



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 318 OF 2014

BETWEEN

RICHARD TOROITICH APPELLANT

AND

MIKE K. LELMET 1ST RESPONDENT

ELISHEBA C. LELMET 2ND RESPONDENT

PAULINE J. LELMET3RD RESPONDENT

ESTHER J. LELMET (Sued as

Administrators of the Estate of

WILLIAM CHERUIYOT LELMET..... 4TH RESPONDENT

**(An Appeal from the Order of the High Court of Kenya at Kitale (Hon. Mr Justice E. Obaga) dated
28th May, 2014**

in

H.C. E & L CASE NO. 17 OF 2014)

JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the High Court at Kitale (E. Obaga, J) delivered on 28th May 2014 upholding the respondents' preliminary objection to the appellant's action on the basis that the same is barred by the Limitation of Actions Act. The result of the ruling was that the appellant's suit seeking a declaration that he is entitled to five acres of the property known as L. R. No. 6614/4 Cherangany, Trans-Nzoia East County ("the property") and for an order directing the respondents to transfer the same to him was struck out *in limine*. In the same ruling, the court also struck out the appellant's motion for interlocutory injunction seeking to restrain the respondents from trespassing, ploughing, planting or in any other way interfering with his peaceful use and possession of the property.

2. According to the appellant, the learned judge was wrong to uphold the preliminary objection and to strike out his suit as well as his application for interlocutory injunction because the issue of limitation did not arise. According to him, the cause of action arose in 2014 when the respondents began encroaching on his portion of the property.

Background

3. In his plaint filed in the High Court of Kenya at Kitale on 31st January 2014 against the respondents as the administrators of the estate of William Cheruiyot Lelmet, deceased, the appellant pleaded that he purchased five acres of the property from the deceased under agreements for sale dated 2nd April 2003 and 12th January 2005; paid the total purchase price and that he took possession of the parcel of land and “*has remained thereon to date.*”
4. The reliefs sought by appellant in the suit, as already mentioned, were for a declaration that he is entitled to five acres of the property and for an order directing the respondents to transfer the same to him.
5. On 1st April 2014, the appellant presented an application under rules 1 to 4 of Order 40 of the Civil Procedure Rules and sought a temporary injunction to restrain the respondents from trespassing, planting or otherwise interfering with his peaceful use and enjoyment of the five acres he claimed, pending the hearing and determination of the suit. In his affidavit supporting that application, he deposed that he had resided and utilized the parcel of land without interruption since purchasing the same from the deceased; that in the year 2014 the respondents “*have begun interfering with my peaceful use and possession of the land*”; that on 30th March 2014, the 2nd respondent made a report to a police station that the appellant was unlawfully using the land; that on 31st March 2014 two administration police officers went to the property and informed him that they had orders to stop him from carrying out activities on the property and that unless a restraining order was issued, he would be unable to utilize the property.
6. On the same date, and satisfied that the matter was urgent, the High Court issued a temporary restraining order against the respondents and directed that the application be heard on 7th April 2014.
7. On 24th April 2014 the respondents filed their defence and counterclaim. In the defence, the respondents denied that the appellant purchased the property from the deceased; they averred that the alleged contract of sale lacked validity and was not enforceable; they contended that consideration failed as the purchase price was not paid; that the bankers cheque issued to the deceased at the request of the appellant was never cashed; that the suit being based on alleged contracts of sale “*is time barred having been filed after the lapse of the statutory limitation period*”; that the transaction was in any event void for want of consent of the relevant Land Control Board under the Land Control Act. In the same defence, the respondents intimated that they would raise a preliminary objection to the suit.
8. In their counterclaim in which they sought judgment against the appellant for a mandatory injunction to compel him to vacate the property and an injunction to restrain him from further encroaching on the property, the respondents pleaded that the appellant had without any lawful justification or right trespassed on the property, forcibly fenced it off, ploughed it thereby depriving them of their right to occupy and use it.
9. Simultaneously with the defence and counterclaim, the respondents filed a notice of preliminary objection praying that the appellant’s suit “*be struck out or otherwise dismissed*” on the grounds that:

“1. The Plaintiff’s suit being based on alleged contract(s) of sale transacted between the years 2003 and 2005 is time barred having been filed after the lapse of the statutory

limitation period.

2. The Plaintiff's suit violates a ruling of the High Court dated 20/12/2011 (Muketi, J) in **Kitale High Court Misc. Civil Application No. 65 of 2010 Republic-Versus-Cherengani LDT & Another Ex parte Mike Kiptoo Lelmet Interested Party Richard Toroitich** where the learned Judge noted that the limitation period had lapsed and suo moto extended time, for the Respondents, for 30 days effective from 20/12/2011 (the date of the said ruling); and which order of extension in terms the said ruling did lapse 60 days thereafter.

3. The land the subject of this suit being agricultural land, the Plaintiff's suit is also bad in law in terms of section 7 of the Land Control Act (Cap 30 Laws of Kenya) for want of the consent of the Land Control Board within the prescribed 6 months which made the said transaction of sale null and void ab initio and unenforceable.

4. No demand or notice to file this suit was ever issued by the Plaintiff to the Defendants before the filing of this suit as required by the law hence this suit also violates the Civil Procedure Rules of 2010”.

10. After considering the rival submissions by counsel, the learned judge of the High Court delivered the impugned ruling on 28th May 2015 upholding the respondents' contention that the appellant's suit was barred by limitation. In reaching that conclusion, the judge stated that:

“It is clear that the contracts were made between 2003 and 2005. The six year Limitation expired in early 2011. Later in 2011, Justice Muketi extended the period by 60 days. This extension was conditional upon the suit being filed within that time. This never happened. The plaintiff's suit is therefore caught up by limitation.”

11. The judge proceeded to strike out, with costs, the suit in its entirety alongside the application for interlocutory injunction thereby provoking the present appeal. In the same ruling, the judge directed that the respondents were at liberty to fix the counter-claim for hearing and determination.

Submissions by counsel

12. During the hearing of the appeal before us, Mrs. Eunice Kibe, learned counsel for the appellant, referred us to the memorandum of appeal and submitted that the preliminary objection taken by the respondents was not a pure point of law as envisaged under the principle established by this Court in **Mukisa Biscuit Co. Ltd vs. West End Distributors Ltd [1969] E A 696**; that the court should have delved further into the matter to satisfy itself when the cause of action arose; that it should be clear from the plaint that it is the interference with the appellant's peaceful use of the property that precipitated the action; that the cause of action arose in the year 2014 and the suit was therefore not barred by limitation.

13. Citing the decision of **D. T. Dobie & Company Ltd vs. Muchina & Anor [1982] KLR 1**, counsel went on to say that this was not a proper case for striking out as the suit could not be said to be so hopeless that it could not be salvaged by an amendment. According to counsel, the learned Judge should also have interrogated whether the death of the deceased had the effect of suspending the running of time. She concluded her arguments by inviting us to consider the overriding objective under section 3 of The Environment and Land Act No. 19 of 2011 as well as section 19 thereof and stressed that it was important and a fundamental right for the parties to be heard on the merits. In that regard counsel cited the decisions of this Court in **Peter Ngugi Kabiri vs. Esther Wangari Githinji and another [2015] eKLR** and in **Kutima Investments Limited vs. Muthoni Kihara and Anor [2015] eKLR**.

14. Opposing the appeal, learned counsel for the respondents Professor Sifuna submitted that on the face of the plaint, the appellant's claim is based on the agreements for sale allegedly entered into

in 2003 and 2005; that when the suit was filed in 2014, it was clearly out of time as it was outside the 6 year time limit allowed under section 4 of the Limitation of Actions Act; that the respondents raised the defence of limitation in their statement of defence; that based on the decision of **Mukisa Biscuit Co. Ltd vs. West End Distributors Ltd**, (supra) the issue of limitation is a matter of pure point of law amenable for adjudication *in limine* based on the pleadings; that limitation is a jurisdictional issue and not a procedural technicality and is not curable under Article 159 of the Constitution of Kenya, 2010 or under the overriding objective under section 3 of The Environment and Land Act. According to Professor Sifuna, the decision by Madan, J. in **D. T. Dobie & Company Ltd vs. Muchina & Anor** that related to striking out of an action is not applicable in the circumstances of this case in which a statutory time limit cannot be extended.

15. In considering the matter, Professor Sifuna urged as to have regard to the principle that equity does not aid the indolent; that the appellant is guilty of indolence as demonstrated by the fact that his letter applying for proceedings was four months late and that the appeal was filed outside the time permitted.

Determination

16. In **Mukisa Biscuit Co. Ltd vs. West End Distributors Ltd**, (supra) Law, J.A stated:

“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. Examples are an objection to the jurisdiction of the court, 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.

17. Sir Charles Newbold, P in the same case expressed himself as follows:

“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.”

18. Under paragraphs 3 to 6 of the plaint, the appellant pleaded that the deceased was the registered proprietor of the property; that by sale agreements dated 2nd April 2003 and 12th January 2005, the deceased sold five acres of the property to the appellant; and that the appellant took possession of the property on that basis and remained in possession.

19. Save for the plea that the deceased was the registered proprietor of the property, the respondents in their statement of defence denied the sale agreements or that the appellant was in possession.

20. Under paragraphs 7 to 9 of the plaint, the appellant pleaded that:

“7. The Plaintiff states that the defendants now allege that he purchased only two (2) acres.

8. It is the plaintiff’s contention that he is legally entitled to five (5) acres.

9. The plaintiff states that the defendants’ actions are unlawful.”

21. The pleading in the plaint is certainly not elegant and neither does it contain sufficient details on the basis of which the appellant avers at paragraph 9 that “...*the defendants’ actions are unlawful.*” However, on the face of the plaint, the appellant’s claim as we appreciate it is that, he asserts his right to occupation and use as stemming from the contracts of sale with the deceased. But what seems to have triggered the appellant’s suit would appear to be the alleged “*unlawful*” “*actions*” referred to in paragraph 9 of the plaint, and the particulars of which are not provided in

the plaintiff and the claim made in paragraph 7 that the respondents “*now allege*” that he purchased only two, as opposed to five, acres of the land. The respondents in their statement of defence as we have stated, denied all those averments.

22. In the circumstances that we have set out in the immediately preceding paragraph, and in light of the background set out above, it seems to us that notwithstanding that the defence of limitation was pleaded in the statement of defence, the question ‘when did the appellant’s cause of action arise?’ is one that required further interrogation. Did the cause of action arise when the appellant entered into the contested sale agreements or did it arise when the respondents perpetrated the alleged unlawful actions in 2014? The less we say in this regard, the better. Suffice to say, that we are not satisfied that it is a matter that could, in the face of the contested facts, be disposed of in limine. We are fortified in this view by the fact that the respondents raised a counterclaim, which is in our view, inextricably linked with the appellant’s claim, contending that the appellant has without any lawful justification or right trespassed on the property and ploughed it thereby depriving them of their right to occupy and use it.

23. The respondents withdrew their application to have the appellant’s appeal struck out on the ground that the appeal was filed out of time. Having taken that course, it is not open to the respondents to raise the same matters in this appeal.

24. Although the notice of preliminary objection as set out in paragraph 9 above was based on four (4) grounds including a complaint that the transaction of sale is null and void and unenforceable for want of consent of the Land Control Board, the learned judge of the high court confined himself to the ground relating to the complaint that the action was barred by limitation. We have therefore not addressed ourselves to those other grounds.

25. For those reasons we hold that the learned judge erred by upholding the preliminary objection and by striking out the appellant’s suit and notice of motion. The order of the High Court given on 28th May 2014 is hereby set aside. The appellant’s suit and notice of motion filed in the High Court on 1st April 2014 are hereby reinstated for hearing and disposal on the merits by the High Court.

26. The appellant shall have the costs relating to the hearing of the preliminary objection in the High Court.

27. The costs of this appeal shall abide by the outcome of the proceedings in the High Court.

Dated at Eldoret this 24th day of June, 2015

D. K. MUSINGA

JUDGE OF APPEAL

GATEMBU KAIRU, FCI Arb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR