



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 623 OF 2017

(FORMERLY MILIMANI CIVIL SUIT NO. 467 OF 2016)

LEAH GATHONI KINYARI.....PLAINTIFF

VERSUS

ESTHER NJERI KAMAU.....1ST DEFENDANT

COUNTY GOVERNMENT OF KAJIADO.....2ND DEFENDANT

RULING

What is before Court for determination is the 2nd Defendant's Notice of Preliminary Objection dated the 27th September, 2016 where he raises the following grounds that:-

1. This Honourable Court lacks jurisdiction to hear the suit as framed.
2. This Honourable Court lacks jurisdiction to hear the claim as raised by the Plaintiff.
3. The entire suit as filed by the Plaintiff is an abuse of the process of the Court.
4. The entire suit as filed by the Plaintiff offends the mandatory provisions of the Law of Limitations Act Cap. 22.
5. The jurisdiction of this Honourable Court is not invoked at all.

AND the 2nd Defendant prays that the Plaint dated the 24th April, 2016 be struck out with costs.

The Defendants filed their respective written submissions but the Plaintiff failed to do so despite being granted leave of 30days from 2nd November, 2017 to file it.

I have considered the submissions on record.

Analysis and Determination

It is the Defendants' contention that the suit herein is statute barred as the cause of action arose in 1984 as per averments in paragraphs 7, 12 and 13 of the Plaint. Further that no leave of court was obtained before the suit was filed. The Plaintiff did not file a reply to the Notice of Preliminary Objection nor written submissions.

Upon perusing the pleadings including the submissions filed herein, I find that the only issue for determination is whether this suit is statute barred.

The 1st Defendant in her submissions relied on the Case of **Owners and master of the motor vessel "joey" v owners and masters of the motor tugs "barbara" and "steve b" [2007] eklr** where Nyarangi JJA 'Nyarangi, J.A graphically put it thus:-

"..... I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter

before it the moment it holds the opinion that it is without jurisdiction.”

She also relied on the case Thuranira Karauri Vs. Agnes Ncheche [1997] eKLR – Civil Appeal No. 192 of 1996. At page 2/3, 3rd paragraph the Court state that:’ **As the issues of limitation goes to jurisdiction, we shall deal with it first. The Plaintiffs answer to the Defendant’s plea that the claim was time – barred was that she had obtained the necessary extension from the Superior Court. She did not produce any such order and none was shown either to the Judge or to the Counsel for the Defence. We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction. The order for extension, if indeed obtained, as alleged, should have been served on the Defendant with the Plaint. And since it was not, the Plaintiff’s Advocate was under a duty to prove its existence as part of the Plaintiff’s case at the trial. Since this was not done, the Defence of limitation raised by the Defendant in his Defence stood, and the Plaintiff should have been non suited forever. In view of this failure, the Plaintiff’s suit was incompetent and should be struck out. This finding alone is sufficient to dispose of this appeal but as there are other serious errors that occurred, we find it necessary to deal with them. ‘**

Paragraph 7 of the Plaint states as follows:’ **The Plaintiff avers that on or about the year 1983 upon completing construction of her permanent house on the suit property, she leased the same to the 1st Defendant at the rate of Kshs.3,000/= per month which the 1st Defendant paid until the year 1984 when she refused and/or neglected to pay alleging that the property had been transferred to her pursuant to a hand written agreement which the Plaintiff was a stranger to.’**

I note the Plaintiff was well aware of the alleged action from 1984 and did not institute a suit but instead opted to resolve the dispute amicably.

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’.**

Section 9 (1) of the Limitation of Actions Act further stipulates that: *‘Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right to action accrues on the date of the dispossession or discontinuance. ‘*

From a reading of paragraph 7 of the plaint, it is quite evident that the right of action to recover the suit land first accrued to the Plaintiff in 1984, yet she instituted the suit in 2016, which is 16 years later. The Plaintiff has even admitted being dispossessed of the suit land by the 1st Defendant from 1984 to date. All this point to the fact that the Plaintiff should have instituted this suit latest by 1996. Further, the Plaintiff has not indicated in her pleadings as to whether she sought leave of court before instituting this suit and there seems to be no evidence of it on record. I note that the Plaintiff never filed any response to controvert the averments in the Notice of Preliminary Objection.

It is against the foregoing that I find that the Plaintiff’s suit is incompetent in court as she failed to obtain leave before instituting it. In relying on the authority above and section 7 of the Limitation of Actions Act, I will uphold the Defendants’ Preliminary Objection and strike out the Plaint and dismiss the suit. Costs are awarded to the Defendants.

Dated Signed and Delivered in open court at Kajiado this 8th day of February, 2018

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Parties absent