



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 305 OF 2012

KIPNGOCHOCH FARM CO. LIMITEDPLAINTIFF

VERSUS

OBADIAH K. KIPKORIR1ST DEFENDANT

JOHN MARK MOI.....2ND DEFENDANT

JAPHETH K CHEPKERES3RD DEFENDANT

WELDON LABBAT5TH DEFENDANT

ATTORNEY GENERAL6TH DEFENDANT

R U L I N G

1. The plaintiff with leave of Court filed the amended plaint dated 17th July 2019 on 22nd July 2019. By the amended plaint the hitherto 6 plaintiffs were replaced by Kipngochoch Farm Company Limited as the sole plaintiff. The plaintiff by the plaint averred that it had at all material times been the bonafide owner of land parcels **Solai/Ndungiri Block1/235**. The plaintiff averred further that the 1st defendant has been in illegal occupation of land parcel **Solai /Ndungiri Block 1/223** since the year 1985 while the 2nd defendant fraudulently caused land parcel **Solai/Ndungiri Block1/235** to be transferred to himself . The plaintiff stated that the fraudulent acts of the defendants were facilitated following the unlawful and forceful change of the plaintiff's leadership and management in 1984 when the 1st, 3rd and 4th defendants became directors of the Company .

2. The plaintiff vide the amended plaint prays for judgment against the defendants for :-

(a) A declaration that the Plaintiff is the lawful owner of **Solai/Ndungiri Block1/223** and **Solai/Ndungiri Block 1/235**.

(b) An order revoking the 2nd Defendant's title in **Solai/Ndungiri Block1/235**.

(c) An order that the Plaintiff be registered as the lawful owner of **Solai/Ndungiri Block 1/235**.

(d) An order directing the 1st and 2nd Defendants to vacate the parcels of land known as **Solai/Ndungiri Block 1/232** and **Solai/Ndungiri Block 1/235** respectively (the suit property) failing which they be forcibly evicted therefrom;

(e) A permanent injunction to restrain the Defendants, their agents, servants or assigns from trespassing upon the suit property or acting in any manner whatsoever inconsistent with the Plaintiff's right to the suit property;

(f) Mesne profits from the 1st Defendant at the rate of Kshs 240,000.00 per year from January 1985 until the time the 1st Defendant vacates the suit property and mesne profits at the rate of Kshs3,000,000.00 per year from the 2nd Defendant from January 1993 until the time he vacates the suit property;

(g) An order for the 2nd Defendant to compensate the Plaintiff a sum of Kshs.2,000,000.00 in damages being the estimated cost of the company building that was erected on the land and illegally destroyed by the 2nd Defendant.

(h) Costs of the suit.

(i) Any other relief this honourable court may deem fit to grant.

3. The 1st to 4th defendants amended statement of defence dated 18th August 2019 was filed on 13th September 2019. The defendants inter alia contended that the 1st and 2nd defendants purchased the suit properties from the plaintiff Company. They deny there was any fraudulent dealing asserting that the sale to the 1st and 2nd defendants was sanctioned by the plaintiff's shareholders and directors. The 1st defendant stated that following the purchase he had occupied land parcel **Solai/Ndungiri Block 1/223** since 1985 and that his occupation and possession has been adverse to the interests of the plaintiff. The 2nd defendant for his part averred that land parcel **Solai/Ndungiri Block 1/235** was duly transferred and registered in his name on or about 24th August 1992 after due process. The defendants have further averred that the plaintiff's claims are statute barred by limitation and by their defence paragraphs 11A and 17A pleaded that the suit was statute barred by reason of the Limitations of Actions Act, Cap 22 Laws of Kenya and gave notice that they would raise a preliminary objection that the court lacked the jurisdiction to entertain the suit. The 1st to 4th defendants simultaneously with filing the statement of amended defence filed a Notice of preliminary objection dated 13th September 2019 on the following grounds :-

(a) That the plaintiff's suit is time barred under Section 4 and 7 of the Limitations of Actions Act (Cap 22) for being an action for recovery of land and breach of fiduciary duty by directors based on torts alleged to have been committed during the years 1984 and 1993 as indicated in paragraphs 6, 7 and prayer (f) of the Amended Complaint dated 17th July 2019 hence is fatally flawed and incompetent .

(b) That the plaintiff has neither sought nor been granted leave to file the instant suit out of time as required by Section 27 of the limitation of Actions Act (Cap 22).

4. The preliminary objection was responded to by the plaintiff by way of a replying affidavit dated 25th October 2019 sworn by one Chepsat Ruto a director of the plaintiff Company. The deponent in the replying affidavit sets out the background and historical factors that he alleges brought about the present state of affairs. 5. In the replying affidavit the deponent stated that since the defendants had the support of the government when the acts complained about occurred, it was not possible or practical to commence any action against the defendants then. The plaintiff argues it was only after 2006 when the leadership of the company which was supportive of the defendants left office did it become possible to commence legal action against the defendant after discovering the fraud. In that regard, the deponent averred the company sought the intervention of the Ministry of Lands in 2007 to remedy the wrongs that had been committed by the previous leadership of the Company whereby the company's property has unlawfully been handled to the 1st and 2nd defendants.

5. The Court on 30th October 2019 directed that the preliminary objection be canvassed by way of written submissions . The 1st to 4th Defendants filed their submissions on 8th January 2020 and the plaintiff /Respondent filed their submissions on 10th February 2020.

Submission in support of the preliminary objection

6. The 1st to 4th defendants have submitted that the plaintiff's claim is essentially a claim for recovery of land based on breach of fiduciary duties by 1st, 3rd and 4th defendants being directors of the plaintiff company between the years 1985 and 1992 as is evidenced by prayer (f) of the amended complaint. The defendants submit these constituted tortious acts and that section 4(2) of the limitation of Actions Act, Cap 22 Laws of Kenya prohibits the institution of a suit based on a tort after the expiry of three years. Section 4(2) of the Act provides:-

4(2) 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.

7. The defendants submit that under paragraphs 6,7 and prayer (f) of the amended complaint the alleged breach of fiduciary duties by the said defendants occurred in the year 1985 when the 1st defendant allegedly illegally occupied land parcel **Solai /Dugiri Block 1/223** and ended in 1992 when the 2nd defendant was issued title to land parcel **Solai/Ndungiri Block1/235**. The plaintiff did not initiate any action within a period of 3 years in regard to the tortious acts complained about and henceforth the plaintiff's action founded on breach of fiduciary duties by the defendants relating to the acts complained of became time barred.

8. In regard to the claim of land recovery by the plaintiff from the 1st and 2nd defendants, the defendants submitted that the claim to recover the land ought to have been commenced before the expiry of 12 years from the date of accrual of the action. Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya bars any land recovery actions after the expiry of 12 years. It provides as follows: -

7. 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 action accrued to some other person through whom he claims to that person.

9. The defendants have submitted that the 1st defendant has occupied land parcel **Solai/Ndungiri Block1/223** from 1985 though the title is still in the plaintiff's name and that the occupation and possession has been peaceful, open and uninterrupted and contends that the plaintiff's title has been extinguished in his favour by operation of the law. The 1st defendant submits that he is entitled to be registered as the owner of the land as pleaded in the statement of defence.

10. Likewise the defendants contended that the plaintiff has by virtue of section 7 of the Limitations of Actions, Act lost any right of action to recover land parcel **Solai/Ndungiri Block1/235** which was registered in the 2nd defendant's name in 1992 on account of the present suit being statute barred. In support of their submissions the defendants have placed reliance on the case of **Cherron (K) Ltd –vs- Harrison Charo Wa Shutu (2016) eKLR and Garon Onyacha -vs- The National Police Service Commission & Another (2017)**

eKLR.

Plaintiff/Respondents submissions.

11. The plaintiff /Respondent's submissions were twofold that the preliminary objection did not meet the threshold of a preliminary objection in law; and that the preliminary objection taken was not capable of disposing of the entire suit. In their submissions the plaintiff submitted the 1st to 4th defendants preliminary objection did not satisfy the threshold of what constitutes a preliminary objection as established in the case of **Mukhisa Biscuit Manufacturing Co Ltd -vs- West End Distributors Ltd (1969) EA 696** where **Sir Charles Newbold P** stated thus:-

“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.”

