



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.820 OF 2017

KIMANI KABOGO.....PLAINTIFF/APPLICANT

-VERSUS-

WILLIAM KABOGO GITAU....DEFENDANT/RESPONDENT/OBJECTOR

RULING

The Plaintiff herein *Kimani Kabogo* filed this suit on **22nd December 2016**, and sought for Judgment against the Defendant in the following terms:-

- a) Indemnity against all liability arising out of breaches by the Defendant on his duties to the Plaintiff arising out of his position as proprietor in trust for himself, the Plaintiff and his family of LR.Nos.12825/27, 12825/33 and 12825/34.**
- b) Kshs.387,875,000/= in damages.**
- c) Punitive damages**
- d) Interest**
- e) Any other or further relief as this Honourable Court may deem fit and just to grant.**

The Plaintiff alleged that on or about **3rd March 1998**, he was registered as the owner of **LR.No.12825/27** and **12825/34**, which he used as collateral to borrow **Kshs.10million** from **NIC Bank** and **LR.No.12825/33**, which he also used as collateral to borrow **Kshs.5million** from **ICDC** which loans he was unable to service due to exorbitant interest rates. He also alleged that sometime in **September 2000**, he sought the help of the Defendant who paid off the loan due to **NIC Bank** to avert the sale of **LR.No.12825/27** and **12825/34** by public auction. That the understanding was for the Defendant to hold the suit properties in trust for himself and the Plaintiff until such time when the properties would be sold at market value and/or developed and the proceeds was to be shared equally between the Plaintiff and the Defendant.

Further, the Plaintiff also sought the assistance of the Defendant in the **year 2003** to salvage **LR.No.12825/33**, which was in the verge of being auctioned by **ICDC**, for recovery of the said loan. That it was agreed that the Defendant was to recover the principal sum paid to offset the loan together with 20% interest and the balance of sale was to be shared equally.

However, in **2006**, when the Plaintiff sought to find out the status of the said properties from the Defendant so that they could reduce the oral agreement between them into writing, the Defendant avoided the Plaintiff. After, the plaintiff discovered that the Defendant alienated the said properties contrary and in breach of their oral agreement. Further, that the Defendant has evicted the Plaintiff from the suit property and has demolished their houses, coffee factory and the workers' camp leaving him and his siblings who were residing on the suit properties homeless and destitutes.

The Plaintiff alleged that the Defendant's conduct amounted to fraud and breach of trust and that the action of Defendant has resulted in loss and damage on the part of the Plaintiff to the tune of **Kshs.387,875,000/=** as stated in paragraph 9 of the **Plaint**.

The Defendant filed his statement of defence on **17th March 2017**, and denied the allegations made against him by the Plaintiff. He particularly denied the existence of any agreement to have the suit properties registered in his name to hold in trust for himself and the Plaintiff as alleged by him. He claimed that **LR.No.12825/27**, and **LR.12825/34**, were registered in his favour after **NIC Bank** sold them by **Private Treaty** in exercise of its **Statutory Power of Sale** to recover a loan owed by **Kenya Modern Digital Ltd** and guaranteed by the Plaintiff. However the Plaintiff consented to the sale by **Private Treaty** and signed the transfer at the request of **NIC Bank**. Further that **LR.No.12825/33**, was sold by **ICDC** in exercise of its **Statutory Power of Sale** to **Arcoverde (K) Ltd** and therefore the Plaintiff's claim against the Defendant is a gross abuse of the court process since the Defendant has no proprietary interest in **LR.No.12825/33**. Further, the Defendant does not owe the Plaintiff any proceeds of sale since he is not the registered owner of **LR.No.12825/33**. The Defendant denied

existence of any oral agreement between himself and the Plaintiff and he further contended that the Plaintiff has no claims over **LR.No.12825/27** and **LR.No.12825/34** as alleged by him.

Further, the Defendant alleged that the suit is statute barred under **Section 4** of the **Limitation of Actions Act**, Cap 22 Laws of Kenya and that the Plaintiff's suit offends the mandatory provisions of **Section 3(3)** of the **Law of Contract Act**, Cap 23 Laws of Kenya, as the Plaintiff's claim over the suit property is hinged on an alleged oral agreement. The Defendant urged the Court to strike out the Plaintiff's suit and/or the same be dismissed with costs.

