



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 52 OF 2015

GENERAL H. W. NJOROGE.....PLAINTIFF

VERSUS

WILLIAM NJOROGE MBOTE..... DEFENDANT

RULING

Coming up before me for determination is the Defendant's Notice of Preliminary Objection dated 3rd March 2015 on the following grounds:-

1. That the Plaintiff lacks *locus standi* to bring this suit against the Defendant as the claim is time barred by virtue of the provisions of the Limitation of Actions Act Cap 22, Laws of Kenya.
2. That the Plaintiff lacks *locus standi* to bring this suit against the Defendant as the claim is void by virtue of the provisions of the Land Control Act Cap 302, Laws of Kenya.
3. That this court has no jurisdiction to entertain the Plaintiff's claim since the Plaintiff lacks *locus standi*.

The Plaintiff filed this suit on 27th January 2015 seeking orders of specific performance, among other reliefs, arising out of a Sale Agreement with the Defendant dated 20th December 2003 for the purchase of 0.5 acre of property known as LR No. 1008/39 in which the Plaintiff claims to have paid the Defendant a deposit of Kshs 220,000/=.

Parties canvassed this Preliminary Objection by way of written submissions. The Defendant submitted that the issues raised stem from contractual obligations arising from the Sale Agreement entered into between the Plaintiff and the Defendant. He further submitted that that Sale Agreement has expired and/or lapsed and as such has no force of law therefore the Plaintiff cannot institute this suit. Further, the Defendant submitted that the action is time barred through the working of the **Limitation of Actions section 4 (1) (a)** which provides, "...no action may be brought after the end of six years from the date on which the cause of action accrued for actions founded on contract". He maintained that the Sale Agreement lapsed 90 days after it was entered into. He added that the basis of this is contained in the terms and conditions in the Sale Agreement, in particular paragraph 7, which provided that the Law Society Conditions of Sale (1989) would apply where possible. He further submitted that since there was no explicit provision for the completion date in the Sale Agreement, the Law Society Conditions of Sale

take effect and as per the said conditions, time started running from 20th December 2003 and lapsed on 20th March 2004 and any claim for breach of contract ought to have been filed on or before 20th March 2010, the same being six years after the cause of action arose. He further stated that even though the Plaintiff may have had a valid claim, the same has gone stale and leave should have been sought before filing this suit. He added that since no evidence of leave has been exhibited this matter is irregular before the court. He relied on the case of **Francis Mugo Ndegwa –vs- Amboseli Court Limited [2012] e KLR** where the court held that, *“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”*

On whether this suit is void by virtue of the provisions of Land Control Act, the Defendant submitted that under the Act the consent of the land control board and or that of the Commissioner of Lands is necessary and that the said consent ought to be given within six months of entering into the Sale Agreement. He added that since the Sale Agreement was entered on 20th December 2003, the land control board consent ought to have been given at least on or before 20th June 2004. He submitted that the said consent was never granted therefore the transaction is void for all purposes at the lapse of six months. He relied on the case of **Joseph Muchoe Wanyama (suing for and on behalf of members of Yuya Farmers Co-operative Society Limited) –vs. - Mercia Muliro (sued as personal representative of Masinde Muliro) (2014) eKLR** where the judge held that the lapse of six months after the signing of the agreement where no consent is granted the transaction is void for all purposes. He concluded by stating that the up short of the lack of consent is that the transaction the Plaintiff wishes the Defendant to abide by is void for all purposes including the institution of a suit towards the enforcement of the Sale Agreement.

The Plaintiff filed his submissions dated 18th November 2015 where he submitted that his action to recover land is governed by section 7 of the Limitation of Actions Act which provides that an action for recovery of land lapses twelve years from the date on which the right of action accrued to him. He stated that his main prayer in this suit is for an order of specific performance of the agreement for sale against the Defendant. He further submitted that even though an agreement for sale of land was founded on contract, an action for specific performance of a contract for a sale of land is essentially an action to recover land. He added that if an order of specific performance is granted, the Defendant will undoubtedly be required to practically fulfill their obligation under the contract which is to transfer land to the other party. He cited the case of **James Semasaumbwa –vs- Rebecca Muliro** where the learned judge held that, *“The law as I understand it is that under this Limitation Cap 7 section 4 (1) (a) which is similar to ours...as already pointed out by the learned counsels above is that an action founded on a contract shall not be brought after the expiration of six years and under subsection 6 there is however an exception to section 4 (1) in that the claim shall not apply to any claim of contract for specific performance of a contract”* Further the judge held that, *“Whereas under section 6 of the referred Act no action shall be brought for recovery of land after the expiration of 12 years from the date on which the right of action accrued to him or it first accrued to the person through he claims to that person..In the instant case the plaintiff as administrator to the estate of the late Mujoobe is seeking for specific performance of the contract of the lease agreement entered into between the said Mujoobe and defendant on 28/8/1977. He is therefore not time barred this being an exception to the provisions of section 4 (1) (a) of the Act. I do not therefore subscribe to Mr. Mukasa that since the plaintiff was seeking general damages as agreement based on land relief for specific performance of the sale the action could not be brought after the expiration of six years.”*

The Plaintiff further submitted that an action to recover land under section 7 of the Limitation of Act is not limited to regaining land that was previously owned by the aggrieved party but also involves getting possession and ownership of such land through an order of the court as was addressed in the case of **Williams –vs.- Thomas (1909) 1 Ch.713** where the judge held that, *“It has been argued and I think successfully that while on one hand the expression “to recover land” in section 2 of the (Real Property Limitations Act 1883) does not mean regaining something which the plaintiff previously had and lost, but mean to “obtain any land by judgment of the court”, yet it is not limited to meaning “obtain possession of any land by judgment of the court”*. On the time that the cause of action accrued, the Plaintiff submitted

that the cause of action accrued when the Defendant breached the terms of the contract entered with the Plaintiff.

I have considered the Preliminary Objection and the submissions filed by both the Defendant and the Plaintiff. The test of whether an application is a proper preliminary objection has been stated in the case of **Equity Bank Limited –vs- Bryan Yongo & another [2014] eKLR** where the court held that,

“Any true Preliminary Objection should not be entangled with factual issues.”

In the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributor Ltd [1969] E.A 696**, Law JA stated that,

“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.”

In **Oraro –vs- Mbajja [2005] eKLR** J.B Ojwang J. (as he then was) stated that,

“I think the principle is abundantly clear. A “preliminary objection” correctly understood is now well identified as, and declared to be the point which must not be blurred with factual details liable to be contested and in any event, to be through the processes of evidence. Any assertion which claims to be preliminary objection, and 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. I am in agreement ... that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary point.’”

Turning to this matter, the question of when the cause of action arose is one that requires factual evidence to determine. The court will need to look at the alleged sale agreement and the terms and conditions applicable thereto whether emanating from the sale agreement itself or the Law Society Conditions of Sale (1989) as asserted by the Defendant. Further, whether or not there was Land Control Board consent for the transaction is also a matter to be determined at the main trial after evidence has been adduced. In the circumstances and as enunciated in the precedents cited above, the issues raised by the Defendant in this Preliminary Objection do not qualify to be categorized as preliminary objections.

Accordingly, the Preliminary Objection is hereby dismissed. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 9TH DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE