



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC CASE No. 49 OF 2018

EDWARD MOONGE LENGUSURANGA.....PLAINTIFF/APPLICANT

V E R S U S

JAMES LANAIYARA.....1st DEFENDANT/RESPONDENT

COUNTY LAND REGISTRAR

NYANDARUA/SAMBURU COUNTIES.....2nd DEFENDANT/RESPONDENT

RULING

1. On the 20th August 2018 the Applicant herein filed his Notice of Motion under a certificate of urgency dated an equal date wherein he sought for interim orders against the Respondents herein injuncting them from dealing with land parcel No. Samburu Poro "A"/87 pending the hearing and determination of the application and suit thereafter.
2. It was upon service of the said application that a Notice of Preliminary Objection was filed on the 22nd November 2018 by counsel for the 'Landlord' whom I believe in this instance was the 1st Respondent herein.
3. The said Notice of Motion sought to have the Applicant's suit struck out for being incurably defective, frivolous and vexatious.
4. Directions were taken for the Application on the Preliminary Objection to be disposed of in the first instance through written submissions, and thereafter parties highlight on their respective submissions.
5. It is worth noting that the 2nd Respondent herein did not file their papers despite service.
6. Pursuant to the said directions, parties filed their written submissions and highlighted the same on the 25th March 2019.

1st Defendant's Submissions.

7. The 1st Defendants' submission was that pursuant to the suit land having been transferred and registered to the 1st Defendant by reason of him having bought it from the plaintiff in the year 1999, that the suit herein having been filed after 14 years, was in contravention of Section 7 and 8 of the Limitations of Actions Act. They relied on the provisions of the law as well as the decided cases of **Damaris Kondoro vs Gachanja Gitere & Another [2005] eKLR** to submit that the suit had been overtaken by events and had suffered laches and therefore the Plaintiff was untenable.
8. The 1st Defendant, while relying on the decided case of **Njeri Muranja & John Muranja Mahinda vs Virginia Ndiba & Kajiado County Government [2014] eKLR** also submitted that since they had taken possession of the suit land in the year 1999, any remedy against him for trespass and mens profit had been extinguished at the expiry of time pursuant to the provisions of Section 7 and 8 of the Limitations of Actions Act.
9. It was further the 1st Defendant's submission that even after the Plaintiff become aware that the 1st Defendant had been registered as the

proprietor of the suit land, he had filed the present suit without seeking leave for extension of time if they had any claim. That limitation of time went to the jurisdiction of the court and since the same was statutory provided, the Plaintiff's suit could not be sustained. They relied on the decided case of **Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie and 9 others [2018] eKLR** in support of their submissions.

Plaintiff's Submission.

10. It was the Plaintiff's submission and while opposing the 1st Defendant's Preliminary Objection, that the only issue before court was whether the Plaintiff's suit was statutory barred. That in order to establish whether the suit is time barred, it was important to establish the case before court. That the type of case before court could only be disarmed from the facts as pleaded.
11. That the Plaintiff was the original proprietor of parcel No. Samburu/Poro A/87 which measured 40.56 hectares. On or about 1999 the parties herein entered into an oral land sale agreement, which was not reduced into writing, where they agreed that the suit would be sold and bought at a consideration of Ksh.12,000/= per acre thus making it a total of 1.2 million for the entire suit land. The 1st Defendant had subsequently paid a total of Ksh 600,000/= in staggering installments between the year 1999 to 2002. He thereafter failed to complete the entire purchase price for a period of 4 years, the value which had appreciated then. In the year 2000, a supplementary agreement was arrived between the parties wherein the Plaintiff gave the 1st Defendant 4 (four) options if they were to complete the agreement to which:
 - i) The 1st Defendant accepts 20 acres of land exercised from the suit land on account of the Ksh 600,000/= he had already paid and the matter ends there or;
 - ii) That the 1st Defendant tops up Ksh 900,000/= to the money he had already paid so that he could get 50 acres exercised from the suit property as the value had appreciated from Ksh 12,000/= per acre to 30,000/= per acre.
 - iii) The Plaintiff tops up Kshs. 2,400,000/- to the amount already paid to make it 3,000,000/- so that he could now get the 100 acres of land.
 - iv) The parties have to laminate the agreement and the monies already paid be utilized as rent for the Defendants' 33 heard of cattle grazing on the land.
12. In show of good faith, the Plaintiff had executed 3 land control board consents which were blank and which he had presented the 1st three options of transfer of land for the 1st Defendant to choose one so that he himself would file the form.
13. The 1st Defendant choose to top up Ksh 900,000/- to have 50 acres excised from the suit land to which he paid Ksh. 460,000/- in staggering amounts again instead of the agreed 900,000/-, up to January 2010. When a disagreement again arose for the non-payment of the full consideration. All this time, he had not applied for the consent to transfer to the land as he awaited the completion of the consideration.
14. That it had been upon realizing that the 1st Defendant was not ready to pay the whole consideration that he had approached his lawyers on 20th November 2014 when they wrote a demand letter to the 1st Defendant informing him that the contract had been terminated for non-payment of consideration.
15. That he had received a response by the 1st Defendant to the effect that he had already paid a total of Ksh1.2 million in consideration which was the full payment of the consideration price wherein he had already acquired a title deed in his name.
16. When the Plaintiff sought for a green card to the suit land on the 13th January 2015, he was surprised to learn that the suit property had been bought at a consideration of Ksh 700,000/- and a title deed issued
17. That it is clear that although the title was obtained in 2004 albeit clandestinely, the Plaintiff came to know about it in the year 2015 when he bought the green card. That issues of registration of land were latent and one needed need to conduct a search or by an abstract of title otherwise known as a green card to ascertain whether ownership had changed.
18. That although the 1st Defendant had relied on the provisions of Section 8 and 7 of Limitation of Actions Act, these provisions were not cast in stone and there were exceptions where a suit could be brought outside the period of 12 years to recover land. That these exemptions are contained in both statute and the case laws.
19. That they relied on Section 26 of the Limitations of Actions Act which stated that:

Where, in the case of an action for which a period of limitation is prescribed, either the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

 - (b)
 - (c)

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with

reasonable diligence have discovered it:

20. That in case law, courts had set a principle that where allegations of fraud have been pleaded, the suit should be set down for hearing. The court was referred to the cases of

i. **Mintina Ene Keton Koponi (suing as a legal representative of the estate of Keton Ole Koponi Parsena (Deceased) vs Francis Njakwe Gathiari & 2 Othres [2018]eKLR**

ii. **Justus Tureti Obarar vs Peter Koipeitai Nengiso [2014] eKLR**

iii. **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Othre [2015] eKLR**

21. Further submission was that the court in the present case should not allow the 1st Defendant to hide under the provisions Section 7 and 8 of Limitation Act and benefit from his fraudulent act and therefore, the Preliminary Objection should be dismissed with costs and the matter to proceed for hearing on merit.

Analyses and Determination

22. I have considered the 1st Defendant's application on a point of Preliminary Objection to the effect that the suit should be struck out for reasons that the same was incurably defective, frivolous and vexatious and an abuse of the court process for it was time barred.

23. In the case of **Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696** where their Lordships observed thus:

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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 a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

24. The summation of the 1st Defendant's Preliminary Objection is that this matter was based on a sale contract which was executed in the year 1999 and a title deed issued on the 13th January 2004. That subsequently the Plaintiff filed the present suit on the 20th August 2018 which was 14 years after the cause of action arose.

25. Secondly, that this matter also involved a cause of action founded on fraud which is a tort herein and which ought to have been brought within 3 years from the date the cause of action arose.

26. Lastly, the 1st Defendants' Preliminary objection was based on the fact that the Plaintiff's claim was for the recovery of land which was time barred since it was brought after 12 years from the date on which the right of action accrued to them.

27. The Matters for determination are:

i. Whether the Preliminary Objection raised is sustainable.

ii. Whether the said Preliminary Objection has merit and should be upheld.

28. In the case of **Justus Tureti Obara vs Peter Koipeitai [2014] eKLR** wherein J. Okong'o held that;

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.

29. To contextualize the 1st Defendant's point of Preliminary Objection, on this point, it is necessary to set out the relevant provisions of the Limitation of Actions Act which he relies on and I set the same out hereunder:-

30. Section 4 (2) reads:

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”

31. I have considered the submissions and the annexures herein, I note from the Plaintiff's pleadings and submissions that at all times, he was the registered proprietor of land parcel No Samburu/Poro 'A'87 measuring about 40.46 Ha. That upon an oral sale agreement with the 1st Defendant in the year 1999 he had agreed to sell the said suit land to the 1st Defendant for Ksh 12,000/= per acre making it a total of Ksh. 1,200,000/=. The 1st Defendant had paid a total of Ksh 600,000/ in installments between the year 1999 and 2002. That he had defaulted in the payment for 4 years wherein the Plaintiff had later varied the terms of the contract for reasons that the land had appreciated. The 1st Defendant had opted for the 2nd option wherein he was to top up the consideration amount with Ksh 900,000/= to the already Ksh 600,000/= he had paid. He however paid only Ksh 460,000/= in installments up to the 20th January, 2010 wherein the 1st Defendant had decided to rescind the contract vide his letter of 25th November 2014.

