



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 15 OF 2016**

**HAFIZA JOGINDER DHANJAL.....1<sup>ST</sup> PLAINTIFF**

**AMIDA JUMA OMAR.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**SAID AHMED SULEIMAN.....1<sup>ST</sup> DEFENDANT**

**RAS KISAUNI HOLDINGS LTD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed this suit against the two defendants vide a plaint dated 4<sup>th</sup> February 2016 and filed in Court on 9<sup>th</sup> February 2016. Together with the plaint was a notice of motion application dated 4<sup>th</sup> February 2016 and filed in Court on 9<sup>th</sup> February 2016. The motion is brought under the provisions of Section 1A, 1B, 3A & 63 (e) of the Civil Procedure Act and Order 40 of the Civil Procedure Rules. The applicant prayed for ;

**1. Spent**

**2. Spent**

**3. That an order of interim injunction do issue restraining the Defendants jointly and severally their officers, employees, servants, agents and/or any other person from charging, selling and/or disposing and/or in any way dealing with property known as LR No. 11723/I/MN (Original No. 49/2) (CR. 38206) is housing sub-plots Nos. 18 and 47 (which have not been taken out individual titles) pending hearing and determination of this suit.**

**4. That the status quo obtaining be preserved pending the hearing and determination of this suit.**

**5. That costs of this application be provided for.**

2. The application is premised on the several grounds listed on the face of it and affidavit sworn in support by Hafiza Joginder Dhanjal, the 1<sup>st</sup> Plaintiff.

3. The application is opposed by the 2<sup>nd</sup> defendant vide a replying affidavit sworn by Ketan Rajandra

Shukla dated 29<sup>th</sup> February 2016. Besides the replying affidavit, the 2<sup>nd</sup> defendant also filed a notice of Preliminary Objection dated 11<sup>th</sup> May 2016. The 1<sup>st</sup> defendant has so far not entered appearance.

4. The parties then filed rival submissions. The plaintiffs filed their submissions both on the merits of the application and on the preliminary objection. The 2<sup>nd</sup> defendant submitted purely on her objection. I will therefore consider whether the Preliminary Objection raised has any merit before I go to the substance of the application. The preliminary point of law is that the suit and the application is time barred as it offends the mandatory provisions of section 4 (1) of the Limitation of Actions Act Cap 22 of the Laws of Kenya.

5. On addressing this point, the 2<sup>nd</sup> defendant submitted that in the plaint, the plaintiff seeks the following prayers ;

**1. An order against the defendants jointly and severally their servants and agents prohibiting them from selling, alienating, further sub-dividing, charging or dealing in any way with the property known as sub plots No 18 and sub plot No 47 comprised in LR No 11723/1/MN (Original No 49/2) CR 38206 formerly known as Plot No 49 section 1 Mainland North Mombasa County.**

**2. An order for specific performance against the defendants jointly and severally with respect to the agreements with the plaintiffs dated 24<sup>th</sup> October 1997.**

**3. An order of rectification and/or subdivision of title No LR No 11723/1/MN (Original No 49/2) CR 38206.**

6. According to the 2<sup>nd</sup> defendant, the main prayer is No 2 which seeks an order for specific performance based on an agreement that was executed on 24<sup>th</sup> October 1997. Therefore the claim ought to have been filed before the lapse of six years since it is founded on contract. She relied on the provisions of Sec 4(1) of Cap 22 and the following cases to support her submissions

**i. Abraham Gina Adams (suing as the administrator of the Estate of the late Geoffrey Adams Ogwa) vs James Ouma Natolio (2015) eKLR**

**ii. Harrison Kamau Gikambu vs Daniel Kiragu Gitau (2016) eKLR.**

7. The plaintiff in reply to the preliminary objection submitted that it is pleaded that they only learnt of the registration of another 3<sup>rd</sup> party as proprietor of the larger parcel on November 2010. They also submit that the contracts between them and the 1<sup>st</sup> defendant is partially performed as they are in continuous and non-interrupted occupation of the suit property for over 30 years while the 2<sup>nd</sup> defendant is claiming to have registration documents but does not have possession of the two plots. The plaintiffs submitted further that section 34 of the Evidence Act allows admission of evidence given in previous proceedings between the same parties.

8. The plaintiffs added that the defendants in their statements in the trial before the Magistrate's Court at page 2 in the judgement (CMCr case No 255 of 2011), the 1<sup>st</sup> defendant confirmed the sale of the suit property to the plaintiffs and that she was in the process of obtaining title deeds. The plaintiffs submit that the preliminary objection does not meet the threshold set in the case of **Mukisa Biscuit Manufacturing Ltd vs West End Distributors Ltd (1969) E.A 696** because it did not raise a pure point of law but also factual issues which need to be proved. They added that the objection was not pleaded therefore the same cannot stand. They urged the Court to dismiss preliminary objection.

9. As pointed out by the 2<sup>nd</sup> defendant section 4 (1) of Cap 22 sets time limits for filing of suits. Under section 4 (1) (a) and (e) suits founded on contracts or seeking equitable reliefs should not be filed after the end of six (6) years. In paragraph 7 of the plaint, it is pleaded thus ;

*“That sometimes in the year 1997 the 1<sup>st</sup> Defendant offered to sell to the plaintiffs and other tenants living at the suit property and eventually sub-divided the suit property and:*

*a. On the 24/10/1997 the 1<sup>st</sup> Defendant entered into a Sale Agreement to sell Sub-plot No. 18 at Plot No. 47 in Section 1 Mainland North at a consideration of Kshs. 250,000/- respectively of which a deposit of Kshs 60,000/- was to be paid at execution of the Sale Agreement and the balance was to be paid in monthly instalments of Kshs 7,000/- each.*

*b. Clause 8 of both Agreements provide: “The purchaser shall be liable to pay Municipal rates assessed in respect of the property including interest if any thereon effective from the 1<sup>st</sup> day of July the year Two Thousand subject to the provisions that if the Municipal rates have not been separately assessed in respect of the property sold then the purchaser shall be liable to pay the vendor a proportion of the Municipal Council of Mombasa from time to time in respect of the plot which includes the property and which rates are payable to the Vendor”.*

10. In paragraph 9 of the plaint, the plaintiff pleaded that they finished payments of the full purchase price in January year 2000 in accordance with the sale agreement and the 1<sup>st</sup> defendant was to furnish the deed plan of the property. In paragraph 11 of the plaint, the plaintiffs pleaded the particulars of breach of contract, misrepresentation, collusion and or fraud on the parts of the defendants jointly and severally. Further in paragraph 12 of the plaint, it is stated that it is worth noting that the 1<sup>st</sup> defendant contracted to sell the suit properties to the plaintiffs on 24.10.1997 but she allegedly sold the larger property containing the suit property on 10<sup>th</sup> November 2004.

11. Clearly from the plaintiffs’ pleadings, their claim is founded on a contract of sale between themselves and the 1<sup>st</sup> defendant. On the basis of this contract, they have sought for an order for specific performance in prayer (b) against the defendants jointly and severally in accordance to their agreement dated 24<sup>th</sup> October 1997. The prayer (c) is dependant on prayer (b) succeeding while prayer (a) must also hang on prayer (b) because it is on the basis of their agreement of 24<sup>th</sup> October 1997 that they want the defendants prohibited from selling or alienating the subject parcels of land. I am therefore satisfied that the Preliminary Objection meets the threshold set in Mukisa Biscuits case supra. The pleadings as set forth are self-explanatory and you need no evidence to prove them.

12. Since the suit as filed is seeking an order for the 1<sup>st</sup> defendant to fulfil her obligations under the agreement dated 24<sup>th</sup> October 1997 it is indeed filed outside the time set under Section 4 (1) of the Limitation of Actions Act. No leave of the Court was sought to bring this suit out of time. The suit is thus fatally defective and so is the application founded on it. The plaintiffs may have a good claim but presently they approached the Court in the wrong format. It is a format that even granting them leave to amend would not cure.

13. In conclusion, I find merit in the preliminary objection and do allow it. The result is that the plaintiffs’ application and the suit is struck out for being in breach of section 4 (1) of Cap 22. The costs of the application and suit awarded to the 2<sup>nd</sup> defendant.

**Dated and delivered at Mombasa this 16<sup>th</sup> day of November 2016.**

**A. OMOLLO**

**JUDGE**