



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 485 of 2016**

**MARTHA KARWIRWA ANTHONY.....PLAINTIFF**

**-VERSUS-**

**BARCLAYS BANK OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. The Plaintiff Martha Karwira Antony is the Plaintiff in this matter. The Defendant, Barclays Bank of Kenya Limited, is a Limited Liability Company and is licensed to operate as a bank under the Banking Act Cap 488.

2. For consideration, in this Ruling, is the Notice of Motion dated 27<sup>th</sup> October 2017, filed by the Defendant. The Defendant is seeking the prayer for the Plaintiff's suit to be struck out. The application is based on the grounds that the suit, being an action in tort, is statute barred under Section 4 (2) of the Limitation of Action Act Cap 22; the cause of action arose over 10 years before the suit was filed; and that the Plaintiff should have litigated this cause in HC ELC 2034 of 2007 and HCCC 446 of 2009.

3. The application was opposed by the Plaintiff through the Plaintiff's own affidavit sworn on 3<sup>rd</sup> April 2018.

4. By that affidavit, the Plaintiff deposed she is the owner of property L.R. No 17589, having purchased it on 13<sup>th</sup> October 2006. That before that sale transaction was concluded, the vendor of the subject land entered into a lease agreement with the Defendant, for 6 years. On realizing this, the Plaintiff contacted the Defendant and they began to negotiate. Those negotiations did not bear fruit and there followed a suit between the Plaintiff and the vendor, being HC ELC 2034 of 2007; and a suit between the Plaintiff and the Defendant being HCCC 446 of 2007.

**THE PLAINT**

5. By her Complaint, the Plaintiff has pleaded that she purchased the subject property on 13<sup>th</sup> October 2006 from Henry Muthee Kathurima, the vendor. On making the initial payment of Kshs. 2 million, the Plaintiff pleaded that she took possession of the subject property.

6. That with actual knowledge of the Plaintiff's said possession, the Defendant entered into a lease agreement with the vendor, over the subject property, for 6 years.

7. The Plaintiff pleaded that the Defendant in entering into that lease agreement knew or ought to have known that the vendor did not have beneficial interest in the property. The Plaintiff pleaded that by the Defendant entering into the lease agreement, the Plaintiff was denied (by the Defendant) the user of the property, rental income and/or mesne profits.

8. The Plaintiff's prayer is for rent and/or mesne profit from 28<sup>th</sup> December 2006 to 22<sup>nd</sup> February 2012 at Kshs. 150,000 per month.

**ANALYSIS AND DETERMINATION**

9. The single issue for determination is, is the Plaintiff's suit statutorily barred.

10. It is clear from the Complaint that the cause of action, in this case started to run from when the Plaintiff alleges the rent and/or mesne profit was due. This according to the Complaint is 28<sup>th</sup> December 2006.

The Plaintiff however on her part argues that time began to run as at 22<sup>nd</sup> February 2012.

The reason the Plaintiff hinges her argument on that date is because on that day, the Defendant's suit against her, namely HCCC 446 of 2012 was struck out. The Plaintiff therefore argues that since her cause of action began to run on that date, she was not time barred when this suit was filed on 29<sup>th</sup> November 2016. This, according to Plaintiff is because the limitation in a claim for rent, under Section 8 of Cap 22, is of 6 years.

11. In my view, the Plaintiff erred to so argue. The period of limitation began to run on 28<sup>th</sup> December 2006. It follows that for a claim for rent, the period to file a claim ran out on December 2012.

12. In the case of **HARON ONYANCHA V NATIONAL POLICE SERVICE COMMISSION & ANOTHER [2017] eKLR** the Court considered the effects of a claim being statute barred as follows:

**IGA VS MAKERERE UNIVERSITY [1972] EA 65** where Mustafa, J. A. held as follows:-

*“A Plaintiff which is barred by limitation is a Plaintiff “barred by law”. Reading these provisions together it seems clear to me that unless the appellant 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 appellant was clearly out of time, and despite opportunity afforded by the Judge he did not show what grounds of exemption he relied on, presumably because none existed. The limitation 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.”*

Law, Ag. V. P. in the same case inter alia stated thus:

*“... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the Plaintiff, the Plaintiff must be rejected.”*

13. The Court also in the case Haron Onyancha (Supra) also considered the purpose of having limitation period and said:

*“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. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”*

Again in that very case the Court stated:

*“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one 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.”*

14. I however reject the Defendant's argument that, this, the Plaintiff's suit is *res judicata*. This is because Section 7 of the Civil Procedure Act provides that there must be a prior suit where the issues, similar to the ones in the suit being challenged, were litigated and determined.

15. The suits before Court involving both parties was struck out. The issues thereof were not determined. Accordingly, that argument of the Defendant is rejected.

16. Since there is no reason why costs should not follow the event, they will in this case follow the event.

In the end, the orders of the Court are:

a) **The Plaintiff's suit is hereby struck out for being statutorily time barred. The costs of the suit are awarded to the Defendant.**

b) **The costs of the Notice of Motion dated 27<sup>th</sup> October 2017 are awarded to the Defendant.**

**DATED SIGNED and DELIVERED at NAIROBI this 5<sup>th</sup> day of MARCH, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the Presence of:**

Sophie.....COURT ASSISTANT

..... COUNSEL FOR THE PLAINTIFF

..... COUNSEL FOR THE DEFENDANT