On **19th October 2017**, the Plaintiff herein filed a **Notice of Motion** application under **Certificate of Urgency** and sought for the following orders:-

- 1) That the Honourable Court be pleased to grant prohibitory orders on LR.Nos.12825/27, 33 and 34 pending the determination of this suit.**
- 2) That the Honourable Court be pleased to grant an injunction restraining the Defendant, his employees, servants, agents and/or any other persons claiming through him from trespassing or developing or in any manner dealing with LR.Nos.12825/27, 33 and 34 pending the determination of this suit or order for maintenance of status quo.**
- 3) That the costs of this application be provided for.**

The application is premised on the following grounds:-

- 1) That the Defendant, his employees, servants and/or agents have broken ground on the suit properties in readiness for development of the properties therefore prejudicing and rendering nugatory the outcome of this suit.**
- 2) That the Plaintiff stands to suffer irreparable loss and damage unless the Defendant and his employees, servants, agents and/or assigns are restrained from initiating developments on the suit properties.**
- 3) That the Plaintiff stands to suffer irreparable loss and damage unless prohibitory orders are issued on the suit properties.**

The application is also supported by the affidavit of **Kimani Kabogo**, the Applicant herein who averred that the **doctrine of Lis pendens** and **Environment & Land Court Practice Directions** require that the *status quo* be maintained during the pendency of this suit. He alleged that the Defendant and his Co-Intended Defendant have broken grounds to develop the suit properties, a development he alleged will constitute **60 houses** to be sold at consideration of **30 Million** each, even though the Defendant has not put up any sign showing the nature of development. It was his contention that unless prohibitory orders are issued on the suit properties, he stands to suffer irreparable damage. Further that unless the Defendant and his Co-Intended Defendant, their agents, servants and employees are enjoined from trespassing thereon or dealing with the suit properties, the Plaintiff/Applicant and his Company stand to suffer irreparable damage. He urged the Court to allow the said application.

The instant **Notice of Motion** application is opposed by the Defendant/Respondent who filed **Grounds of Opposition** on **14th December 2017**, and stated as follows:-

- 1) That the court has no jurisdiction to hear and determine the matter as the Plaintiff's claim is statute barred under provisions of Section 4 of the Limitation of Actions Act. Cap 22 Laws of Kenya.**
- 2) That the Plaintiff has no proprietary interest in the suit properties as alleged or at all and therefore has no locus to seek any injunctive relief.**
- 3) That the Plaintiff has not tendered any evidence in support of the allegations contained in paragraph 6 of his Supporting Affidavit.**
- 4) That the application does not meet threshold and/or test set out in Giella..vs..Cassman Brown [1973] EA 385 for granting of injunctive orders.**
- 5) That the Plaintiff's application is without merit and should be dismissed with costs.**

Further, the Defendant/Respondent also filed a **Notice of Preliminary Objection** even dated and averred that:-

- i. That the Honourable Court has no jurisdiction to hear and determine the matter as the same is statute barred under the provisions of Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya.**
- ii. That the suit offends the mandatory provisions of Section 3(3) of the Law of Contract Act as the Plaintiff's claim over the suit property is premised on an alleged oral agreement. Consequently, the court has no jurisdiction to hear this suit.**

On **19th December 2017**, the Court directed that both the **Preliminary Objection** and instant **Notice of Motion** application be canvassed together by way of written submissions.

In compliance with the above directions, the **Law Firm of Njeru, Nyaga & Co. Advocates** for the Plaintiff/Applicant filed their written submissions on **22nd February 2018** and submitted that no legal agreements were drawn because the matter was urgent as the Plaintiff's suit properties were on the verge of being auctioned by the Bank.

On the issue of Jurisdiction, the Plaintiff alleged that **Section 4** of the **Limitation of Actions Act** is counteracted by **Section 20(1)** of the same Act and the Defendant is holding the suit property in trust for the Plaintiff/Applicant and therefore **Section 4** does not apply. Further that the evictions that led to the institution of this suit only happened months ago and therefore the suit is not time barred.

