**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, MAKHANDIA & KIAGE, JJ.A)**

**CIVIL APPEAL NO. 211 OF 2015**

**BETWEEN**

**DIANA KATUMBI KIIO .....……..…..….. APPELLANT**

**AND**

**REUBEN MUSYOKI MULI .....…….....……. RESPONDENT**

*(An appeal from the Ruling/Orders of the Environment and Land Court at Nairobi (J. M. Mutungi, J) dated 19th June, 2015*

***in***

***ELC No. 525 of 2014)***

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**JUDGMENT OF THE COURT**

1. The main issue that falls for our determination in this appeal is whether an agreement for sale of land gives rise to a cause of action for recovery of the land or a cause of action in contract. The answer to the issue would then determine whether the time limitation for filing suit under the **Limitation of Actions Act, Cap 22, (LAA)** was complied with. The Environment and Land Court **(Mutungi J.)** in this matter allowed a Preliminary Objection **(PO)** raised by the respondent on the grounds that the appellant's suit was time barred and struck it out on 19th June 2015.

2. The suit was filed on 2nd May 2014 (Dated 10th April 2014) seeking a declaration that the appellant was the lawful owner of land parcel number **Machakos Town Block 11/332 (plot 332)** measuring 0.0465 Hectares.; a permanent injunction to restrain the respondent from interfering with it; and an order that the respondent hands over the certificate of lease and executes the necessary instruments of transfer.

3. The story behind the suit is fairly short. Some 10 years and 11 months before the filing of the suit (precisely 6th June 2003), both parties signed a written agreement in which the respondent agreed to sell plot 332 together with all developments and improvements thereon for KShs. 450,000. Possession was given to the appellant upon payment of the purchase price on the same day and two letters were addressed to the Town Clerk of Machakos Municipal Council, the head lessor, **(the Council)** to give consent to the transfer, and for extension of the lease which had expired in January 2003. The council granted consent to the transfer on 18th June 2003. After execution of the agreement, payment of the purchase price, and

possession, the appellant continued to pay all taxes including rents and rates to the council which altered its records to reflect the appellant as the owner of the plot. He also commenced development of a ground water tank in readiness for a major building thereon, cultivated the land and planted seasonal crops.

4. On 2nd October 2006 the respondent executed the transfer of lease in favour of the appellant and handed over all documents necessary for registration, including the original Certificate of lease, passport, identity card, photographs, Income Tax PIN, and a further consent for the transfer from the council. But, lo and behold, the registration was rejected by the Land Registrar on 27th November 2006 for the reason that "*the term of the lease had expired and a letter of consent from the Land Officer was not attached."* The documents were returned to the appellant.

5. At the instance of the appellant, the respondent wrote to the Land Officer seeking extension of the lease on 3rd October 2007 and the application was submitted to the Land Officer by the appellant who paid for the required fees and kept the original receipts. There being no objections raised by the relevant authorities including The District Physical Planning Officer, The District Surveyor and the Council, the extension of lease was granted by the Commissioner of Lands for 66 years from 1st January 2003 and forwarded to the District Land Registrar, Machakos, for collection on 3rd July 2011. The letter was copied to the respondent who subsequently went to the Land Registry without informing the appellant and collected the new Certificate of Lease. On demand from the Land Registrar, the appellant surrendered the original certificate of lease to the Lands Office on 10th February 2014 since another certificate had been issued. But the respondent refused to give the new certificate to the appellant or execute fresh documents of transfer for registration, thus precipitating the dispute which went to court shortly thereafter.

6. The respondent did not deny that he entered into an agreement for sale of plot 332 and sought the consent of the Council for the transfer. But he denied that he gave possession; that any rates or rents were paid by the appellant; that he had any knowledge of the alleged application for transfer or its rejection; that he was assisted by the appellant in making an application for extension of the lease; and that he obtained a new certificate of lease which he refused to hand over to the appellant. On the contrary, he pleaded that he had refunded the purchase price of Sh. 450,000 to the appellant in 2003 and retrieved the original certificate of lease whereupon he applied for extension of lease and obtained it in 2014 on his own.

7. Pending the hearing of the suit, the appellant filed a motion seeking a temporary injunction to restrain the respondent from alienating or interfering with plot 332. The respondent, however, raised the issue of time bar against the main suit and the application in a PO dated 2nd June 2014. The appellant opposed the PO as unsustainable since it was based on disputed facts. She further argued that the suit touched on Land and Contract which had time limits of 12 years and 6 years, respectively, under ***Sections 7*** and ***4(1)*** of the LAA**.** According to the appellant, in both provisions, the claim was actionable from the date on which the cause of action arose and in this case it arose upon refusal by the respondent to hand over the new certificate of lease on 4th February 2014, despite request being made. Even if the cause of action was to be considered from the date of the agreement, it was contended, the claim was still within time.

