

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 141 OF 2014

ALFRED BARASA OKEDO..... PLAINTIFF

= VERSUS =

FRANCIS JUMA BULUMA1ST DEFENDANT

LOUS ANGURA OTWANI.....2ND DEFENDANT

R U L I N G

1. The 2nd defendant raised a Preliminary Objection under section 4(1)(a) of the Limitation of Action Act Cap 22 that the suit is time barred. Mr. Ipapu learned counsel for the 2nd defendant submitted that the suit is founded on the sale of a land agreement as pleaded in paragraph 4 of the amended plaint. That since it is a claim on contract which was executed on 3rd August 1984 and choses of action on contract are limited to six years the time for bringing the claim thus expired in 1990.

2. The plaintiff's counsel opposed the preliminary objection stating that the 2nd defendant was registered on September 2018 during the pendency of this suit. That it is this entry which necessitated the inclusion of the 2nd defendant to these proceedings. That the 2nd defendant has no interest in the agreement of 1984 hence cannot sustain a preliminary objection premised on that agreement. The plaintiff added that at paragraph 9 of the plaint, the date of discovery of the illegality is disclosed as 20/3/2014 which date according to him is when the cause of action arose. That paragraph 4 of the amended plaint cannot be read in isolation. He urged the court to dismiss the preliminary objection.

3. It is settled in law in the case of *Mukisa Biscuits Co. Limited Vs West End Distributors Ltd (1969) EA 696* that a preliminary objection qualifies as one if it does not require proof to ascertain it by way of calling additional evidence. This suit original commenced against the 1st defendant only. The 2nd defendant was introduced by way of amendment pursuant to the order of this court given on 24th June 2019 granting leave to effect the amendment.

4. The claim against the 2nd defendant is set out in paragraph 9B, 10 and 12 of the amended plaint. Paragraph 10 listed the particulars of mistake, fraud and illegalities of the 1st and 2nd defendants *inter alia*:

10(a) purchasing 0.052ha and acquiring 1.1ha.

10(j) selling of 1.1ha of land parcel L.R S.Teso/Angoromo/1601 unprocedurally and while this suit is pending.

The plaintiff therefore prayed for cancellation of the 2nd defendant's title and an order of permanent injunction to issue against both.

5. The plaintiff in opposing the preliminary objection submitted that the 2nd defendant became registered as owner of the suit land on September 2018 which then necessitated the amendment of the pleadings to bring him on board. The claim against the 2nd defendant was thus generated by his acquisition of the suit property in September 2018 and not earlier. I am persuaded by the plaintiff's submission that since the 2nd defendant was not party to the agreement of 1984, he cannot rely on it to raise the issue of limitation of actions.

6. Further the plaintiff submitted that he discovered the fraud about 2013/2014 and filed the suit in 2014. The issue raised by the 2nd defendant on whether the plaintiff ought to have discovered the fraud earlier or not i.e. whether the plaintiff was indolent is a question of fact which can only be proved by calling evidence. Once the question of fact requiring proof comes in to play, the preliminary objection ceases to be a pure point of law thus falls before the threshold set in the *Mukisa Biscuits'* case.

7. Consequently, I am not satisfied that the preliminary objection raised herein is merited on the two accounts discussed herein above. The same is hereby dismissed with costs to the plaintiff.

Dated, signed & delivered at BUSIA this 3rd day of Dec., 2020.

A. OMOLLO

JUDGE