



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 463 OF 2017

JENNIFER MUTHONI MORIGI.....1ST PLAINTIFF

JANE WANJIKU HIRAM.....2ND PLAINTIFF

JULIA WAMBUI GAKUNGI (*Suing as trustees and*

officials of WOMEN TRUST HOUSING

WELFARE ORGANIZATION).....3RD PLAINTIFF

VERSUS

HOMELANDS DEVELOPMENT INVESTORS LTD.....DEFENDANT

RULING

1. In the Notice of Preliminary Objection dated 4th September, 2019, the Defendant has averred that the Plaintiffs filed this suit for specific performance based on an alleged breach of a Sale Agreement; that the alleged breach took place on 25th February, 2011; that the Plaintiffs filed more than six (6) years from the date of the alleged breach and that the suit is statute barred by virtue of Section 4 (1) (a) of the statute of Limitation of Actions Act.
2. On those grounds, the Defendant seeks to have the suit dismissed with costs. The Notice of Preliminary Objection proceeded by way of written submissions.
3. The Defendant's advocate submitted that the plea of limitation was raised in the Defendant's Defence; that the Plaintiffs did not file a Reply to Defence and that the Plaintiffs ought to have responded to the Defendant's plea of limitation in the Reply to Defence and that from the date of executing the Sale Agreement, and when the cause of action arose, a period of six (6) years had lapsed.
4. Counsel submitted that from the Plaintiffs' pleadings, the Plaintiffs did not bring their cause of action within the mandatory stipulated timelines of six (6) years and that the issue of limitation goes to the jurisdiction of the court. Counsel relied on numerous authorities which I have considered.
5. On his part, the Plaintiffs' advocate submitted that the Plaintiffs entered into a Sale Agreement with the Defendant on 28th September, 2010 for the sale of land parcel L.R. No. 20523; that in breach of the said Agreement, the Defendant only paid Kshs. 55,000,000 instead of Kshs. 135,000,000 as the purchase price and that the Plaintiffs are seeking to recover their land since the same was acquired fraudulently.
6. According to the Plaintiffs' counsel, other than having the contract dated 28th September, 2010 repudiated, the Plaintiffs are seeking to recover the suit land and that the applicable provisions of the law is Section 7 of the Limitation of Actions Act and not Section 4(1) (a).
7. Counsel submitted that as at the time the Plaintiffs instituted the suit, twelve (12) years had not lapsed from the date of the contract for the sale of land. Counsel submitted that it is in the interest of justice that the Applicant and the Respondents be heard before any decision can be made.
8. This suit was commenced by way of a Plaintiffs' dated 23rd November, 2017 and filed on the same day. In the Plaintiffs', the Plaintiffs averred that they were the registered proprietors of land known as L.R. No. 20523, Mavoko Municipality. According to the Plaintiffs, they entered into a Sale Agreement dated 28th September, 2010 for the sale of the suit property to the Plaintiffs at a consideration of Kshs. 135,000,000.
9. The Plaintiffs averred that out of the purchase price of Kshs. 135,000,000, the Defendant paid Kshs. 13,500,000 being a deposit of the

purchase price, on the date the Agreement was executed.

10. According to the Plaintiffs, the parties agreed that the Defendant should pay a total of Kshs. 90,000,000, after which the Plaintiffs would transfer the suit land to the Defendant, and then pay the balance of Kshs. 45,000,000 upon registration of the title in favour of the Defendant.

11. The Plaintiffs' case is that the Defendant paid them a total of Kshs. 55,000,000 whereafter the title was transferred in its favour and that the Defendant is in breach of the Agreement of Sale for failing to pay the full purchase price. The Plaintiffs have prayed for the following orders in the Plaint:

a. An order declaring the Sale Agreement dated 28th September, 2010 repudiated at the instance of the breach of the Defendant and a further order that the Defendant forfeits 10% of the purchase price to the Plaintiffs.

b. An order that the title to land parcel L.R. No. 20523 Mavoko Municipality in the name of the Defendant be and is hereby cancelled and a new title be issued in the name of the Plaintiffs at the Defendant's costs.

c. Costs of this suit.

12. The Defendant filed a Defence dated 28th September, 2018. In the said Defence, the Defendant stated that the purchase price of the suit property was Kshs. 90,000,000, which amount it paid in full; that the Sale Agreement was fully consummated when the Plaintiffs transferred the suit property to the Defendant on 25th February, 2011 and that after receiving the full purchase price, the Plaintiffs have uttered a false document alleging that the purchase price was Kshs. 135,000,000. At paragraph 19, the Defendant averred as follows:

“19. The contents of paragraph 15 are denied as the jurisdiction of this Honourable Court to hear this matter lapsed on 28th December, 2016, when the limitation period to file suit on the Agreement of Sale dated 28th September, 2010 expired.”

13. The above paragraph 19 of the Defence is the basis of the current Preliminary Objection.

14. The Defendant's advocate submitted that the Plaintiffs having not filed a reply to the Defence, they had admitted that indeed the suit is time barred as pleaded under paragraph 19 of the Defence.

