



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 395 OF 2002

AMRUT INVESTMENTS LIMITED.....PLAINTIFF

- VERSUS -

SOBHAG H. SHAH T/A SOBHAG

H. SHAH & V. GOSWAMI ADVOCATES.....1ST DEFENDANT

SAMSON MASABA MUNIKAH T/A

MUNIKAH & COMPANY ADVOCATES.....2ND DEFENDANT

RULING

1. The 2nd defendant has raised the following preliminary objections to the plaintiff suit:

“a. Pursuant to Section 19(1) of the Limitations of Actions Act Cap 22, an act may not be brought in respect of proceeds of the sale of land after the end of twelve years from the date when the right to receive the money accrued.

b. Pursuant to Section 4(1)(a) of the Limitation of Actions Act, an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

c. That the plaintiff’s suit is bad in law and the same does not disclose any reasonable cause of action against the 2nd defendant.

d. That the plaintiff is guilty of inordinate and inexcusable delay in filing or amending its pleadings in respect of the 2nd defendant and in prosecuting their suit rendering justice impossible.

The plaintiff’s suit as against the 2nd defendant therefore needs to be dismissed with costs to the 2nd defendant.”

2. Anyone who has an inkling of what a proper preliminary objection is will immediately note that objection ‘c’ and ‘d’ above do not pass the test of a preliminary objection. The tried and tested definition of a preliminary objection can be found in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 where Law JA, stated:

“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 off the suit.”

3. It follows from the above holding that any Preliminary Objection raised on disputed facts or one which seeks the court to exercise discretion cannot be a proper Preliminary Objection.
4. Consequently, the objection ‘c’ which seeks the court’s finding that the plaintiff suit is bad in law or that it does not disclose any reasonable cause of action against the 2nd defendant, is not a proper Preliminary Objection.
5. Similarly the objection ‘d’ that seeks a finding that the plaintiff is guilty of inordinate and inexcusable delay in filing or amending its pleading fails the test of a preliminary objection.
6. What then remains for consideration is the two objections that is whether the plaintiff’s suit is caught by limitation as provided in Section 19 (1) and Section 4 (1) (a) of the Limitations of Action Act Cap 22.
7. Section 19 (1) of Cap 22 provides that no action can be brought to recover principal sum of money secured by a mortgage on land or to recover proceeds of sale of land after the end of 12 years from the date when the right to receive the money accrued. Section 4 (1) (a) of Cap 22 provides that no action can be brought after the end of 6 years from the date on which the cause accrued in action founded in contract, amongst others.
8. The plaintiff filed this action as an originating summons on **29th March 2002** as against **Sobhag H. Shah & V. Goswami Advocates**, the 1st defendant, who was then the only defendant.
9. By that claim, the plaintiff pleaded that it was a share holder of a company called **Fedha Investments Limited** (Fedha), holding 330 shares. Fedha was the registered owner of a parcel of land **LR No. 209/11331** (the property). A decision was made by the board of directors of Fedha to sell the property. During that sale transaction, the plaintiff was represented by the 1st defendant while Fedha was represented by **Samson Masaba Munikah T/A Munikah & Company Advocates**, 2nd defendant.
10. Plaintiff further pleaded that the 1st defendant released the title of the property to the 2nd defendant. The 2nd defendant represented Fedha in the sale of the property on **31st December 1993** to National Social Security Funds for **kshs 65 million**.
11. The plaintiff by its amended plaint, amended on **24th February 2014**, joined the 2nd defendant in this action.
12. The plaintiff’s claim against the 2nd defendant is that the 2nd defendant gave an undertaking not to release the title of the property without the 1st defendant’s consent and also undertook to release 33% of the sale proceeds to the 1st defendant. The plaintiff has pleaded that the sale proceeds was not released to him. The plaintiff prays for judgment against both the defendant jointly and severally for ksh 21,450,000 plus general damages.
13. That is the claim the 2nd defendant has objected to on the basis that it is time barred.
14. In my view, the 2nd defendant in raising that objection has fallen into error. I say so because the plaintiff filed its suit on **29th March 2002**. The amount the plaintiff seeks by this suit accrued on **December 1993**. The plaintiff, it will be seen filed this case 9 years after the amount accrued. It follows that section 19 (1) of Cap 22 does not apply to this suit.
15. Further the objection that the claim is caught by the provisions of Section 4 (1) (a) of Cap 22 also fails because the plaintiff’s case is not founded in contract as submitted by the 2nd defendant.
16. It follows therefore that the 2nd defendant’s preliminary objection dated **25th July 2014** must and

does fail. It is dismissed with costs to the plaintiff. Orders accordingly.

17. Finally this is a very old case which was filed in the year 2002. At the reading of this ruling the court will require that the parties do comply with Case Management Conference so that a hearing date may be fixed.

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE