



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**E.L.C NO. 270 OF 2017**

**KURIA MWANGI - PLAINTIFF**

**VS**

**SAMUEL KIRUMBA KARIUKI - 1<sup>ST</sup> DEFENDANT**

**MARGARET WAIHERA KARIUKI - 2<sup>ND</sup> DEFENDANT**

**TERESIA WAMBUI KARIUKI - 3<sup>RD</sup> DEFENDANT**

**FRANCIS GACHEHA KARIUKI - 4<sup>TH</sup> DEFENDANT**

**MARY WANJIKU KARIUKI - 5<sup>TH</sup> DEFENDANT**

**PETER KIMANI KARIUKI - 6<sup>TH</sup> DEFENDANT**

**(Suing in their capacities as legal Representatives of KARIUKI**

**MANUTHU ALIAS KARIUKI KIMANI DECEASED)**

**JOSEPH KURIA MWANGI - 7<sup>TH</sup> DEFENDANT**

**RULING**

1. By an amended Plaint dated the 18/5/17 the Plaintiff filed suit against the Defendants seeking, *inter-alia*, transfer of LOC 18/Marumi/213 or alternatively a refund in the sum of Kshs 41,000/- plus interest from the 1<sup>st</sup> -6<sup>th</sup> Defendants. It is the Plaintiffs case that in 1983/4 he entered into an agreement with Kariuki Manuthu *alias* Kariuki Kimani, the father of the 1<sup>st</sup> -6<sup>th</sup> Defendants (now deceased) for the sale of the suit land in which he paid the sum of Kshs 41,000/- leaving a balance of 14,000/- payable during the transfer.

2. The Plaintiff states that before entering into the previously mentioned agreement, he had been put in possession which possession he has to-date. That upon the demise of the Vendor, the 1<sup>st</sup> and 3<sup>rd</sup> Defendants obtained a grant of letters of administration and thereafter disposed the suit land to the 7<sup>th</sup> Defendant whereupon a title was issued in the 7<sup>th</sup> Defendant's name. That the Plaintiff was left out as a creditor of the estate of the late Kariuki Manuthu.

3. The 1<sup>st</sup> -6<sup>th</sup> Defendants are Children of the Vendor. In their statement of defence, they pleaded that the suit land has been conveyed to the 7<sup>th</sup> Defendant by the successors in title of the Vendor. They undertook to raise a preliminary objection to the suit for *inter-alia* being time barred. They denied that the Plaintiff was in possession of the suit land nor a creditor of their fathers' estate.

3. The 7<sup>th</sup> Defendant upon being enjoined to the suit filed a defence in which he pleaded that he is bonafide purchaser for value without notice from the 1<sup>st</sup> -6<sup>th</sup> Defendants and denied the Plaintiffs claim. He averred that he was in possession of the suit land. He raised two issues; that the Plaintiffs claim is time barred and null and void on account of want of land control board consent to transfer the suit to the Plaintiff.

4. On the 31/1/18 the 7<sup>th</sup> Defendant fired the first salvo by filing a preliminary objection on the following grounds;

a. That this honourable Court has no jurisdiction whatsoever to hear and determine this matter since the suit is time barred under section 7 of the limitation of Actions Act having been filed out of time without the leave of the Court noting that in his plaint the

Plaintiff claims specific performance of a contract (agreement for sale) executed in the years 1983/4 or thereabouts.

b. That the suit herein is fatally defective as it was filed extremely out of time after a delay of at least 22 years without leave of the Court and it should be struck out forthwith in its entirety as it is barred by the doctrine of laches.

6. The 1<sup>st</sup> – 6<sup>th</sup> Defendants followed suit on the 7/2/18 and filed their Preliminary Objection on the following grounds;

a. The plaint as filed is statutory time barred under section 4(1) (a) of the Limitations of Actions Act, Cap 22 Laws of Kenya.

b. The 1<sup>st</sup> -6<sup>th</sup> Defendant join issue with the 7<sup>th</sup> Defendant' Notice of Preliminary objection dated the 23/1/18 and also invoke section 6 & 8 of the Land Control Act Cap 302 Laws of Kenya.

7. In their submissions the Plaintiffs gave the history of the transaction as thus; that the suit land was registered in the name of Vendor (now deceased) on 12/6/63; on 24/12/83 the Vendor sold the suit land to the Plaintiff at an agreed price of Kshs 45,000/-. He was paid Kshs 5,500/- leaving a balance of 39,000/-. The Plaintiff was put into possession. The agreement was written by the 1<sup>st</sup> Defendant and witnessed by the 6<sup>th</sup> Defendant; on 7/4/84 the vendor acknowledged receipt of Kshs 15,000; on 16/2/13 the vendor acknowledged another Kshs 24,000/-.

