



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.69 OF 2012

**AGRO CHEM HOUSING CO-OPERATIVE
SOCIETY.....PLAINTIFF**

VERSUS

**LAKE HOLDINGS (KENYA)
LIMITED.....DEFENDANT**

RULING

1. Lake Holdings (Kenya) Limited, the Defendant, gave notice dated 30th October 2012 to raise preliminary objection on the following grounds:

- “ 1. This honourable court has no jurisdiction to hear this suit.**
- 2. The suit is statute barred.**
- 3. The Plaintiff lacks locus standi to institute this suit”.**

And in the premises the suit herein be dismissed with costs to the defendant.

2. On the 14th January 2016 the Plaintiff’s counsel fixed the hearing of the main suit to be on the 8th June 2016. When the counsel for both parties appeared before the court on the 8th June 2016, the court directed that the preliminary objection be heard and determined first. The counsel then proposed that they be allowed to file written submissions. The Plaintiff’s counsel filed their’s dated 15th June 2016 on the 16th June 2016 while the Defendant’s counsel filed their’s dated 22nd June 2016 on the 27th June 2016.

3. The submissions of counsel are summarized as below;

a) **DEFENDANT’S COUNSEL SUBMISSION;**

i. That the memorandum of understanding signed between the parties in the suit has an explicit clause that incase of disagreements, the parties were to refer the matter to arbitration and that the provisions of the Arbitration Act was to apply, and therefore this court lacks jurisdiction to hear and determine this case.

ii. That this suit being based on contract where limitation period under the **Limitation Actions Act Chapter 22** of Laws of Kenya is six years is therefore statute barred. The counsel referred to the memorandum of understanding and the affidavit of Jackson O. Odenyo at paragraph 10 and submitted that the suit was filed way over seven (7) years from the date of contract. That no leave

to file the suit out of time was obtained.

iii. That subsequent to the memorandum of understanding between the parties, the Defendant entered into contracts of sale with individual members of the Plaintiff over the same parcels of land covered by the memorandum of understanding. That the Plaintiff as a society, lacks capacity to file this suit on the basis of the contracts of sale of land signed by individual members.

iv. That in the event of any breach of contract between the Defendant and the individual members with whom they signed sale agreements for sale of land, it is the parties to the said agreements who can commence action on the contracts and not the Plaintiff, as the members executed the agreements on their own individual behalfs.

v. The counsel prayed that the preliminary objection be upheld and the suit be struck out with costs.

The counsel indicated that they had attached “**the relevant judicial pronouncement in support**” of their submissions but none was attached nor the details (citations) of the pronouncements disclosed.

b) **PLAINTIFF’S COUNSEL SUBMISSIONS;**

(i) That the Plaintiff and Defendant had a memorandum of understanding dated 17th May 2005 on behalf of itself and the members to purchase various plots arising from land parcel I.R. No.58279 [L.R. 13432]. That the Defendant availed to the Plaintiff only thirteen (13) titles. The Defendant then showed the Plaintiff ten (10) other plots but failed to avail the remaining 12 plots to the Plaintiff and instead purported to offer the Plaintiff some other plots at four (4) times the purchase price leading to this suit.

(ii) That it is important to establish whether this court has jurisdiction to hear and determine this suit in view of the holding in the famous case of **Owners of the Motor Vessel “Lilian –V- Caltex Oil (Kenya Ltd [1989] KLR 1.** The learned counsel submitted this the dispute involves parcels of land and this court has jurisdiction under **Section 13 (2)** of Environment and Land Court Act which talks of “**disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.**” That as the instant case emanated from contracts for sale of land this court therefore has jurisdiction.

(iii) That the sale agreement between the Defendant and the Plaintiffs members are all dated 6th August 2009 and this suit was filed on 3rd October 2012 which is within the six years prescribed under

Section 4(1) of the Limitation of Actions Act. That the suit was also filed before the 12 years prescribed under **Section 7** of the said Act on the limitation period to recover land. That in view of the foregoing the suit is not statute barred.

(iv) That the Plaintiff filed this suit on its own behalf and on behalf of its members. That the Plaintiff is a body corporate with capacity to sue and be sued in terms of **Section 12** of the Cooperative Societies Act. That in terms of **Order 1 Rule 8(1)** of Civil Procedure Rules, the Plaintiff filed this suit on its own behalf and that of its members following their resolutions in the minutes dated 31st July 2012 and hence the Plaintiff has locus standi to file and prosecute this suit.

v) The learned counsel referred to the following to the following decided cases:

- **Babu Omar & Others –V- Edward Mwiraria & Another Mombasa H.C.C.C. NO.1 of 1996.**
- **Mukisa Biscuits Company Ltd –V- Westend Distributors Limited [1969] E.A. 696.**
- **Daniel Lwambi & 2 Others –V- Penguni Holdings Limited ELC Civil Appeal**

No.41 of 2012.