8. The contention by the respondent on the other hand was that the claim was strictly based on a contract signed on 6th June 2003 and therefore a suit filed on 2nd May 2014 would be way outside the 6 years set under the LAA for seeking relief. The right to seek relief was extinguished on 5th June 2009. In the respondent's view, the claim that the breach of contract was on 4th February 2014 when the cause of action arose, cannot be made independently of the contract.

9. The learned Judge considered the matter and formed the view that the suit was based on the contract dated 6th June 2003 and that there would be no cause of action without the agreement. The court further found that the agreement was a nullity since the lease for plot 332 had expired before the agreement was signed and the respondent had thus no property in the plot to transfer. The Court stated thus:

> ***"The plaintiff in the suit seeks to enforce her right as a purchaser and the plaintiffs claim against the Defendant does not arise in any other manner other than through the agreement for sale dated 6th June 2003 and it is my finding that <u>the cause of action is founded</u> <u>on this contract</u>***

***and that being the case the plaintiff ought to have instituted the instant suit within 6 years of the date of the agreement for sale. In terms of section 4(1) (a) of the Limitation of Actions Act, the plaintiff ought to have brought the instant suit within 6 years from the date of the agreement. The suit by the plaintiff is simply statute barred and cannot be maintained."*** [Emphasis added].

10. The suit and the motion were struck out thus provoking the appeal before us raising six grounds of appeal, complaining in summary that the learned Judge erred in law in:-

***(a) wrongly interpreting the provisions of sections 4(1) and 7 of LAA .***

***(b) considering matters of fact, which had not been tested and proved in evidence at trial.***

***(c) considering matters which had not been pleaded***

***(d) holding that the agreement of sale signed on 6th June, 2003 was not conditioned on the extension of lease when the conduct of the parties showed that it was.***

***(e) failing to note and make a finding on the respondent's conduct throughout the transaction.***

***(f) determining the matter before him against the weight of evidential documents and the applicable law.***

11. The submissions thereon were made orally. Learned counsel for the appellant, **Mrs. Agnes Nzei,** instructed by M/S Nzei & Company Advocates, basically rehashed the written submissions made before the trial court, emphasizing that the claim before that court was for recovery of land under **Section 7** of the LAA. The land had been purchased through a written agreement and possession was given, a fact denied by the respondent, and therefore necessary to prove through oral evidence. In counsel's view, in terms of the provisions of the LAA, the right of action accrues at the point of breach of contract and not at the point of entry into the contract. The breach of contract, according to counsel, was not until February 2014 when the respondent refused to hand over the renewed certificate of lease for the land so as to effect the transfer. Counsel contended, as there was evidence to support it, that both parties were aware, before they entered into the contract that the lease had expired and they anticipated extension of it. That is why they collaborated in processing the application for extension until it was granted only for the respondent to somersault after receiving the new certificate. All this, submitted counsel, was capable of proof at the hearing of the suit if it was not erroneously struck out. The PO was not on a pure point of law as it was dependent on proof of disputed facts, concluded counsel.

12. In response, learned counsel for the respondent, **Mr. Mutinda Mbuvi,** instructed by M/S J.A. Makau & Company Advocates, submitted that the relationship between the appellant and the respondent was on contract and it did not matter what the contract was about. He contended that the respondent did not part with physical or any possession of the land and was the one who surrendered the original certificate to the Land Registrar in order to obtain a new one, contrary to the appellant's assertion that she was the one who had possession of it. The respondent had also refunded the purchase price to the appellant, despite her denial, and therefore, there was no existing contract between them which could be the basis of a suit. He called for dismissal of the appeal.

13. This being a first appeal, the Court is enjoined to reconsider the evidence, evaluate it and draw its own conclusions. The usual caveat that the appellate court has neither seen nor heard the witnesses and must therefore give allowance for it, does not apply here as the matter was not orally heard. The findings of the trial court must, nevertheless, be given due deference unless they fall foul of proper evaluation in line with the documentary evidence on record or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see ***Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR.***

14. We identified the main issue for determination at the opening paragraph of this judgment. But it is necessary to examine, first, whether the PO was properly raised in this matter. The trial Judge correctly

appreciated that a PO could only be raised as a pure point of law and cited the dicta of **Sir Charles Newbold, P** and **Law, JA** in the ageless case of ***Mukisa Biscuit Co. vs West End Distributors (1969) EA 696***. That authority has been approved by our Supreme Court in several cases including ***Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR, Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others [2014] eKLR*** and ***Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 Others [2015] eKLR*** where the Court stated:-

> ***"[14]..."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. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration … 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 the 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'."***
>
> ***[15] Thus a preliminary objection may only be raised on a "pure question of law". To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are* prima facie *presented in the pleadings on record."***

