



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC. NO. 220 OF 2018**

**SALIM MOHAMED SALIM TWESHE.....PLAINTIFF**

**VERSUS**

**KHALID SALIM NAAMAN**

**SAID SALIM NAAMAN**

**ABDULNASSIR NAAMAN**

**TOBANI SALIM NAAMAN**

**FARID SALIM NAAMAN**

**AL AMIN SALIM NAAMAN.....DEFENDANTS**

**RULING**

1. This ruling is in respect of the defendants preliminary objection dated 25<sup>th</sup> September, 2020 seeking for the dismissal of the plaintiff's suit on the grounds that the claim is time barred as it is based on a contract of sale executed on 14<sup>th</sup> May, 1993.
2. By the plaint dated and filed on 2<sup>nd</sup> October, 2018, the plaintiff has brought this suit against the defendants jointly and severally seeking the following reliefs:
  - a. **A declaration that the plaintiff being a lawful purchaser of Title No. 539/111/MN (T/140) situate at Mtwapa within Mombasa County of the Republic of Kenya has an overriding interest in the parcel of land and therefore he is the legal owner of the land.**
  - b. **An order of Mandatory Injunction do issue compelling the defendant to execute and effect a transfer in favour of the plaintiff over title no. 539/111/MN (T/140) situate at Mtwapa within Mombasa County of the Republic of Kenya.**
  - c. **In the alternative, an order compelling the Registrar of titles Mombasa to dispense with consent of the defendants and to execute and effect a transfer in favour of the plaintiff over title no.539/111/MN (T/140) situate at Mtwapa within Mombasa County of the Republic of Kenya.**
  - d. **Costs of the suit.**
  - e. **Any other relief the court deems fit to grant.**
3. The plaintiff's claim as pleaded is that sometime on the 14<sup>th</sup> May, 1983, the plaintiff bought Plot No. 539/111/MN (T/140) belonging to the defendants late mother, Ms. Mosa Toban through her authorized agent Ms. Mtwapa properties Limited. The plaintiff states that upon execution of the agreement, he paid the entire purchase price of Kshs.7,000.00. That pursuant to the sale agreement the defendants were to execute and effect transfer instruments in favour of the plaintiff upon the plaintiff procuring a deed plan for the said plot. The plaintiff states that on 9<sup>th</sup> April 1990, he did procure a deed plan and notified the defendants to execute and effect transfer instruments in his favour but the defendants declined to do so. The plaintiff states that the defendants have breached the terms of the agreement by failing to execute and effect transfer instruments in favour of the plaintiff.

4. In their statement of defence dated and filed on 13<sup>th</sup> December, 2018, the defendants have denied the plaintiff's claim. The defendants have now raised a preliminary objection to have the plaintiff's suit struck out and/or dismissed on the grounds that the suit is time barred.

5. Mr. Khatib, learned counsel for the defendants submitted that the suit, which is based on a contract, was filed after 35 years. The defendants' counsel submitted that under Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya, a claim based on a contract has to be filed within 6 years from the date the contract was signed. He further submitted that no leave has been sought to file the claim out of time and therefore the suit ought to be struck out with costs to the defendants. Counsel added that even a declaration over land must be brought within 12 years. That the suit having been filed after 35 years from the date the contract was signed cannot be sustained and urged the court to allow the preliminary objection and strike out and/or dismiss the plaintiff's suit with costs.

6. Mr. Chamwada, learned counsel for the plaintiff submitted that the preliminary objection as raised does not meet the threshold of a preliminary objection in the case of **Mukisa Biscuits Co. Ltd –v- West End Distributors Limited (1969) EA 697**. Counsel submitted that the averments in paragraph 3 of the plaint are disputed in the defence. The plaintiff's counsel submitted that the suit is a declaratory suit and not a contractual claim and therefore it should be allowed to go to trial.

7. I have considered the pleadings filed, the preliminary objection raised and the rival submissions made. The main ground of objection is that the plaintiff's suit against the defendants is time barred for reasons that it offends the provisions of Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya. Section 4 of the Limitation of Actions Act provides as follows:

**“4 (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;”**

8. Section 7 of the same Act 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 of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

9. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a “demurrer”. In my view, the defendants' preliminary objection fits the definition of a preliminary objection per the leading case of Mukisa Biscuits Manufacturing Co. Ltd (supra). In that case, Law J. A. stated a preliminary objection to be thus:

**“So far as I am 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 objection 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 the contract giving rise to the suit to refer the dispute to arbitration.”**

10. In the same case, Sir Charles Newbold, President stated as follows:

**“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.”**

11. In this case, the defendants do not seek the exercise of judicial discretion. What the preliminary objection seeks to do is determine the issue whether there is a cause of action in limine. It is well taken because if it succeeds the court will be saved the cost of a lengthy trial and attendant expenses on either side.

12. The cause of action in this case is indicated to have arisen on 14<sup>th</sup> May, 1983. The suit was filed on 2<sup>nd</sup> October, 2018 which was far beyond the six years period within which an action founded on contract may be brought and also beyond the twelve years within which an action may be brought for the recovery of land. From the above provisions of the law, it is evident that the plaintiff's suit herein is statute barred. In this case, the plaintiff argues that the time the cause of action accrued is contested and therefore the objection before court is not on a pure point of law. However, in my view the matters raised are purely on points of law and in particular the issue that the suit is caught by limitation of time. From the pleadings and especially the plaint, it is clear that the plaintiff's claim is grounded on a contract which arose in the year 1983. The court does not require any evidence to arrive at a finding that the suit is caught by limitation of time. Am alive to the fact that at this stage, the court cannot investigate on some facts as to when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. I am only beholden to look at the pleadings as I have done in the instant case.

Having looked at the pleadings herein, I am persuaded that the suit herein is time barred. Accordingly, I find that the preliminary objection herein is merited and the same is upheld.

The upshot is that the plaintiff's suit is struck out with costs to the defendants.

13. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 19<sup>th</sup> day of October**

2020.

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Yumna Court Assistant

**C.K. YANO**

**JUDGE**