4. The following are the issues for the court's determination in the preliminary objection;

- a) Whether this court has jurisdiction to hear and determine this suit.
- b) Whether the suit is statute barred.
- c) Whether the Plaintiff has the locus standi to initiate and prosecute this suit.

5. The court has carefully considered the pleadings filed, the grounds on notice to raise the preliminary objection, the written submissions by both counsel and come to the following determinations:

a) That this suit was commenced through the plaint dated 3rd October 2012 and filed in court on the 10th October 2012. That the basis of the suit is apparent at paragraphs 4 and 7 of the plaint which refers to the memorandum of understanding between the Plaintiff and Defendant dated 17th May 2005 plus the individual sale agreements between the Plaintiff and some of its members as purchasers and the Defendant as the vendor dated 6th August 2009.

b) That the memorandum of understanding of 17th May 2005 was not on its own an agreement for sale of land. That the said memorandum can at best be taken to be a document under which the parties agreed on the plot sizes, purchase price, repayment terms and schedule among others that would apply to the Plaintiff and its members who would be interested in entering into agreements for sale of specific plots with the Defendant.

c) That it was a term of the said memorandum at clause 1.8, **“that in case of any disagreements the parties herein shall refer the matter to arbitration and the provisions of the Arbitration Act shall apply. That the phrase “parties herein” refers to the Plaintiff and the Defendant as they are the ones who signed the memorandum. That had this suit have been based solely on the memorandum of understanding dated 17th May 2005, then the Plaintiff would have had no choice but to refer the dispute it had with the Defendant to arbitration in terms of clause 1.8 as this court would have been without jurisdiction in the first instance. That however the suit before this court is not solely based on the 17th May 2005 memorandum but on the agreements of sale of land entered into on 6th August 2009 between the Defendant, as vendor on one part, and the Plaintiff and some of its members as purchasers on the other part. That the court agrees with the submissions by the Plaintiff's counsel that in terms of **Section 13(2) (d)** of the Environment and Land Court Act No.19 of 2011, this court therefore has jurisdiction.**

d) That flowing from the finding in (c) above that the Plaintiff's suit is based on the sale agreements of land dated 6th August 2009, then by the time the suit was filed on 10th October 2012 only about three years, two months and three days had lapsed from the date of the agreements. The Plaintiff's suit does not therefore contravene the provisions of **Section 4(1)** of the Limitation of Actions Act Chapter 22 of Laws of Kenya which sets the duration of filing suit based on contracts to six (6) years. That this suit is therefore not statute barred.

e) That the pleadings filed by the Plaintiff captures the central role played by the Plaintiff in negotiating on behalf of its membership and itself the terms for the purchase of the plots from the Defendant as crystallized in the memorandum of understanding dated 17th May 2005. That the Plaintiff was to retain a great role of facilitating the payments of the purchase price between its individual members entering into a sale agreement with the Defendant under clause 1.5 of the memorandum. That during the meeting of the 31st July 2012, the members resolved at resolution No.3 as follows:

“On Lake Holding plots the matter is to be taken to court as soon as possible. The office gave the mandate to the chairman to go ahead and transact on behalf of the society”.

That the table at paragraph 7 of the plaint has set out the particulars of the parties who entered into sale agreements with the Defendant over specific plots and the status of each. That the parties are all 24 and include the Plaintiff in its name in respect of plots **51, 52, 73, 79, and 80** and on that basis alone, the Plaintiff has jurisdiction to sue as it is a body corporate in accordance with **Section 12** of the Cooperative Societies At chapter 409 of Laws of Kenya.

f) That in view of the Plaintiff's members resolution of 31st July 2012 and the provision of **Order 1 rule 8(1)** of the Civil Procedure Rules which states:

“8(1) where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and

unless the court otherwise orders, continued, by or against any one or more of them as representing all or as

representing all except one or more of them”, the court is satisfied that the Plaintiff has the authority of its membership to file this suit on their behalf and is therefore properly before the court.

g) That the provision of **Order 1 Rule 9** of the Civil Procedure rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties as the court will deal with the matters in controversial as regards the rights and interests of the parties actually before it.

6. That in view of the foregoing the preliminary objection raised by the Defendant to the Plaintiff's suit has no merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 9TH DAY OF NOVEMBER 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Yogo for Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/11/2016

9/11/2016

S.M. Kibunja Judge

Oyugi Court Assistant

Parties absent

Mr Yogo for Plaintiff

Court: Ruling dated and delivered in open court in presence of Mr. Yogo for Plaintiff only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

9/11/2016