15. In the case of *Kenya Commercial Bank vs. Suntra Investment Bank Ltd (2015) eKLR* the court held as follows;

“10. Again, contrary to the submission by the Respondent, failure to file a Reply to the Defence does not amount to admission of the allegations by the Respondent... Such failure amounts to a joinder of issues. See Order 2, Rule 12 of the Civil Procedure Rules 2010.”

16. Order 2 Rule 12(1) of the Civil Procedure Rules provides that if there is no Reply to a Defence, there is a joinder of issue on the Defence. Order 2 Rule 12(4) provides that a joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

17. Considering that the Plaintiffs have pleaded in the Plaint that this court has jurisdiction, and the Defendant having denied that this court has jurisdiction, there is a joinder of issue which this court must determine. Having found that there is a joinder of issue as pertains limitation of time, I shall now deal with the Defendant's Preliminary Objection.

18. The Defendant is seeking to have this suit dismissed on the ground that the Plaint is premised on the Sale Agreement dated 28th September, 2010, and that the suit having been filed after the lapse of six (6) years, the suit is time barred. The Preliminary Objection is premised on the provisions of Section 4(1) (a) of the Limitation of Actions Act which provides as follows:

“(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.”

19. As correctly submitted by the Defendant's counsel, the Plaintiffs have stated in the Plaint that they entered into a Sale Agreement with the Defendant on 28th September, 2010 for the sale of the suit property. In the said Plaint, the Plaintiffs pleaded that after being paid Kshs. 55,000,000, they caused the title to be transferred and registered in favour of the Defendant on 25th February, 2011 and that the Defendant was supposed to pay them the balance of the purchase price after the said transfer, which it has never done.

20. The Plaintiffs' claim is based on the breach of the Sale Agreement dated 28th September, 2010, and the transfer that was effected in favour of the Defendant on 25th February, 2011. The two dates have been captured in the Plaint at paragraphs 4 and 7.

21. It is the Agreement of 28th September, 2010 that the Plaintiffs are seeking to be repudiated and the cancellation of the title that was registered in favour of the Defendant on 25th February, 2011.

22. Indeed, in addition to the averments in the Plaint, the Plaintiffs' documents filed in this matter shows that the impugned Sale Agreement

was signed by both parties on 25th September, 2010. The copy of the title also tallies with the averments in the Plaintiff that the title was registered in favour of the Defendant on 25th February, 2011.

23. The claim by the Plaintiff is for recovery of the suit land on the ground that the Defendant breached the Agreement of 28th September, 2010. The crux of the Plaintiffs suit is therefore the recovery of the suit land which is registered in favour of the Defendant, due to the alleged breach of the Agreement of Sale of 28th September, 2010. Section 7 of the Limitation of Actions Act provides the circumstances under which one is barred from recovering land on any ground, including on the ground that the Sale Agreement has been breached. The said Section 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.”

24. This position was adopted by the court in the case of ***Peter Muriithi Nyaga vs. Madris Kanini Mbungu & Another (2017) eKLR*** as follows:

“8. The court has considered the pleadings herein, the submissions of the parties and the said provisions of the Act. The court is of the view that the Plaintiff’s action falls within the provisions of section 7 and not section 4(1) (a) of the Act. The Plaintiff’s suit is not an action on an ordinary contract but a contract for the sale of land which he is seeking to recover. The court is persuaded by the authorities cited by the Plaintiff’s advocate ie Embu ELC No 9 of 2015 Salesio Njeru Mbogo Vs Michael Muriithi Njagi & Another [2017] eKLR and Board of Governors Kisasi Secondary School Vs Johnson Kitheka Kathenge [2017] eKLR that the applicable section of the Act is section 7.”

25. This court also considered the issues raised in this matter in the case of ***Board of Governors Kisasi Secondary School vs. Johnson Kitheka Kathenge (2017) eKLR*** as follows:

“29. Considering that the Respondent was seeking for an order of specific performance in respect to land, the applicable law of limitation of time is not Section 4(1) but Section 7 of the Limitation of Actions Act.”

26. In the case of ***Justus Tureti Obara vs. Peter Koipeitai (2014) eKLR***, the court held as follows:

“I am in agreement with the Plaintiff’s submission that the Plaintiff’s claim is for the recovery of the suit property from the defendant and as such the limitation period for such a claim is 12 years as provided for in section 7 of the Limitation of Actions Act, Cap. 22, Laws of Kenya. I would wish to point out further that the Plaintiff’s case although for recovery of land is based on fraud. The proviso to section 26 (a) of the Limitation of Actions Act, Cap. 22, Laws of Kenya provides 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. As to when the Plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial.”

27. It is evident from the Plaintiff that the Plaintiffs’ claim is for recovery of land, which land can only be recovered if it is proved that indeed the Defendant was in breach of the Agreement of 28th September, 2010. The Plaintiffs’ claim is not an action on an ordinary contract, but a contract for the sale of land, which they are seeking to recover. The limitation period for recovery of land is twelve (12) years and not six (6) years.

28. Considering that the Defendant herein was registered as the proprietor of the suit land in the year 2011, the cause of action for recovery of the land arose in that year. A period of twelve (12) years had not lapsed by the time this suit was filed.

29. For the reasons I have given above, I dismiss the Defendant’s Notice of Preliminary Objection dated 4th September, 2019 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 13TH DAY OF MARCH, 2020.

O.A. ANGOTE

JUDGE