32. He was however surprised when the 1st Defendant wrote to him informing him that he had completed paying the whole purchase price and that the suit land had already been registered in his name. That was when Plaintiff applied for the green card, on the 13th January 2015, wherein he discovered that the 1st Defendant in collusion with the 2nd Defendant had fraudulently registered the suit land in the name of the 1st Defendant. That was what prompted him to file the present suit.

33. I have asked myself when the operation of limitation comes into play in such a situation. I have considered paragraphs 14-16 of the Plaintiff's Pleas as well as the copy of the green card in regard to the suit land and the same are clear that the alleged fraud was committed on the 13th January 2004 when the 1st Defendant was registered as the proprietor of the suit land. The cause of action against the 1st Defendants therefore arose on the 13th January 2004.

34. Section 26 of the Limitation of Actions Act provides as follows;

Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

35. From the Plaintiff's pleadings it is clear that he had discovered the fraud in the year 13th January 2015 as stated in paragraph 14 of his pleadings.

36. A cause of action, is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party. The term also refers to the legal theory upon which a plaintiff brings suit. According to Section 26 of the Limitation of Actions Act the cause of action accrues when the fraud is discovered. In the present scenario therefore I find that the alleged fraud was discovered on the 13th January 2015 and a period of three years ended on 13th January 2018. These proceedings were filed on the 20th August 2018 which period was beyond the 3 years from the date the fraud was discovered.

37. Section 7 of the Limitation of Actions Act provides:

“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

38. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the 1st Defendant having bought the suit land in the year 1999 (as per paragraph 6 of the plaint) and taken possession of the same, the Plaintiff herein could only seek to recover it from the 1st Defendants, but only if he did so within twelve years after the sale agreement.
39. There is no doubt that the period of about fourteen years have lapsed from 2004 when the 1st Defendant was registered as proprietor of the suit land. The period of limitation starts running a fresh whenever there are changes in the title as was held in the case of **of Kimani Ruchine & Anor -vs- Swift Rutherford & Co.Ltd and Another(1980) KLR 10**.
40. Indeed I find that in the present case, that the Plaintiff has not proved that he dispossessed the 1st Defendant for a period of 12 years as it is clear that time started to run from 13th January 2004 when the 1st Defendant got registered as the proprietor of the suit land up to 20th August 2018 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, which makes it about 14 (fourteen) years.
41. It also clear that the 1st Defendant was put into possession of the suit land in the year 1999 as a purchaser under a contract for sale wherein time also started running against the vendor upon entry into possession. See the case of **BRIDGES v MEES [1957] Ch 475**. No leave for extension of time to file the suit outside the twelve year period has been exhibited before this court.
42. If we decide to tabulate the limitation time from the period when the 1st Defendant was put into possession of the suit land, to when the suit was filed, the time sums up to nineteen years. On the other hand if we tabulate the limitation from the time the suit land changed title, we would be looking at 14 years, either way the Plaintiff's case would be statutorily time barred.
43. The Plaintiff needed to commence his claim within the time prescribed under Section 7 of the Limitation of Actions Act. It follows therefore that by the time the Plaintiff filed this suit, the claim was statute barred.
44. In the case of **Bosire Ongero vs Royal Media Services [2015] eKLR** the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.
45. I have considered the foregoing and I find that limitation being a substantive law, the provisions of section 1A and 1B of the Civil Procedure Act cannot be invoked with a view to disregard the provisions of another Act of Parliament. Even if the Limitation of Act was a procedural legislation, section 3 of the Civil Procedure Act provides:
- In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.*
46. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows
- '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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'*
47. Clearly, this Court lacks jurisdiction and the matter is at its end. I will have to down my tools and take no further step. The preliminary objection herein succeeds in its entirety with the result that the Plaintiff's suit is herein struck out with costs to the 1st and 2nd Defendants.

Dated and delivered at Nyahururu this 11th day of June 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE