



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

ELC. NO. 163 OF 2014.

DANIEL OKASISI OLEGEREA & ANOTHER1ST PLAINTIFF.

VERSUS

BARASA EKAPOLONI AUKUDEFENDANT.

RULING.

The defendant filed a Notice of preliminary objection here on 2nd June, 2015. The objection is based on section 7 of Limitation of Actions act (cap 22). It is to the effect that the palintiffs claim is time-barred, was filed out of time without leave and is therefore an abuse of court process. The defendant asked that the suit be struck out with costs.

2. Both sides filed submissions in lieu of oral arguments. The defendants submissions were filed on 13th July 2015. According to the defendant, the court should consider when the right of action accrued. It should then consider whether 12 years had lapsed by the time the plaintiffs filed their suit in year 2014.

3. And the defendants position is that that period had lapsed. He submitted that he went into possession of the suit land in 1980 when he bought the land. The plaintiffs left in 1985. The defendant then became registered owner in 1985. It seems to be the defendants position that time started running in 1985 when the plaintiffs left the land and went to live in Narok or in 1987 when by law he became the legal owner. Either way, twelve years had lapsed by the time the suit was filed in 2014.

4. Generally, it is clear from the defendants submissions that he is relying on the statutory law governing adverse possession. And it is clear that adverse possession is one of the averments in his defence.

5. It is clear however that the plaintiffs claim is not based on adverse possession. It is based on the tort of fraud.

6. The palintiffs submissions were filed on 26th October, 2015. They are brief and to the point. First, the plaintiff discovered the fraud in 2013. Second, the question is when the plaintiff discovered the fraud. Then the law is stated: In JAVED GABAL RAHIM & Another VS BENARD ALFRED WEKESA SAMBU & Another. CA NO. 11 of 2001 LLR 6088 (CAK) the court is said to have held as follows;

“In a claim for land on the basis that registration was done by way of fraud, the time starts to run when the said registration is discovered and the limitation is a period of three years”

7. The court was urged to find that the claim herein is based on fraud, not adverse possession. Dismissal of the objection was then asked for.

8. I have considered the preliminary objection as raised and the submissions filed by both learned counsel. I agree with counsel for the plaintiffs that the plaintiffs claim is based on fraud. It is the defendant who has raised the issue of adverse possession and after doing so, then proceeded to file a preliminary objection based on statutory law applicable to that issue.

9. The defendant's counsel filed detailed submissions but it can be seen that I have given the submissions only a short and generalized overview. There is a reason for that. When the applicable law is considered, it is clear that the defendant lacks a clear legal standpoint to come to court by way of preliminary objection.

10. A few things need to be said. First the law is as stated by the plaintiff's Counsel. Where the claim is based on fraudulent registration of land, the cause of action accrues when the fraud is discovered.

11. Second: the defendant has denied the plaintiffs' entire claim. The defendant needed to appreciate what a preliminary objection is or should be. And a preliminary objection is in the nature of a demurrer in that it raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. (see **MUIRURI VS KIMEMIA [2002] 2 KLR 677** and also **SIRMA VS KIPRONO [2005] 1 KLR 197**).

12. In this case here, there is no assumption that the facts raised by the plaintiffs are correct. If anything, everything is disputed. All the facts require to be ascertained. How then can the defendant, after disputing the facts, raise a preliminary objection? The law is against him.

13. But there is even another reason based on a decided case which is broadly similar to this one. The case is **ACHOLA & Another VS hongo & a NOTHER: [2004] 1 KLR 462**. In the case, the appellants filed a case against the respondents alleging, inter alia, the tort of fraudulent misrepresentation. The second respondent, the Municipal Council of Kisumu, which was 2nd defendant in the High court, raised a preliminary objection.

14. The preliminary objection was to the effect that the case against it was time-barred since the alleged tort was said to have been committed in 1994 and the original plaint was filed only in 1997.

15. A defence which had been previously filed by the second respondent had neither pleaded the defence of limitation nor specifically pleaded that the claim was time-barred.

16. The high court nevertheless allowed the issue of limitation, upheld the preliminary objection, and terminated the appellants claim. The appellants appealed.

17. It was held, inter alia, that having failed to plead limitation in its defence, the 2nd respondent was not entitled to rely on that issue and base a preliminary objection on it. It was also not entitled to rely on that issue during trial unless it amended its defence. It was further held that the High court was not right in allowing the issue of limitation to be raised and in upholding the preliminary objection of the second respondent based on the issue of limitation.

18. Our present case is similar to the above case in the following ways:

- i. Just like in the above case, it raises the issue of limitation and a preliminary objection is raised based on that issue.
- ii. Just like in that case, this case does not raise the issue of limitation in the defence filed. The defence does not also intimate that a preliminary objection would be raised on that issue.
- iii. Just like in the above case, the plaintiffs claim in this case revolves around the tort of fraud.

19. It can therefore be seen that having not raised the issue of limitation in the defence, and having not

intimated too in the defence that a preliminary objection on limitation would be raised, it is not open to the defendant to raise the preliminary objection herein.

20. It is now sufficiently clear that the preliminary objection raised is misplaced. It runs into legal headwinds because of judicial pronouncements in the cases I have cited herein. The preliminary objection herein is therefore found to have no merit and the same is dismissed with costs.

A. K KANIARU

JUDGE

DATED AND DELIVERED ON 10TH DECEMBER, 2015

IN THE PRESENCE OF:

PLAINTIFF.....

DEFENDANT.....

COUNSEL.....

JUDGE.