



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 96 OF 2018**

**BENJAMIN KIMAIYO ITOK.....PLAINTIFF**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> DEFENDANT**

**THE DIRECTOR OF LAND ADMINISTRATION.....2<sup>ND</sup> DEFENDANT**

**REBECCA CHELIMO YATOR AND GILBERT KIPTANUI YATOR BEING**

**SUED AS THE ESTATE ADMINISTRATORS/ PERSONAL REPRESENTATIVES**

**OF THE ESTATE OF JOSEPH KANDA CHEPKWONY (DECEASED) AND ON BEHALF**

**OF THE OTHER TWO TRUSTEES T/A MARAKWET MATATU GROUP...3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant filed the Notice of Preliminary Objection dated the 26<sup>th</sup> April, 2019 to the Plaintiff's suit on the following three (3) grounds:

***"1. The suit is statutory barred pursuant to Section 4(1) of the Limitation of Actions Act Cap. 23 of Laws of Kenya and the court lacks capacity to hear it.***

***2. The suit offends provisions of Section 3(3) of the Law of Contract Act Cap. 23 of the Laws of Kenya.***

***3. This suit deserves to be struck out with costs to the 3<sup>rd</sup> Defendants."***

2. The matter came up for mention on the 31<sup>st</sup> October, 2019 when Mr. Mathai and Kiptarus, the learned Counsel for the 3<sup>rd</sup> Defendant and Plaintiff respectively, agreed to have the preliminary objection heard first through written submissions. Thereafter, the learned Counsel for the 3<sup>rd</sup> Defendant and Plaintiff filed their written submissions dated the 26<sup>th</sup> November, 2019 and 4<sup>th</sup> February, 2020 respectively.

A. The 3<sup>rd</sup> Defendant's Counsel submits that this suit is based on an oral agreement of 12<sup>th</sup> May, 2000 under which the Plaintiff made the various amounts totaling Shs.1,077,280 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which he now claims refund of. That as this suit was filed outside the six years period, it contravenes **Section 4(1) of the Limitation of Actions Act** and hence is statutory barred. That as the agreement was over land, and was not in writing it contravened **Section 3(3) of the Law of Contract Chapter 23 of Laws of Kenya**. That this court is therefore without jurisdiction and should down its tools. The learned Counsel for the 3<sup>rd</sup> Defendant cited the following superior court decisions; ***The Owners of Motor Vessel Lilians Vs Caltex Oil (Kenya) Ltd 1989 KLR 1, Silver Kenya Ltd Vs Junction Ltd & 2 Others (2013) eKLR, Kangatta Properties Co. Ltd Vs Charity Njeri T/A Winacom Crossline Suppliers & 4 Others (2014) eKLR, and Mukhisa Biscuit Manufacturing Company Ltd Vs West End Distributors Ltd (1969) E.A. 696.***

B. The Plaintiff's Counsel submits that the suit is not statutory barred as it is based on fraud and in terms of **Section 26(c) of the Limitations of Actions Act**, time started running in 2016 when the notice dated 9<sup>th</sup> February, 2016 to revoke the title to the land parcel Eldoret Municipality/Block 10/941 came to their attention. That as there is no doubt that the 3<sup>rd</sup> Defendant and Plaintiff entered into a contract over purchase of Eldoret Municipality/Block 10/941, the suit is based on constructive trust as the Plaintiff deposited money in the account of the trustee of Marakwet Matatu Group for the three plots. That the 3<sup>rd</sup> Defendant acknowledged the existence of the agreement and the suit should not struck out under **Section 3(3) of the Law of Contract**. The learned Counsel cited the Environment and Land Court, Malindi decision in ***Riccardo Nelson Pasotto Vs Carlo Barbin Lissone [2017] eKLR***, in

which the case of Macharia Mwangi Maina & 87 Others Vs Danson Mwangi Kagiri [2014] eKLR and Lloyds Bank PLC Vs Rosset (1991) IAC 107, 132 were referred to.