8. The Plaintiff argued that the since the suit was filed on the 6/2/17, 4 years after the last payment of the purchase price. That on that account the suit is therefore not time barred. On the second issue of want of consent of the Land Control Board, the Plaintiff relied on the case of **Macharia Mwangi Maina & 87 others Vs Davidson Mwangi Kagiri CA 26 & 27 of 2011.**

9. On the issue of time bar, the 7<sup>th</sup> Defendant argued that the Plaintiff is guilty of laches and the claim is statute barred pursuant to the provisions of section 7 of the Limitation of Actions Act. That the alleged agreement for sale between the Plaintiff and the 1-6<sup>th</sup> Defendants father was executed in 1983/4 and the Plaintiff has filed suit 34 years later after the cause of action accrued. Further that the Plaintiff did not file a protest in the succession cause to register his claim as a creditor. Relying on the equitable maxim of equity aids the vigilant and not he indolent, the 7<sup>th</sup> Defendant argued that the Plaintiff has been caught up with doctrine of laches.

10. The 7<sup>th</sup> Defendant further contended that pursuant to section 4(1) of Limitation of Actions Act, the 6- year limitation period for the purported cause of action expired in 1990 or thereabouts and there is no evidence that the Plaintiff obtained leave of the Court to file the current suit. He termed the suit hopeless having been filed in 2017. Further that the transaction being a disposition of land for which consent of the Land Control Board ought to have been obtained, the sale became null and void and therefore the claim for specific performance is not available to the Plaintiff.

11. The 1<sup>st</sup> -6<sup>th</sup> Defendants associated themselves with the written submissions of the 7<sup>th</sup> Defendant. They did not file any submissions.

12. It is trite that a Preliminary Objection can only be raised as a pure point of law. See the case of **Mukisa Biscuit Co. vs West End Distributors (1969) EA 696.** That authority has been approved by our Supreme Court in several cases including **Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR, Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others [2014] eKLR** and **Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR** where the Court stated: -

"[14] .."a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... 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'."

[15] Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

13. In my own words a Preliminary Objection is a pure question of law arising or capable of being clearly discerned from the pleadings without the necessity of ascertaining any facts in the case or requiring exercise of any discretion by the Court.

14. Sections 4(1)(a) and 7 of the LAA provide as follows

:- 4.(1)(a):-

“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,

Section 7:-

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..."

15. The above provisions refer to the date on which 'the cause /right of action accrued'. A 'cause of action' is:-

"... every fact which is material to be proved to entitle a party to succeed and every fact which the Defendant would have a right to traverse." **per Aldous LJ in Ord vs Upton [2000] 1 All ER 193.**

Lord Esher, M.R. in the case of **Read vs Brown (1888), 22 QBD 128**, defined it as:-

“Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the Court”.

Lord Diplock in **Letang vs. Cooper [1964] 2 All ER 929 at pg 934** opined:-

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.”

16. A cause of action in contract arises from breach of the contract and not at the time, it is executed. According to the author in the Journal of **International Banking and Financial Law: " What's the Limit" (2007) 11 JIBFL 642:-**

"In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."

17. In the instant case, there is contestation between the parties as to when the cause of action accrued. From the evidence, the Court would call for evidence to determine when the breach of contract occurred as to create a cause of action. The Court would have to look at the conduct of the parties at the execution of the agreement of sale, during the subsistence of the contract at the purported point of breach. It is on record that the parties are contesting the sale agreement. It is alleged on record that consideration was being paid in instalments. Possession of the property is also hotly contested. In these circumstances, the Preliminary Objection ceases from being a pure point of law.

18. It is submitted by the Plaintiff that he was put in possession in 1983 and therefore has acquired equitable possessory rights in the land. That pursuant to the decision in **Macharia Mwangi Maina & 87 others Vs Davidson Mwangi Kagiri CA26/27 of 2011**, the consent of the land control board is not required. The Defendants on the other hand have contended that the agreement is null and void for want of consent. These are matters in contention would call for evidence to determine whether indeed an equitable interest has been proved capable of protection under the law. Discretion of the Court is hereby called in aid. I rely on the case of **Mwangi & Another vs Mwangi, (1986) KLR 328**, where it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.

19. It is the Courts view that the cause of action arose after 2013 and even if it was, too considered a breach of contract the suit having been filed in 2017, was only 4 years later and well within the 6 years. Even if section 7 of Limitation of Actions Act is to be considered, 12 years has not lapsed from the date of the cause of action and therefore the suit is not time barred. Notwithstanding the foregoing, however, the cause of action can only properly be founded on the date the last instalment was paid. This can only be ascertained by evidence.

20. In view of my findings above the Preliminary Objection is unmerited and is hereby dismissed with costs to the Plaintiff.

It is so ordered

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26<sup>TH</sup> DAY OF JULY 2018**

**J.G. KEMEI**

**JUDGE**

**Ruling read in open Court in the presence of;**

Mr Ndegwa HB for Mr Gacheru for the Plaintiff.

1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant Mr Mwaniki HB for Mr. Kirubi

4<sup>th</sup> Defendant

5<sup>th</sup> Defendant

6<sup>th</sup> Defendant

Mr. Mwaniki HB for Mr Macharia for the 7<sup>th</sup> Defendant

Mr. Wainaina, Ms.Irene and Ms Njeri, Court Assistants