It was further submitted that **Section 3(3)** of the **Law of Contract** would not apply as the same Section does not affect the creation of **resulting, implied or constructive trust**. The Plaintiff relied on the case of **Bogani Properties Ltd...Vs...Fredrick Wairegi Karuri(2015) eKLR.**

On whether the Plaintiff has proprietary interest in the suit properties, it was submitted that the trouble the plaintiff had taken to repay the loan showed that he had an interest in the suit property. Further that the Defendant's action of negating the Oral Agreement he had entered with the family would amount to unjust enrichment. He relied on the case of **Samuel Kamau Macharia..Vs...Kenya Commercial Bank Ltd & Kenya Commercial Finance Co. Ltd** which established instances of unjust enrichment and awarded the Plaintiff their dues as against the Defendants. The Plaintiff also relied on the case of **Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358.**

On the part of the Defendant, the **Law Firm of Issa & Co. Advocates**, filed their submissions on **24th April 2018** and submitted that Plaintiff had pleaded tort of **fraud** and **breach** of trust arising from what happened in the **year 2006**. It was further submitted that the suit was instituted **10 years** after the alleged cause of action arose. The Defendant relied on the case of **Elijah Ntaiya...Vs...Lekinini Kulale & 3 Others (2008)**, where the Court held that **Limitation period where fraud is alleged starts to run when the said fraud was discovered**.

Further on the issue of jurisdiction, the Defendant relied on **Section 3(3)** of the **Law of Contract Act**. It was submitted that the absence of a written contract signed by both parties made the alleged transaction invalid. The Defendant relied on the cases of **Nitin Coffee Estates Ltd...Vs...United Engineering Works Ltd & Another (1986-1989) EA 281, Silverbird Kenya Ltd...Vs...Junction Limited & 3 Others and Kangatta Properties Company Ltd...Vs...Charity Njeri t/a Winacom Crossline Supplies & 4 others (2014)**, where the Courts had held that the absence of an Agreement for Sale signed by both parties in land transaction makes such sale in-operative and of no effect.

The Defendant submitted that since there was no written contract on the disposition of interest in the suit properties, the court had no jurisdiction to deal with the matter and the same should be struck out.

On whether the Plaintiff has established a *prima-facie* case, it was submitted that he failed to do so taking into account the definition of *prima-facie* case in **Mrao Ltd...Vs...First American Bank(2003)KLR 125**, which states:-

“So what is prima facie case? I would say that in civil cases it is a case in 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”.

Further, the Defendant relied on **Order 40 Rule 1** and submitted that though the onus of tendering evidence on the danger occasioned to the suit properties by the conduct of the Defendant was on the Plaintiff, he failed to do so.

Further, that the Plaintiff lacked any proprietary interest on the suit properties since the properties were sold to the Defendant by **NIC Bank** and **ICDC** in exercise of their **Statutory Power of Sale** and the Plaintiff only signed the transfer forms.

The Defendants relied on the case of **Venture Capital & Credit Ltd...Vs...Consolidated Bank of Kenya** and **Henry Githuku Githongo...Vs...Marubu Mwangi & 4 Others (2013) eKLR**, where the Court held that:-

“He has not annexed a copy of the title or the details of subdivision. It behoved him to provide cogent evidence of ownership....”

The Defendant urged the Court to allow his **Notice of Preliminary Objection** and dismiss the Plaintiff's **Notice of Motion** application dated **19th October 2017**.

The Court has carefully read the pleadings in general and annexures thereto, the written submissions and the cited authorities, the relevant provisions of law, the Supplementary List of Documents by the Plaintiff/Applicant and the Court renders itself as follows:-

There are two issues for determination. The 1st is the **Notice of Motion** dated **19th October 2017**, by the Plaintiff and the 2nd is the **Notice of Preliminary Objection**, dated **14th December 2017** filed by the Defendant.

The Court will determine the **Notice of Preliminary Objection** first. This is so because a **Preliminary Objection** is capable of determining the matter if upheld.

Black's Law Dictionary, 9th Edition describes '**Preliminary Objection**' as:-

“An objection that if upheld would render further proceedings before the tribunal impossible or unnecessary”.

