



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 707 OF 2017**

**JOHN KIARIE WAWERU.....1<sup>ST</sup> PLAINTIFF**

**PAUL MBUGUA WAWERU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**EMMA NJOKI NJOROGE.....DEFENDANT**

**RULING**

What is before me for determination is the Defendant’s Notice of Preliminary Objection dated the 8<sup>th</sup> April, 2019 where she avers that the suit is statute barred and contravenes the mandatory provisions of sections 4 and 7 of the Limitation of Actions Act. Further, that the cause of action offends the then provisions of section 6 of the Land Control Act as no consent of the Land Control Board was sought and granted.

The Defendant filed her submission but the Plaintiff failed to do so.

The only issue for determination is whether the suit is statute barred.

The Defendant in her submissions reiterated her claim above and relied on the cases of **Esther Gachambi Mwangi V Samuel Mwangi Mbiri (2013) eKLR; Shakespeare Investments & Another V Paul Kipsang Kosgei (2006) eKLR and In Re Estate of Joseph Gitonga Migwi (Deceased) (2008) eKLR** to buttress her arguments.

Section 7 of the Limitation of Actions Act 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 **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows:’ A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. ‘**

These provisions requires a party seeking a claim over land to institute it within twelve years. I note the fulcrum of this suit revolves around a claim over land which had to be instituted within 12 years. However, in the Sale Agreement dated the 12<sup>th</sup> September, 2003 at clause 3 and 4 it referred to the completion of the said Agreement to be when the vendor obtains a Certificate for Confirmation of Grant in respect to the deceased owner’s estate. The Defendant had annexed the said Certificate of Confirmation of Grant dated the 10<sup>th</sup> June, 2008 in her documents. I note the Defendant entered into the Agreement while she had not obtained Letters of Administration Intestate. It is trite law that in instances where the subject of a contract involves the estate of a deceased person, time will only begin to run once the said party obtains Certificate for confirmation of Grant. In this instance, I find that time only begun to run on 10<sup>th</sup> June, 2008 which means it will lapse on 10<sup>th</sup> June, 2020. In the circumstances and relying on the above cited legal provisions, I find that the claim herein is not statute barred.

On the issue of lapse of the contract for lack of consent of Land Control Board. I hold that since the Plaintiffs’ are in occupation of the land, the issue of consent can only be ascertained at a full hearing and not at this interlocutory stage. I further note that the Defendant has pleaded fraud as against the Plaintiffs which fact they have denied. The said averments of fraud can only be determined when the suit is set down for hearing and not at this stage.

I opine that the Defendant seeks to rely on technicalities which offends the provisions of Article 50 and Article 159 (2) (d) of the Constitution.

It is against the foregoing that I find the Preliminary Objection dated the 8<sup>th</sup> April, 2019 unmerited and will proceed to dismiss it.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 21<sup>st</sup> day of November, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Kamanda holding brief for Gakaria for plaintiff/respondent

Oseko holding brief for Muriithi for respondent/applicant

Court assistant-Mpoye