



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 287 OF 2016

DANIEL KIPCHIRCHIR KOMEN.....PLAINTIFF

VERSUS

ISAAC KIPKEMEI TERER.....1ST DEFENDANT

PAULS COOKIEMANS.....2ND DEFENDANT

RULING

The 2nd defendant has filed a Notice of Preliminary Objection to the effect that the plaintiff's suit is statutorily time barred and therefore, should be struck out. Mr. Ngugi, counsel for 2nd defendant argues that the basis of the suit is an agreement between Virginia Wangui Kamau who is not party to this suit and the Pauls Cookiesman the 2nd defendant. According to the 2nd defendant, the agreement is dated 21.4.2008 hence the suit was to be brought within 6 years. The suit was brought in 2016, and therefore a period of 8 years has lapsed. There is no specified completion period and that the transaction was subject to the Law Society conditions of sale. In a nutshell he submits that the suit is time barred.

Mr. Langat, Advocate for 1st defendant argues that section 4(1) of the Law of Limitation Act Cap 22 Laws of Kenya is clear on action based on contract. There is no application for extension of time.

The plaintiff has not made submission in response to the preliminary objection. He was served but never appeared for hearing and therefore the preliminary objection was not challenged

I have considered the preliminary objection and submission of counsel for the 2nd defendant who raised the preliminary objection and counsel for the 1st defendant and do find that the plaintiff brought this suit based on fraud and not contract. The particulars of fraud against the 1st defendant are:

- (a) Willfully, acting in his capacity as an advocate with the object of defrauding the plaintiff, receiving cheques and presenting of the said cheques for collection.***
- (b) Conspiring and/or colluding with the 2nd defendant with the object of defrauding and injuring the plaintiff in its credit by making payments of the said cheques, knowing very clearly that the said transaction was a sham.***
- (c) Failing to inform the plaintiff that the defendant was a beneficiary of the sale agreement and including his name as part owner of the property.***
- (d) Wrongfully and maliciously debiting the plaintiff's current account with the amount of the said cheques.***
- (e) Failing and/or maliciously neglecting to give the plaintiff an account of how the money was spent.***
- (f) Failing and/or maliciously avoiding to give any assistance, or maliciously withholding any assistance, to the plaintiff in its endeavours to get back his money or parcel of land.***

The particulars of fraud against the 2nd defendant are:

- (a) Conspiring and/or colluding with the 1st defendant with the object of defrauding and injuring the plaintiff in its credit by making payments of the said cheques, knowing very clearly that the said transaction was a sham.***

(b) Wrongfully and maliciously debiting the plaintiff's current account with the amount of the said cheques.

This court finds that fraud is a tort and any action based on fraud should be brought within 3 years. It is clear from the pleadings that the alleged fraud was committed in the year 2008 and therefore, time barred as section. Even if it is argued that this matter is based on contract, the same is time barred having been filed more than 6 years after the cause of action accrued. Section 4 of the Limitation of Actions Act provides as follows; -

(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;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

(2) an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

provided that an action for libel or slander may not be brought after the end of twelve months from such date.

The upshot of the above is that the preliminary objection is upheld and the suit herein is dismissed with costs.

Dated and delivered at Eldoret this 30th day of May, 2018.

A. OMBWAYO

JUDGE