Further the description of what amounts to **Preliminary Objection** was stated in the case of Mukisa Biscuits & Co. Ltd....Vs...West End Distributors Ltd (1969) EA 696 to mean:-

“So far as I am aware, 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”.

It is also not in doubt that a **Preliminary Objection** should be capable of disposing off the matter preliminarily. See the case of Quick Enterprises Ltd.,Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Further, the **Preliminary Objection** must stem or germinate from the pleadings. See the case of Avtar Singh Bhamra & Another...Vs...Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, where the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

Having laid the background of what amounts to a **Preliminary Objection**, this court will now answer the question of whether what has been raised by the Defendant/Objector herein amounts to a **Preliminary Objection**.

As was held in the above quoted cases, a **Preliminary Objection** raises pure points of law and must stem from the pleadings filed.

The Defendant/Objector has raised two points. Firstly, that the Court has no jurisdiction to hear the matter as the same is statute barred under the provisions of **Section 4** of the **Limitation of Actions Act**. Secondly that the suit offends the mandatory provisions of **Section 3(3)** of the **Law of Contract**.

It is trite that jurisdiction is everything. A court without jurisdiction cannot deal with the matter in issue. If the Court finds that it lacks jurisdiction, then the only option available is to down its tools. See the case of The Owners of the Motor Vessel ‘Lillian S’...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1, where the Court held that:-

“...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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

Further, a question of jurisdiction has to be raised at the earliest opportunity. See the case of Ndimu...Vs...Ndimu & Another (2007) EA 269, where the Court held 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 issues straightaway..... More importantly, the issue of jurisdiction is a pure point of law which can be raised at any time and it is better raised at the earliest possible opportunity”.

Therefore, the Court finds that if it is to find and hold that it is divested of jurisdiction, then it will have no option but to proceed and down its tools. That will bring the matter to an end primarily.

Further, the issues of jurisdiction is a pure point of law and the **Preliminary Objection** herein falls within the description of what amounts to a **Preliminary Objection** as stated in the Mukisa Biscuits Case (supra). On whether the suit offends the mandatory provisions of **Section 3(3)** of the **Law of Contract**, that can be discerned from the pleadings and thus it falls squarely under the description of the **Preliminary Objection** which raises pure points of law and which stems from the pleadings.

Therefore the Court finds that what has been raised herein by the Defendant/Objector are issues of law which are capable of determining the matter preliminarily if upheld and consequently the Court finds that the objection herein falls within the description of what amounts to a **Preliminary Objection** as described in the Mukisa Biscuits case(supra)

Is the **Preliminary Objection** herein merited?

The Defendant/Objector has alleged that the suit herein is statute barred under the provisions of **Section 4** of the **Limitation of Actions Act Cap 22 Laws of Kenya**. The said Section reads:-

“An action founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued”.

It is submitted that in his claim, the Plaintiff pleaded the tort of **fraud** and **breach** of trust by the Defendant. The Plaintiff alleged that he discovered that the Defendant had gone against their oral agreement and defrauded him of the suit properties in the **year 2006**. However, the Plaintiff's suit was filed on **22nd December 2016**, which was a period of **10 years** after the alleged discovery. However, the Plaintiff has

submitted that **Section 4** of the **Limitation of Actions Act** does not apply herein and the applicable Section is **Section 20(1)** of the same Act since the Defendant was holding the property in trust for the Plaintiff/Applicant. However, from the Plaintiff's own pleadings and annexures thereto, it is clear that he pleaded fraud and breach of trust on the part of the Defendant. The Plaintiff averred that he discovered this fraud allegedly committed by the Defendant in the **year 2006**. The Plaintiff did not take any action until **2016**, when the Defendant/Objector allegedly started to develop the suit properties which according to the Plaintiff were purchased by the Defendant in the **year 2000** and **2003**. The court in the case of **Elijah Ntaiya...Vs..Lekinini Kulale & 3 Others (2008) eKLR** held that:-

“...Limitation period for an action founded on fraud is three years. See Javed Iqbal Abdul Rahma & Another...Vs...Alfred Wekesa Sambu & Another. The Limitation period begins to run when the fraud is discovered”.

