



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ELC CASE NO. 5 OF 2016.

ALEX SANDE WAFULA (Suing as the Legal representative

of the estate of the late **WAFULA MULUNDA JOHN (DECEASED)**.....**PLAINTIFF**

VERSUS.

JAIRUS WAKHUNGU MULUNDA.....**DEFENDANT**

RULING.

[1]. A preliminary objection was raised by the plaintiff that this suit is time barred. The preliminary objection was premised on the Limitations Act Section 20(1) Cap 22. That Section provides as follows;

Sec 20 (1) None of the periods of limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action-

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of any breach of trust (not being an action for which a period of limitation is prescribed by any other provision of this Act) may not be brought after the end of six years from the date on which the right of action accrued:

It is argued that time does not run where a beneficiary is claiming trust in respect of a fraudulent breach to which the trustee was a party and where the trustee seeks to recover trust property or proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his own use.

It was argued that the plaintiff's claim does not fall under the provision of Sec. 20(1) (a) and (b) of Cap 22. That therefore the limitation is then six (6) years.

[2]. Madam Mufutu for the defendant argued that this suit was filed after 29 years down the line that this is not a Trust perse but that it is a trespass case and that the suit should be dismissed. The plaintiff opposed the Preliminary Objection and argued that time in a trust case does not run where it can be established that there was a fraud. That such fraud was not pleaded in paragraph 7 of the plaint. The plaintiff relied on article 59 2(e) and he stated that the court should do justice without relying on technicalities. That the suit land was ancestral land. Mr. Juma learned Counsel for the Plaintiff argued that the Preliminary Objection should be dismissed.

In reply, learned Counsel for the defendant Madam Mufutu said that no particulars of fraud had been pleaded contrary to the requirement of order 2 rule 4 of the Civil Procedure Rules which demands that particulars must be pleaded. Further that article 159 of the Constitution of Kenya cannot be relied on to arm-twist the written law.

[3]. The plaintiff's prayers are based on paragraph 13 of his plaint. In that paragraph, he states;

13. The plaintiff claim against the defendant herein is for a declaratory order that the defendant herein holds title Number Kimilili/Kibingei/216 for land measuring 2.3 Acres in trust for the plaintiff's family and he should surrender the same.

The claim by the plaintiff is clearly not covered by Sec. 20(1) (a) or (b). It is only when a claim is covered by the aforesaid Sections that time does not run. This requirement cannot be said to be a technicality. It is a requirement of the Law. Article 159 of the Kenya Constitution does not therefore apply to this case. In all other cases of trust where Sec 20(1) (a) and (b) does not apply, the limitation is six (6) years pursuant to Sec. 20 (2). The claim in this suit dates as far back as 1970. The suit is clearly time barred by limitation. The Plaintiffs claim is therefore barred by limitation of actions. The defendants Counter Claim shall proceed for hearing on merits.

Judgment read in Open Court in the presence of the Counsels.

Dated at Bungoma this 22nd day of November, 2017.

S. MUKUNYA

JUDGE

In the presence of:

Hon. S. Mukunya (Judge)

Joy - Court Assistant

Mr. Kundu for the Plaintiff

Madam Mfutu: For the Defendant