



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO 164 OF 2016

PURITY NKATHA JAPHET.....PLAINTIFF

VERSUS

WILLIAM MUCHUI ALDO.....DEFENDANT

R U L I N G

1. This Ruling is in respect of the preliminary Objection filed on 20:10:16. In it the Plaintiff prays that the suit be struck out on the following grounds:-

- 1) That the Defendant is not the registered owner of that Parcel known as PLOT No, 13 'A' NCHIRU MARKET as the same is registered in the name of one ALDO MBAYA who is deceased.
- 2) That the suit herein is bad in law as the same relates to the estate of a deceased person yet the Administrator of the deceased's estate has not been made a party to the proceedings.
- 3) That the Plaintiff's claim is primarily based on an alleged contract of sale which is claimed to have taken place in January, 2009 and as such the said claim is obviously statutory time barred by virtue of Section 4 of the limitation of Actions Act, Cap 22 Laws of Kenya.
- 4) That the entire suit herein is thus bad in law, improper and incompetent and should be struck out.

2. On 04.05.17, parties agreed to have the preliminary Objection canvassed by way of Written Submissions. Such Submission were only filed by the defence.

3. As set out in *Mukisa Biscuit manufacturing Co. Ltd Vs West End Distributors Ltd (1969) E.A 696*, **"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 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..."**

4. That the suit land belongs to a deceased person is an issue that has to be ascertained. Firstly, the Plaintiff has not pleaded that the property in question belongs to the deceased. Secondly the plot registration is also one that has to be proved in evidence.

5. I have also noted that the defence side has not filed any documents in support of their case and the documents filed by Plaintiff cannot confirm the issue of ownership at this stage.

6. The preliminary Objection fails on this ground.

7. On the issue of limitation. I find that the main prayers in the plant are for:-

a) Specific performance of the said agreement

b) General damage for breach of agreements.

8. I am in agreement with defence submissions that Plaintiff's claim is contract based. An action founded on contract is barred by limitation from filed after a period of six year; see Section 4 of limitation of Actions Act. The agreement that Plaintiff invokes is dated 07.01.09. This suit was filed on 16. 09.16. and was therefore filed outside the time allowed by the statute. The preliminary Objection succeeds on this ground.

9. The suit is hereby struck out as it is statutory time barred.

10. Plaintiff is hereby condemned to pay costs of the suit.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Mutuma for Plaintiff Present

Kitheka for Defendant Present

Hon. L. N. MBUGUA

ELC JUDGE