



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 436 OF 2017

DAVID MWANGI NGUGI - PLAINTIFF

VS

FRANCIS NDUNGU MUTURI - DEFENDANT

RULING

1. The Plaintiff filed suit against the Defendant seeking for special damages of Kshs. 74,000/= and interest from the same from the 4/5/99.
2. The Defendant has in Para 3 of the Defence admitted selling the land to the Plaintiff and averred that the Plaintiff took possession of the plot and has been in possession ever since. He undertook to raise a Preliminary Objection which Preliminary Objection was filed on 6/6/18 on the following grounds;-
 - a. The cause of action arose on 4/5/1999 and therefore the claim is time barred.
 - b. The cause of action is a contract for purchase and the Court therefore lack jurisdiction.
 - c. The Defendant shall therefore seek that the suit be dismissed with costs.
3. The Defendant submitted that the claim being founded on contract between the parties arose on 4/5/99 and therefore the suit ought to have been filed on 3/5/05. That having been filed 13 years later is therefore time barred by virtue of 4(1) (a) of the Limitation of Actions Act. That the letters dated 14/9/16 from the Defendant to the Plaintiff did not extend time or renewed the contract.
4. Secondly the Defendant submitted that the transaction having arisen out of contract, is not a matter that the Environment and Land Court has jurisdiction. He cited the case of **Suzanne Achieng Butler & 4 Others vs. Red Hill Heights Investments Ltd & Another Commercial Case No. 2 of 2016**.
5. The Plaintiffs submitted that the claim is not time barred based on the acknowledgement of the amount vide letter dated 14/9/16. Further that the Environment and Land Court Act has the power to determine the case.
6. The key issues for determination are; Whether the Court has jurisdiction to determine the suit; secondly whether the suit is time barred.
7. As to whether the Preliminary objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a preliminary objection as follows;

“.....a “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

8. **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** stated as follows:

“a prima facie case in a civil application includes but is not confined to a genuine and arguable case.” It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

9. Section 39(1) of Limitation of Actions Act provides as follows;

“A period of limitation does not run if— (a) there is a contract not to plead limitation; or (b) that the person attempting to plead limitation is estopped from so doing”.

10. It is on record that the Defendant has admitted that he sold land to the Plaintiff. It is also on record that the Defendant’s lawyers wrote to the Plaintiff on 24/9/16 to the effect that the Defendant is considering refunding the purchase price of Kshs. 74,000/=. He is therefore estopped from claiming that the suit is time barred. By that act the Defendant acknowledged the debt and revived the claim arising out of the sale in 1999 that may have been become stale. The effect of that acknowledgement therefore breathe new life into an otherwise stale claim.

11. On the issue of jurisdiction of this Court Section 13 (2) (d) & (e) of Environment and Land Court Act is clear. It states as follows;

“(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land”.

The instant suit arises out of contract in land and therefore falls squarely within the jurisdiction of this Court.

12. The Preliminary Objection fails and is dismissed with costs to the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 29TH NOVEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Plaintiff– Absent

Defendant - Absent

Irene and Njeri, Court Assistants