The Plaintiff stated that he discovered the alleged fraud in the **year 2006**. He did not take any action within a period of **3 years** and therefore by the end of **2009**, the action herein was time barred. The suit properties were purchased by the Defendant from **NIC Bank** and **ICDC** who were exercising their **Statutory Power of Sale** but opted for a private treaty with the consent of the Plaintiff. There is no indication in the said transactions that any trust existed between the Plaintiff and the Defendant. Furthermore **LR.No.12825/33**, was sold to **Arcovede Co. Ltd** and not the Defendant herein. Therefore this Court finds that **Section 20(1)** of the **Limitation of Actions Act** does not apply. The Plaintiff's suit herein which is founded on fraud and breach of trust was filed **10 years** after discovery of the alleged fraud. This Court therefore finds that the suit herein is statute barred as provided by **Section 4** of the **Limitation of Actions Act**.

Having found that the suit is statute barred, then this Court finds that it has **no** jurisdiction and without jurisdiction, then the Court has no option but to down its tools as was stated in the case of **Owners of Motor Vessel 'Lilian S' (supra)**.

The second issue raised in the **Preliminary Objection** is that the suit herein offends the mandatory provision of **Section 3(3)** of the **Law of Contract Act** which states:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

It is clear from paragraph 7 of the plaint, that the Plaintiff alleged that there existed an Oral Agreement between himself and the Defendant/

Objector and which oral contract formed the basis of his cause of action. However, the Plaintiff submitted that **Section 3(3)** of the **Law of Contract** is counteracted by **Section 3(3) (b)** of the same Act, which provides:-

“Provided that the subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

However, the oral contract alleged herein by the plaintiff is not made by an auctioneer in the course of public auction as auctioneers were never involved at all. Infact the sale herein was by **Private Treaty**, which the lender allowed with the consent of the Plaintiff. The Plaintiff is alleging an oral contract between himself and the Defendant to assist him salvage the suit properties. The said oral contract forms the basis of the Plaintiff's cause of action and it is not in writing though the said alleged contract dealt with disposition of land. The sale was done by the **Bank** and there is no evidence of any trust created. Therefore **Section 3(3)(b)** is not applicable herein.

It is trite law that a contract over land that does not satisfy the requirement under **Section 3(3)** of the Law of Contract is unenforceable. See the case of **Silver Kenya Ltd....Vs...Junction Ltd & 3 Others (2013) eKLR**, where the Court held that:-

“.....Section 3(3) of the Law of Contract is indeed couched in mandatory terms and does in fact divest the court of jurisdiction in instances where there is no compliance as the instant case. In the circumstances and by reason of the Law of Contract Act, the Plaintiff suit must fail for being in contravention of Section 3(3) of the Law of Contract Cap 23 Laws of Kenya”

Having found that there is no contract signed by all the parties to the alleged contract, then the Court finds that the said alleged oral contract which forms the basis of the Plaintiff's cause of action contravenes the mandatory provisions of **Section 3(3)** of the **Law of Contract** and that alone ousts this Court's jurisdiction to deal with the matter. See the case of **Kangatta Properties Co. Ltd...Vs...Charity Njeri t/a Winacom Crossline Supplies & 4 Others (2014) eKLR**.

Therefore this Court concurs with the Defendant/Objector's submissions that it has no jurisdiction to hear and determine this suit.

Consequently, the Court finds that the Defendant's/Objector's **Notice of Preliminary Objection** dated **14th December 2017**, is merited. For the above reasons, the Court proceeds to strike out the Plaintiff's suit entirely for lack of jurisdiction with costs to the Defendant/Objector.

Having found that the Court has no jurisdiction and the only option available is to down its tools, then this Court finds no reason to determine the **Notice of Motion** application dated **17th October 2017** as the entire suit and the subsequent pleadings are struck out entirely with costs to the Defendant/Objector.

It is so ordered.

Dated, Signed and Delivered at Thika this 10th day of December, 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Makori holding brief for Mr. Njeru for the Plaintiff/Applicant/

Respondent

Mr. Issa for the Defendant/Respondent/Objector

Lucy – Court Assistant

L. GACHERU

JUDGE

10/12/18

Court: Ruling read in open court in the presence of the above Advocates.

L. GACHERU

JUDGE

10/12/18