDURGADASS RAJPUT.....1ST PLAINTIFF

SORAJ SOHANLALA RAJPUT.....2ND PLAINTIFF

VERSUS

DIVISIONAL INTEGRATED DEVELOPMENT PROGRAMMES CO. LTD.....DEFENDANT

RULING

1. By a Notice of Preliminary Objection dated 18th March 2021, the Defendant sought to have the entire suit dismissed with costs on the following grounds;

1) The suit is time barred having been brought outside the statutory limitation of 12 years in view of section 7 of the Limitation of Actions Act Cap 22.

2) The Plaintiff's suit is incompetent, bad in law, barred in law, an abuse of the Court process and should be dismissed with costs to the defendant.

2. In response to the preliminary objection, the Plaintiffs filed grounds of opposition dated 25th May, 2021 and filed in Court on 2nd June, 2021. On 3rd June 2021, the Court directed that the Preliminary Objection be canvassed by way of written submissions. The Defendant filed its written submissions on 7th June 2021, while the Plaintiffs' submissions were filed on 6th October, 2021.

The Defendant's Submissions

3. The Defendant submitted that the instant suit was brought outside the statutory limitation period of 12 years in view of the Provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya. They further averred that the Plaintiffs' suit is incompetent, bad in law, barred in law, an abuse of the Court process and the same ought to be dismissed with costs.

4. The Defendant contended that the Plaintiffs sought to enforce two Agreements dated 8th December, 2007 and 25th January, 2008 in respect to the purchase of plot numbers 8 and 9 respectively. According to the Defendant, time for enforcing the cause of action for the two Agreements lapsed after 12 years from the dates the agreements were entered in to, which was before the filing of this suit.

5. The Defendant also stated in their submissions that even assuming the suit was for enforcement of a contract, the same would still be time barred by the 6-year limitation period. Referring to Paragraph 12 of the Plaintiff, they averred that by the Plaintiffs' own admission, the period that had lapsed since the cause of action accrued is over 12 years. It was further argued for the Defendant that the Plaintiffs' allegation that the Sale Agreements had ambiguities and contradictions in respect to when the cause of action arose, was lacking in truth.

6. In addition, the Defendant submitted that the general rule is that the pleadings must be clear and important facts like the date of the cause of action must be ascertained from the facts pleaded.

7. The Defendant relied on Section 7 of the Limitation of Actions Act which provides that an action for recovery of land may not be brought after 12 years from the date the cause of action accrued. They referred the Court to the case of **Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited) & Another [2020] e KLR**, where the Court held that under the Provisions of Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya, an action for recovery of land cannot be brought after the expiry of twelve years. They submitted that this suit is time barred and the same ought to be dismissed.

8.They further submitted that the Plaintiffs' suit was not based on fraud as alleged by the Plaintiffs, who neither claimed nor pleaded fraud. They averred that the claim is based on breach of contract as particularized in paragraph 19 (a) to (c) of the plaint. They relied on the case of **Dickson Ngige Ngugi** (supra) where it was held that where the Plaintiff has not pleaded fraud or stated particulars thereof, Section 26 of the Limitations of Actions Act cannot apply.

9.The Defendants concluded by citing the case of **Owners of the Motor Vessel "Lilian S" v Caltex (Kenya) Ltd [1989] e KLR 1**, where it was held that jurisdiction is everything and where a Court has no jurisdiction, it must down its tools and cannot take one more step.

The Plaintiffs' Case

10.In opposing the Preliminary Objection, the Plaintiffs filed grounds of opposition dated 25th May and filed in Court on 2nd June, 2021, where they averred that the Preliminary Objection is improperly raised and does not satisfy the threshold set out in **Mukisa Biscuit Manufacturing Limited v West End Distributors [1969] EA 696**. They stated that the facts to determine the date of the cause of action have to be ascertained. They also argued that the Provisions of the Sale Agreements for the purchase of the suit plots were both ambiguous and contradictory. They emphasized therefore that this matter was a factual matter that can only be determined at the trial by *viva voce* evidence.

11.The Plaintiffs argued that the pleadings filed by the Plaintiffs and the Defendant together with the documents filed in support of those pleadings do not expressly indicate a specific date when the cause of action arose, hence the same can only be determined at the trial by *viva voce* evidence. They stated that Section 7 of the Limitation of Actions Act is not applicable as there is provision for extension of the limitation period as provided for under Section 26 of the said Act; for reasons that the right of action was concealed by the Defendant's fraud. They argued that the question as to when the Plaintiffs discovered fraud or concealment of the right of action against the Defendant is a matter to be ascertained at the trial.

The Plaintiffs' Submissions

12. In their submissions, the Plaintiffs reiterated the averments in their Grounds of Opposition and submitted that the Preliminary Objection was improper, unsustainable and unmeritorious. They argued that it is trite law that 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. They placed reliance on the case of **Mukisa Biscuit** (supra) where it was held that a Preliminary Objection is sustainable only when it is premised on pure points of law. They further referred the Court to the case of **Nitin Properties Ltd v Singh Kalsi & Ano. [1995] e KLR**, where the Court reiterated the holding in **Mukisa Biscuit** (supra). They stated that the Defendant had raised a Preliminary Objection on facts that were yet to be ascertained.

13.The Plaintiffs also submitted that from the pleadings and documents filed, it is hard to ascertain the exact date when the cause of action arose, and that the same can only be done after presentation of *viva voce* evidence. The Plaintiffs further contended that the Provisions of the Sale Agreements were ambiguous and contradictory and therefore it was not possible to determine the date of the cause of action without *viva voce* evidence. They relied on Clause 10 of the Agreements in issue to argue that transfer of the suit properties from the registered owners to the Defendant and from the Defendant to the buyers of the subdivisions was to be done simultaneously when all buyers had paid for their plots in full at least 90 days of the final payment by the last Purchaser.

14.The Plaintiffs also submitted that the transfer was to be done at least 90 days from the time the last payment was made by any individual and not necessarily the Plaintiffs, who was purchasing the plots sold by the Defendant. The Plaintiffs submitted that establishing when the last Purchaser made final payment is problematic as there are no documents in support of that and the same can only be established by *viva voce* evidence.

15.It was the Plaintiffs' submissions that the Defendant's Preliminary Objection was based on ambiguous facts in respect of when the cause of action arose.

16.Addressing the second limb of the Defendant's submission that the Plaintiffs' suit was incompetent, bad in law, barred in law, and an abuse of the Court process; the Plaintiffs submitted that this argument was lame, vague and ambiguous, hence unsustainable. They relied on the case of **Mehuba Gelan Kelil & 2 Others v AbdulKadir Shariff Abdirhim and 4 Others [2015] e KLR**, where the Court held that averments that a suit is bad in law, misconceived and disclosed no reasonable cause of action cannot be entertained through a Preliminary Objection.

17.Relying on Paragraphs 5 and 8 of the Agreement dated 8th December, 2007, the Plaintiffs submitted that those provisions were both ambiguous and contradictory as there was no definition of "the period of purchase" and "the agreed period of sale."

18.The Plaintiffs further argued that Clauses 5 and 10 of the Agreement of 8th December, 2007 were contradictory as Clause 5 required transfer of the suit property within the period of purchase while Clause 10 required transfer to be within 90 days from the date of final payment of the purchase price by any individual who purchased a plot from the Defendant.

19.Additionally, the Plaintiffs submitted that Section 7 of the Limitation of the Action Act was not applicable in the instant case as there was an extension as provided for under Section 26 of the Limitation of Actions Act, on grounds that the right of action was concealed by the Defendant's fraud and that the action was based upon the fraud by the Defendant.

20.The Plaintiffs emphasized that the Defendant by fraud failed to disclose the existence of a Court case in respect of the suit property, and that was the reason the Defendant could not transfer the suit property to the Plaintiffs. They stated that had they been aware of the suit they would not have entered into agreement with the Defendant. They relied on Paragraph 11 of the Plaint to reiterate that they had pleaded fraud. They relied on the case of **Justus Tureti Obara v Peter Koipeitai [2014] e KLR**, where the Court held that the Proviso to Section 26 (a) of

the Limitation of Actions Act provide 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.

21. The Plaintiffs concluded their submissions by urging the Court to disallow the Preliminary Objection for being unsustainable, unmeritorious and bad in law.

ANALYSIS AND DETERMINATION.

22. The Court has carefully read and considered the Preliminary Objection raised, the grounds of opposition as well as the rival submissions filed. The main issues for determination are;

- a) Whether the defendant has met the threshold for a Preliminary Objection and;
- b) If the answer to (a) above is in the affirmative, whether the Preliminary Objection raised is merited.

23. In **Mukisa Biscuits** (supra), the Court of Appeal defined a Preliminary Objection as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and if 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 the contract giving rise to the suit to refer the dispute to arbitration.

...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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

24. In the case of **Republic v Eldoret Water & Sanitation Company Ltd Ex parte Booker Onyango & 2 Others (2007) eKLR**, the Court stated that an Objector cannot introduce any factual dispute or controversy and must stick to pure points of law.

25. Therefore, a Preliminary Objection can only be premised on undisputed facts, must raise pure points of law and cannot be raised where facts have to be ascertained or where the Court is asked to exercise judicial discretion. For a Preliminary Objection to be maintained, the pure points of law raised must sprout from the pleadings. In the case of **Avtar Singh Bhamra & Ano. v Oriental Commercial Bank HCC No 53 of 2004**, the Court stated as follows;

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

26. The Defendant has stated in its Preliminary Objection that the suit is time barred. It has also stated that the suit is incompetent, bad in law, barred in law, an abuse of the Court process. The question of limitation is a question that go to the jurisdiction of this Court. It is a clear point of law, which if argued as preliminary point may dispose of the suit. In the case of **Bosire Ongero v Royal Media services [2015] eKLR**, the Court stated that the question of limitation touches on the jurisdiction of the Court, which means that if a matter is statute barred, the Court would lack jurisdiction to entertain it. I therefore find and hold that the Preliminary Objection raised in the instant case is on a point of law, and the same is validly and properly taken.

27. The Defendant argued that the Plaintiffs sought to enforce Land Sale Agreements dated 8th December, 2007 and 25th January, 2008 respectively. According to the Defendant, time for the cause of action for both agreements lapsed 12 years after the said agreements were entered in to. The Plaintiffs on the other hand argue that the agreements contain ambiguous and contradictory provisions and it is not possible to ascertain the date when the causes of action arose without *viva voce* evidence.

28. It is not in dispute that the Plaintiffs' claim is based on Sale of Land Agreements dated 8th December, 2007 and 25th January, 2008 respectively. The agreements are in respect to the purchase of plot numbers 8 and 9 respectively, for which the Plaintiff has sought, among other orders, for orders of specific performance to have the plots transferred to them. The issue is whether the dates when the agreements were executed are the dates when the causes of action arose. The Defendant argued that respective dates when the agreements in issue were entered in to, are the dates when the causes of action arose in this matter. The Plaintiffs on the other hand maintained that the dates when the cause of action arose could not be ascertained as the agreements in issue contain contradictory and ambiguous Provisions in terms of Clauses 5, 8 and 10.

29. A Preliminary Objection is a pure point of law raised on undisputed facts from pleadings. I have perused the pleadings in the instant case. I note that both parties admit that the suit properties were sold by Agreements dated 8th December, 2007 and 25th January, 2008 and Certificates of land ownership Nos. 2258 and 2578 issued respectively upon full payment of the purchase price. On the strength of these facts, the Defendant has submitted that the cause of action arose when the two sale agreements were entered in to. It is further argued for the Defendant that 12 years had already lapsed in respect of the two agreements by the time the Plaintiffs filed this suit on 7th July, 2020.

30. The Plaintiffs have countered the Defendant's submissions by making reference to the Provisions of the two agreements. They stated that transfer of the suit properties was to be effected 90 days from the time the final payment was made by any individual who was purchasing the plots sold by the Defendant, and not necessarily the Plaintiffs. I observe at this point that these submissions are contrary to the Plaintiffs' own averments in Paragraph 7 of the Plaint where they stated that Clause 10 stipulated that transfer of the suit land shall be done when the Plaintiffs have paid for their plots in full, at least 90 days of final payments by the Plaintiffs. The pleadings do not mention other persons

apart from the Plaintiffs and the Defendant's as submitted by the Plaintiffs.

31. The question as to when the cause of action arose can be answered from the pleadings. The pleadings disclose the specific dates when the suit plots were sold to the Plaintiffs. Indeed, the Plaintiffs by their own admission, have stated in Paragraph 12 of the Complaint that the Defendant had failed to deliver title deeds to them for a period of over 12 years which resulted in loss of use, leading to loss and damage. A cause of action is a set of facts sufficient to justify a right to sue to obtain money, property or the enforcement of a right against another party. It also refers to a legal theory upon which a Plaintiff brings suit. See **Dickson Ngige Ngugi** (supra).

32. Therefore, the assertion by the Plaintiffs that there is contradiction and ambiguity on when the cause of action arose in respect to the suit property, is not correct. Both the Complaint and Defence are clear that the parties in this matter entered into Land Sale Agreements on 8th December, 2007 and 25th January, 2008 respectively.

33. In the case of **Edward Moonge Lengusuranga v James Lanaiyara & Another [2019] e KLR**, it was held as follows;

“Section 7 of the Limitation of Actions Act, 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 first Defendant having bought the suit land in the year 1999 (as per Paragraph 6 of the Complaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the Sale Agreement.”

34. In view of the undisputed facts in both the Complaint and the Defence, I find that the causes of action in respect of the two suit plots arose on 8th December, 2007 and 25th January, 2008 respectively.

35. Section 7 of the Limitation of Actions Act provides 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.”

36. The purpose of the Law of Limitation was stated in the case of **Mehta v Shah [1965] E.A 321**, 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 has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

37. In **Gathoni v Kenya Co-operative Creameries Ltd [1982] KLR 104**, the Court of Appeal held as follows;

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

38. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of **Iga v Makerere University [1972] EA**, the Court had this to say on the Law of Limitation;

“A Complaint which is barred by limitation is a Complaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

39. Section 7 of the Limitation of Actions Act provides that an action for recovery of land may not be brought after the lapse of 12 years from the date the right of action accrued to the Plaintiff. Therefore, in regard to the agreement of 8th December, 2007, the limitation period lapsed on 8th December, 2019. On the second agreement of 25th January, 2008, the limitation period lapsed on 25th January, 2020. Essentially therefore, the Plaintiffs' suit having been filed on 7th July 2020, was filed out of time.

40. The Plaintiffs have submitted that the Defendants by fraud failed to disclose that there existed a Court case over the suit plots which was the reason as to why the Defendant could not transfer the suit property to the Plaintiffs. The Plaintiffs therefore pleaded protection of Section 26 of the Limitation of Actions Act that allows extension of the limitation period where fraud is pleaded.

41. Section 26 of the Limitation of Actions Act 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.

42. I have perused the Plaint in this matter. I note that fraud is neither pleaded nor particulars thereof stated in the Plaint. What was pleaded by the Plaintiff was breach of contract and one of the particulars of the said breach is said to be failure to disclose to the Plaintiffs the existence of a dispute or a Court case touching on the suit land. In the circumstances therefore, I find and hold that Section 26 of the Limitation of Actions Act is not applicable in this matter as no fraud is pleaded by the Plaintiff.

43. In the case of **Dickson Ngige Ngugi** (supra) it was held that where fraud is not pleaded or particularized, a Plaintiff cannot seek refuge in Section 26 of the Limitations of Actions Act.

44. The upshot of the above is that the Preliminary Objection dated 18th March, 2021 is upheld. I therefore order the Plaintiffs' suit struck out for being time barred. In view of the fact that the Defendant has pleaded that it sold the suit property to the Plaintiff which it could not effect transfer, I make no order as to costs and each party shall bear their own costs.

45. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 18TH OCTOBER 2021.

A. NYUKURI

JUDGE