12. The plaintiff has argued that the preliminary objection taken by the defendants does not constitute of pure points of law. The plaintiff contends there are issues as to what led to the delay in instituting the suit that have not been controverted. The plaintiff has further argued such are issues that would invite further investigation at the hearing of the suit.

13. In regard to the submission that the preliminary objection was incapable of disposing of the suit, the plaintiff contends that there is the contested issue of whether the 1st defendant is in continuing trespass which issue can only be determined by hearing the parties. In support of this submission the plaintiff cites the case of **JSK -Vs- WKW (2019) eKLR** where the High Court reiterated the test laid in the case of **Mukisa Biscuit Manufacturing Co Ltd -Vs- West End Distributors Ltd (Supra)** where LAW JA stated:-

“So far as I'm aware 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 that contract giving rise to the suit to refer the dispute to arbitration”

14. Having set out the rival submissions of the parties I now turn to consider the preliminary objection on its merits. Firstly, it is a cardinal rule of law that parties are bound by their pleadings. In the instant matter the parties have been afforded the opportunity to amend their respective pleadings. It is arising from the plaintiff's plaint that the 1st to 4th defendants have taken the preliminary objection the subject of this ruling. The defendants argue that on the basis of the plaintiffs plaint the actions that have precipitated the present action /suit occurred between the year 1984 and 1993 and thus the defendants contend the plaintiff's suit is barred under Sections 4 and 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya in view of the fact no leave was sought and/or granted to allow the plaintiff to institute the suit out of time as required under section 27 of the Limitations of Actions Act Cap 22 Laws of Kenya.

15. As correctly submitted by the plaintiff/respondent a preliminary objection has to be on a pure point of law in order to qualify as such. The **Mukisa Biscuit case (supra)** laid the criteria of what qualifies as a preliminary objection and the Courts in this country have religiously followed the criteria laid in the Mukisa Case. The preliminary objection has to be purely on a point of law and should not involve the taking of evidence in order to determine the validity of the preliminary objection. The pleadings and facts as presented by the parties should be sufficient to establish the point of law that the preliminary objection is anchored upon. In regard to the present matter I am satisfied the preliminary objection is on a pure point of law. The preliminary objection is specifically on the question of limitation of the action as against the defendants. Whether or not a suit is caught up by the Limitations of Actions Act, Cap 22 Laws of Kenya in my view is a question of law and thus would qualify to be taken as a preliminary objection. It is a matter that the court could determine having regard to the pleadings of the parties.

16. Although the defendants have contended that the defendants acts complained about occurred between 1984 and 1993 the plaintiff has asserted that they did not know of the fraudulent acts until after 2006 after there was a change of directorship in the company. The plaintiff thus argues the limitation period would commence after they became aware of the fraudulent acts. There is therefore contestation as to when the period of limitation began to run. If the court was to find that the period of limitation started running in 1984 or 1993 as the case may be, then the plaintiff 's suit against the defendants would be statute barred. On the other hand if the court was to hold that the period of limitation began to run from 2006 when the new board of directors of the Company took office, then the plaintiff would have been within the period of limitation in 2012 when the suit was instituted for the recovery of the land occupied and possessed by the 1st and 2nd defendants. Thus whether or not this matter is caught by limitation is dependent on when the alleged fraudulent conduct by the defendants came to the knowledge of the plaintiff. That is a matter of evidence that can only be determined at the trial. In the case of **Justus Tureti Obara -Vs- Peter Koipeitai Nengisoi (2014) eKLR** my brother Okongo J faced with a similar situation where the effective date when the period of limitation began to run was in issue stated :-

“..I am in agreement with the plaintiff's summons that the plaintiff's claim is for the recovery of the suit property from the defendant and as such the limitation period for such 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 provision 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. The defendant's objection based on time bar also fails.”

17. In the circumstances of the present suit where the preliminary objection is primarily based on limitation of time and it being indefinite when the period of limitation commenced running, it is my determination that the preliminary objection is unsustainable. The same is dismissed with costs to the plaintiff.

18. It is so ordered.

Ruling dated signed and delivered in electronically at Nakuru this 30th day of April 2020.

J M MUTUNGI

JUDGE