15. The PO in this case was based on a plea of limitation of actions and was therefore relevant to raise. It was, however, incumbent on the trial court to satisfy itself that it was a pure point of law and that there was no contest as to the facts presented in the pleadings on record. In making its decision, the trial court appears to have accepted without more, that the claim was based on a contract signed more than six years before the suit was filed and was therefore time barred. It was necessary, in our view, for the court to consider, *inter alia*, the nature of the interest conveyed in the agreement between the parties; whether possession of the land was given to the appellant; the conduct of the parties subsequent to the execution of the agreement all the way up to the renewal of the lease; and the point at which the alleged breach occurred. These were relevant considerations in view of the provisions of ***Sections 4(1)(a)*** and ***7*** of the LAA which provide as follows:-

> ***4.(1)(a):***
>
> ***The following actions may not be brought after the end of six years from the date on which the cause of action accrued-***
>
> ***(a) actions founded on contract,.....***
>
> ***Section 7:***
>
> ***An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him..."***

16. Both provisions refer to the date on which *'the cause /right of action accrued'*.

> A 'cause of action' is:
>
> "*.... every fact which is material to be proved to entitle a party to succeed and every fact which the defendant would have a right to traverse." per Aldous LJ* in ***Ord vs Upton [2000] 1 All ER 193***.

***Lord Esher, M.R***. in the case of ***Read vs Brown (1888), 22 QBD 128***, defined it as:-

> ***"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court".***

while ***Lord Diplock*** in ***Letang vs. Cooper*** ***[1964] 2 All ER 929*** at pg ***934*** opined:-

> ***"A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."***

We defer to those definitions.

17. A cause of action in contract arises from breach of the contract and not at the time it is executed. According to the author in the **Journal of International Banking and Financial Law: " What's the Limit" (2007) 11 JIBFL 642**:-

> ***"In contract the cause of action accrues when the breach occurs, but in tort the cause of action accrues when damage is first sustained. The cause of action, whether in tort or contract, arises regardless of whether or not the claimant could have known about the damage."***

We agree with that exposition.

18. The cause of action in this matter was determinable upon examination of the elements cited in paragraph 14 above. But there was no unanimity in the pleadings about any of those elements. Indeed there was open denial at every turn which only oral evidence tested in cross examination could unravel. The trial court made a finding, which neither of the parties had pleaded that the contract was a nullity because the lease had expired and there was nothing to convey. Apart from the impropriety of dealing with an unpleaded issue, we think, with respect, that the issue of the nature of interest conveyed, if any, was in the province of oral evidence. In sum, we are not satisfied that the PO was properly raised as a pure point of law in the circumstances of this case.

19. Adverting now to the main issue, the contract the subject matter of the suit could only have been validly made under ***Section 3 (3)*** of the ***Law of Contract Act,*** which came into effect on 1st June, 2003. The section, as amended vide ***Act No. 2 of 2002*** provides as follows:

> ***"No suit shall be brought for the disposition of an interest in land unless:***
>
> ***(a) The contract upon the suit is founded:***
>
> ***(i) is in writing;***
>
> ***(ii) is signed by all parties thereto and***
>
> ***(b) The signatures of each party signing has been attested by a witness who is present when the contract was signed by such party.***

20. The agreement exhibited on record was signed six days after commencement of the Act, but whether it was compliant with the law is a matter of evidence. It is pleaded that physical possession of the land was given, but again, whether that is so is a matter of evidence. What cannot be detracted from is the legal position that would ensue if such pleadings are ultimately proved, that a party who executes an agreement in land acquires an equitable interest which is protected by law. In the case of ***Peter Mbiri Michuki vs Samuel Mugo Michuki [2014] eKLR*** this Court dealt with the issue, in relevant parts, as follows:

> ***"34. In Mwangi & Another vs Mwangi, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.....***
>
> ***35. The dicta in Mwangi & Another vs Mwangi, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land.... In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land.***

> **Section 18** ***of the*** **Limitation of Actions Act** ***provides that subject to*** **Section 20(1),** ***the*** **Act** ***applies to equitable interests in land … and accordingly a right to action to recover the land … accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.***
>
> ***36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property."***

21. In our view, the appellant had acquired a clear interest in plot 332 upon which a claim of 'recovery of land' could be based in terms of **Section 7** of LAA. We find and hold that the claim in the suit before the trial court was not time barred as it was well within the limitation period of 12 years, even if it was computed from the date of execution of the contract. It would also have been within the time of six years even if it was based on a breach of contract which occurred when the respondent evinced the intention not to release the certificate of lease for transfer purposes in February 2014.

22. With those findings, we have no choice but to allow the appeal. We set aside the order of the Environment and Land Court made on the 19th day of June, 2015 and substitute therefor an order dismissing with costs the Preliminary Objection raised by the respondent vide notice dated 2nd June 2014. The main suit as well as the notice of motion dated10th April 2014 are reinstated forthwith and shall be set down for hearing in accordance with the law before any Judge of the Environment and Land Court, excepting Mutungi J. The appellant shall have the costs of this appeal.

We so order.

**Dated and delivered at Nairobi this 19th day of January, 2018.**

**P. N. WAKI**

**……..…….....…..**

**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

**…….....……..**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**…….……..**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**