



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 4 OF 2021

(FORMERLY HIGH COURT CIVIL APPEAL NO. 110 OF 2019)

DENNIS NYANDU.....APPELLANT

VERSUS

FRANCIS ABURI OYARO.....RESPONDENT

JUDGMENT

INTRODUCTION

1. This appeal arises from the ruling of Hon. E.A Obina - Principal Magistrate, delivered on 24th September 2019 in Kisii CMCC No. 599 of 2018. In the said ruling, the learned trial Magistrate allowed the Respondent's application to strike out the Appellant's suit for being statute-barred.
2. Before delving into the merits of the appeal, it is necessary to give a brief background of the case. On 18th September 2018, the Appellant filed suit against the Respondent seeking a refund of Kshs. 160,000 being the purchase price in respect of a plot known as KISII MUNICIPALITY/BLOCK 1/644.
3. In his Defence dated 22nd October 2018, the Respondent denied the Appellant's claim and stated that if there was any agreement for the sale of land between him and the Appellant, the same was made in the year 1991 and the suit for breach of contract could not be entertained as the limitation period had lapsed.
4. The Respondent subsequently filed an application dated 1st April 2019 seeking to strike out the Appellant's suit for being statutorily time-barred on the grounds that the Appellant sought to rely on a sale agreement made in 1991 which was outside the limitation period. The Appellant opposed the application and after considering the submissions of both parties, the court allowed the application and struck out the Appellant's suit.
5. Being aggrieved by the said ruling, the Appellant filed this appeal citing the following grounds:
 - i. That the learned trial Magistrate erred in law and in fact in striking out the Appellant's suit when the same was properly grounded in law.
 - ii. That the learned trial Magistrate misdirected himself in finding that the Appellant had slept on his rights when there was evidence that there had been occupation and development upto the time the fraud was discovered.
 - iii. That the learned trial Magistrate ruled to strike out the Appellant's case against overwhelming evidence to the contrary.
6. The appeal was initially filed in the High Court but it was subsequently transferred to this court as it relates to a contract for the sale of land.
7. The court directed that the appeal be canvassed by way of written submissions and both parties filed their submissions.
8. The main issue for determination is whether the suit was time-barred.

This being a first appeal, this court has the liberty to consider, evaluate and draw its own conclusions on both law and facts as stated in **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR**, where the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

9. The gist of the Appellant’s claim is captured at paragraph 4 of his Plea where he states as follows:

“The Plaintiff’s claim against the Defendant is for a refund of Kshs. 160,000 paid by the Plaintiff to the Defendant in the year 1991 being the price of a piece of land KISII MUNICIPALITY/BLOCK 1/644 which the Defendant purported to sell to the Plaintiff but which sale did not materialize full particulars whereof are within the Defendant’s knowledge.”

The relief sought in the plea is a refund of Kshs. 160,000- together with costs of the suit.

10. From the Plea, it is not in dispute that the Appellant’s suit is based on a sale agreement that was entered into in the year 1991. The suit is therefore founded on contract and in accordance with section 4(1) of the Limitation of Actions Act, it ought to have been instituted within a period of six years from the date when the cause of action accrued.

The said section provides as follows:

Section 4(1) 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

11. In the case of **Michael Benhardt Otieno v National Cereals & Produce Board (2017) eKLR** the court observed as follows:

“As regards the applicability of section 4(1) it is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done, namely an action that is brought in contract six years after the cause of action. ..In light of these clear provisions it should be unacceptable to imply as the learned judge of the superior court did that the wording of section 4(1) of the Limitation of Actions Act suggests a discretion can be invoked”

12. In the case of **Gathoni v Kenya Cooperative Creameries Ltd (1982) KLR 104** the court observed that:-

“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 intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest”

13. Furthermore, in **Iga vs. Makerere University [1972] EA** it was held that:-

“A plea which is barred by limitation is a plea barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rules of Uganda which has same provisions with the Limitation of Actions of Kenya 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.”

14. In **Bosire Ogero v Royal Media Services [2015] eKLR R.E. ABURILI J** stated that: *‘The law of Limitation of Actions is intended to bar the plaintiffs from instituting claims that are stale and aimed at protecting defendants against unreasonable delay in the bringing of suits against them’.*

She further stated that *“.....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 the case of **Pauline Wanjiru Thuo vs David Mutegi Njuru CA 2778 of 1998.**”...*

15. Whichever way one looks at the Appellant’s suit, the suit is hopelessly out of time. Learned counsel for the Appellant submitted that since the Appellant had taken possession of the suit property, time did not start to run until the day he discovered the fraud. However, the issue of fraud is not pleaded in the Plea and the court could not have speculated as to whether there was fraud and if so, when it was discovered by the Appellant. Counsel also submitted that had the matter gone to trial, the Appellant would have obtained an admission from the Respondent that he promised to do something failing which he would refund the purchase price. This is purely speculative and one cannot file a suit that is statute barred in the hope that he will extract an admission from the Defendant.

16. Having carefully considered the Record and Grounds of Appeal, rival submissions and the law as well as the authorities cited to me, I have come to the inescapable conclusion that the appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE