



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 174 OF 2018**

**(Formerly Nairobi ELC Case No. 54 of 2014)**

**ESTHER WAMBUI NJAU.....PLAINTIFF**

**VERSUS**

**NGONG BUTCHERS COOPERATIVE SOCIETY LTD.....DEFENDANT**

**RULING**

What is before Court for determination is the Defendant's Notice of Preliminary Objection dated the 4<sup>th</sup> February, 2019 on the following ground:

1. That the Plaintiff's suit is time barred under the doctrine of laches and that the said suit is extinguished by the effluxion of time having been filed out of time without the leave of court.

Both the Plaintiff and the Defendant filed their respective submissions, which I have considered.

**Analysis and Determination**

Upon perusal of the Notice of Preliminary Objection dated the 4<sup>th</sup> February, 2019 including the parties' submissions, the only issue for determination is whether the Plaintiff's suit is time barred and should be dismissed.

The Defendant contends that the Plaintiff's suit is time barred and was filed without leave of court. It relied on section 4(1) (a) of the Limitation of Actions Act and submitted that the dispute herein was founded on contract and yet the suit herein was commenced after 6 years. It relied on various cases including **Charles Njihia Ndungu V Mercy Wamaitha Kaburi (2018) eKLR**; **Diana Katumbi Kiio V Reuben Musyoki Muli (2015) eKLR**; and **Patrick S.K Kimiti V John Ngugi Gachau & Another (2015)** to support its argument.

The Plaintiff opposed the Notice of Preliminary Objection and submitted that a preliminary objection cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion. She relied on the cases of **Quick Enterprises Ltd Vs Kenya Railways Corporation, Kisumu High Court, Civil Case No. 22 of 1999**; **Pan African Builders and Contractors Ltd and Anor Vs Jogdish Sing, Civil Appeal No. 52 of 1995**; and **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** to buttress her arguments.

From the Plaintiff filed on 9<sup>th</sup> March, 2014, the Plaintiff is seeking specific performance from the Defendant and referred to an agreement dated the 3<sup>rd</sup> December, 1997 which she entered into to purchase the suit land. The Plaintiff further averred that she paid the firm of messrs Obadia Thiongo Ngwiri & Company Advocates for valuation and survey fees after which the Defendant released the title to the suit land to her. She also contended that she had already taken possession of the land. The Defendant denied entering into a Sale Agreement with the Plaintiff but at paragraph 10 of the Defence, it averred that there had been irregular dealings with its land, which culminated into referring the issues to the Ministry of Cooperative and the Plaintiff's claim falls within this category. It is the Defendant's claim that the suit was filed 14 years after the Sale Agreement without leave of Court and the same should be dismissed.

Inssofar as the Defendant claims the dispute herein is based on contract, I deem it, as one for recovery of land since the suit land was the subject of the said contract and find that it is governed under the provisions of Section 7 of the Limitation of Actions Act which provides that: **'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.'**

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held that **'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 points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop. ‘**

In the current case and based on the facts as pleaded, I note that the transaction commenced in 1997, while other fees were paid in 2001 which facts are denied by the Defendant. From the pleadings, I find that the Court has to first ascertain whether there was indeed a transaction; whether the Defendant had title; when the cause of action arose before determining if the suit is statute barred or not. Given that these issues can only be determined once viva voce evidence is adduced, I opine that the issues raised in the Preliminary Objection are premature and can be dealt with at the judgment.

In the circumstances, I find the Preliminary Objection unmerited and will proceed to strike it out.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajjido this 18th day of September, 2019.**

**CHRISTINE OCHIENG**

**JUDGE**