



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 15 OF 2020

JITENDRA LILADHAR NAGDA.....1ST PLAINTIFF

DR. ANIL RATILAL TAILOR2ND PLAINTIFF

JINAT INVESTMENT LIMITED.....3RD PLAINTIFF

DIAMOND TRUST BANK LIMITED.....4TH PLAINTIFF

VERSUS

WILLIS OUMA ONDIEK.....1ST DEFENDANT

CONCELLA AOKO MUGA ALIAS CONCILIAH ONDIEK....2ND DEFENDANT

RULING

INTRODUCTION

1. This Ruling is in respect of the Preliminary Objection filed by the Defendants on 28th January, 2021 in which they raise the grounds that:

- i. This court lacks jurisdiction to hear and determine the Plaintiffs' suit.
- ii. The Complaint filed on 19th May, 2019 as pleaded and canvassed is in contravention in section 4 (1) of the Limitation of Actions Act.
- iii. The cause of action in the Complaint offends the doctrine of laches.
- iv. The Complaint filed on 19th May, 2019 is fatally defective in law and as such cannot stand being ventilated in this court.
- v. This suit is an abuse of the court Process and should be dismissed *in limine*.

2. The Preliminary Objection is in response to the Plaintiffs' suit filed in this court vide a Complaint dated 19th May, 2020 wherein they sought the following reliefs against the Defendants;

a. Specific Performance by the 1st Defendant and 2nd Defendant of the sale agreement dated 9th December, 2013 by way of rendering vacant possession of land parcel No. CENTRAL KITUTU/DARAJA MBILI (hereinafter referred to as the suit property) and the premises appurtenant thereupon to the 3rd Plaintiff upon payment of Kshs 42,000,000/= being the residue of the consideration due to them under the agreement.

b. The 1st and 2nd Defendant be jointly and severally condemned to pay to the Plaintiff's mesne profits assessed by this honourable court together with interest until payment is made in full.

In the alternative:

c. The agreement dated 9th December, 2013 be rescinded and the 1st and 2nd Defendant be jointly and severally compelled to pay the

sum of Kshs 5,000,000/= together with interest thereupon with effect from 26th May, 2014 until payment in full.

d. The 1st and 2nd Defendant be jointly and severally condemned to pay to the Plaintiff's mesne profits assessed by this honourable Court together with interest until payment in full.

3. The Defendants filed a Defence and Counterclaim dated 21.10.20 denying the Plaintiff's claim. They further alleged that the 1st and 2nd Plaintiffs breached the sale agreement and fraudulently had the suit property transferred to themselves and thereafter had it charged to the 4th Plaintiff.

4. The Court directed that the Preliminary Objection be canvassed by way of written submissions. The Plaintiffs filed their submissions on 13th March, 2021 while the Defendants filed their submissions on 15th March, 2021.

ISSUES FOR DETERMINATION

5. Having considered the pleadings, the Preliminary Objection filed by the Defendants and the written submissions filed by the parties, the main issue for determination is whether the Preliminary Objection was well founded in law and if so, whether it ought to be sustained

ANALYSIS AND DETERMINATION

6. The Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** laid down the principle as to what constitutes a Preliminary Objection. For a Preliminary Objection to be valid it must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the **Mukisa Biscuit case** (supra) Law, JA stated 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 the 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 the contract giving rise to the suit to refer the dispute to arbitration”

7. In the case of **Oraro v Mbaja 2005 KLR 141** Ojwang J (as he then was) observed as follows:

“A preliminary Objection correctly understood is now well defined and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication is not, a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

8. In the present matter the Defendants have hinged their Preliminary Objection on the grounds that court lacks jurisdiction to hear and determine the Plaintiffs' suit, on the grounds that it contravenes section 4 (1) of the Limitation of Actions Act. Limitation is a pure point of law that would ordinarily dispose of a suit as it goes to the jurisdiction of the court. I however need to determine if the preliminary point raised in this case is sustainable.

9. In any litigation, Jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in suit challenges the jurisdiction of the court, the said court must down its tools. In the **Matter of Interim Independent Electoral Commission [2011] eKLR** the Supreme Court observed as follows:

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1**, which bears the following passage (Nyarangi, JA at p.14):

“I think that 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. Without it, a Court has no power to make one more step.”

[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

10. Learned Counsel for the Defendants submitted that this court lacks jurisdiction to hear and determine the matter on the account of breach of Section 4 (1) (a) of the Limitation of Actions Act which requires that a cause of action founded on contract should be instituted after the end of 6 years. Counsel contended that the 1st and 2nd Plaintiffs having entered into a contract with the Defendants on 9th December 2013, any action in relation to the impugned agreement should have been instituted on 8th December, 2019. He therefore concluded that the cause of action in the Plaint having been founded on an agreement dated 9th December 2013, the same was statute barred by virtue of the provisions of the Limitation of Actions Act.

11. Counsel relied on the case of **Dennis Koikai Naiso v Erik Tipis & 3 others [2019] eKLR** where the court held that;

“..... It is trite law that any sale of land must be based on a contract of sale. However, the sale agreement which were purported to have been made falls outside the requisite period within which a contract based on sale can be instituted.

Section 4(1) of Law of Limitations Act provides that no actions may be brought upon the expiry of a period of 6 years. If the sale agreements were made between 2002 and 2004 the time had lapsed by 2010.”

12. On his part, learned counsel for the Plaintiffs submitted that according to his understanding of section 4 (1) (a) time begins to run on the date when the cause of action accrued. He contended the cause of action arose in the month of May 2014 when the Plaintiffs first sought to obtain vacant possession of the suit property. Counsel contended that the cause of action having arisen in the month of May 2014, the same cannot be said to be time barred since the suit was instituted on 19th May, 2020 which is within the 6 years’ period required under section 4 (1) (a).

13. To support his argument, counsel relied on the case of **Attorney General & another vs Andrew Maina & another [2016] eKLR** where Court of Appeal held that;

“8. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of **Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688** at pg 616. In an earlier case, **Read vs. Brown (1889), 22 QBD 128**, Lord Esher, M.R. had defined it as: -

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court”.

Lord Diplock, for his part in **Letang vs. Cooper [1964] 2 All ER 929 at 934** rendered the following definition:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

I am sufficiently persuaded by those definitions and I adopt them.”

14. Counsel further relied on the case of **Joseph Odira Ombok vs South Nyanza Sugar Company Ltd [2018] eKLR** where the court held that it is only when one of the parties happens to be in breach of the contract that a possible cause of action arises as at the date of the alleged breach and not the end of the contract period.

15. It is clear from the Plaintiff that the Plaintiffs’ cause of action against the Defendants is that of breach of contract. The same is clearly highlighted in paragraph 10 of the Plaintiff. In the said Paragraph the Plaintiffs allege that the 1st and 2nd Defendants have continued to occupy the suit property in breach of the express covenants of the sale agreement between. What is in contestation is the actual date when the breach occurred as both parties appear to have breached the contract on different dates. This means that it will be important to look at the terms of the sale agreement that is alleged to have been breached by the Defendants in order to establish when the cause of action arose.

16. The fact that one has to look at the sale agreement to determine when the breach of contract took place, means that the Preliminary Objection herein is not a pure point of law as it is blurred by factual details. See the case of **Oraro v Mbaja** (supra)

17. In the instant suit the facts are not that clear cut as both parties have raised the serious allegations against each other both in the Plaintiff and Counterclaim. The elements of breach by either party have to be ascertained by the evidence of the parties. I am therefore of the view that the interests of justice would be served if the matter goes to full hearing. Consequently, I find no merit in the Preliminary Objection and I dismiss it. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF OCTOBER, 2021

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J.M ONYANGO

JUDGE