3. The following are the issues for the court's determinations;

*(a) Whether the Plaintiff's suit is statutory time barred in view of Section 4(1) of the Limitation of Actions Act.*

*(b) Whether the suit contravenes Section 3(3) of the Law of Contracts Act.*

*(c) Who pays the costs of the preliminary objection.*

4. The court has considered the grounds on the notice of preliminary objection by the 3<sup>rd</sup> Defendant dated the 26<sup>th</sup> April 2019, the learned Counsel's written submissions for and against the preliminary objection, the pleadings and come to the following determinations;

(a) That from the Plaintiff dated the 9<sup>th</sup> July 2018, and filed on the 10<sup>th</sup> July, 2018 the suit is for a liquidated claim of Kshs.1,077,280 which amount was paid by the Plaintiff to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on behalf of the 3<sup>rd</sup> Defendant on the strength of their oral agreement of 2000 on the promise that he would get three plots from Eldoret Municipality/Block 10/941. That further paragraph 8 of the said Plaintiff sets out the various amounts paid between 17<sup>th</sup> May, 200 [2000] to 20<sup>th</sup> November, 2017.

(b) That flowing from (a) above, the Plaintiff's case is not for the three (3) plots he was to get under the 2000 oral agreement, but for refund of the monies paid under the said agreement. That being the case, the objection to the suit based on the provision of **Section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya** cannot hold as the claim is for refund of money paid under the agreement, and not transfer of, or ownership of any interest in land parcel Eldoret Municipality/Block 10/941.

(c) That further to the finding in (a) above, both the Plaintiff and 3<sup>rd</sup> Defendant are in agreement in their submissions that claims based on contracts, including oral agreements, are required under **Section 4(1) of the Limitation of Actions Act, Chapter 22 of Laws of Kenya** to be commenced before six (6) years lapsed. That paragraph 6 and 7 of the Plaintiff leaves no doubt that the oral agreement between the Plaintiff and 3<sup>rd</sup> Defendant, upon which the payments claimed were paid was made in April and May, 2000. That accordingly, the six years period lapsed on or about May, 2006 and the suit had not been filed or commenced by then.

(d) That the Plaintiff has through submissions indicated that their suit is based on fraud and that under **Section 26(c) of the Limitation of Actions Act**, time started to run on or about 9<sup>th</sup> February, 2016 when they learnt of the fraud. The court has perused paragraphs 1 to 19 of the Plaintiff and there is no averment that the Plaintiff got to know of the fraud in 2016 or any other time. That only paragraph 11 of the Plaintiff refers to fraud but falls short of pleading a claim based on fraud.

(e) That in view of the findings in (c) and (d), the court finds that the Plaintiff's claim for refund of money paid under the 2000 oral agreement was filed outside the six (6) years period set by **Section 4(1) of Limitation of Actions**, and as no extension of time has been sought and or obtained under **Sections 26 and 27 of the said Act**, the 3<sup>rd</sup> Defendant's preliminary objection is upheld on that ground.

(f) That having upheld the 3<sup>rd</sup> Defendant's preliminary objection on that ground, the Plaintiff's suit should be struck out, and in terms of **Section 26 of the Civil Procedure Act Chapter 21 of Laws of Kenya** that costs follow the events, the Plaintiff should pay costs of the suit.

5. That flowing from the findings above, the 3<sup>rd</sup> Defendant's preliminary objection is upheld on the ground of the suit being statute time barred. The Plaintiff's suit is hereby struck out with costs.

Orders accordingly.

**Dated and signed at Eldoret this 19<sup>th</sup> day of February, 2020.**

**S. M. KIBUNJA**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Cheptarus Advocate for Plaintiff.

No appearance for 1<sup>st</sup> Defendant.

No appearance for 2<sup>nd</sup> Defendant.

Mr. Mathai Advocate for 3<sup>rd</sup> Defendant.

Court Assistant: Christine