



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: GITHINJI, MAKHANDIA, SICHALE, J.J.A

CIVIL APPEAL NO. 191 OF 2011

BETWEEN

MUKURU MUNGE.....APPELLANT

AND

- 1. FLORENCE SHINGI MWAWANA.....1ST RESPONDENT**
- 2. GILLIED MWANYASI MWAWANA.....2ND RESPONDENT**
- 3. JOSEPH MWANGANGA MWAWANA.....3RD RESPONDENT**

(Appeal from Judgment of the High Court of Kenya at Mombasa (Azangalala J.) dated 25th February, 2011

in

H.C.C.A. 176 of 2008

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court (*Azangalala J*) as he then was) dismissing the appellants appeal from the judgment of the Senior Resident Magistrate Taveta.

The appellant filed a suit in person in the subordinate court at Taveta against the three respondents mainly for specific performance of a sale agreement entered into between him and *James Mwawana (deceased)* in 1996. the 1st respondent is the widow of the deceased while the 2nd and 3rd respondents are the sons. The appellant averred in the plaint *inter alia* that in 1996 the deceased agreed to sell to him plot LR. No. 4118/148 in Taveta Town for shs. 110,000/=, that he paid shs. 10,000 and the balance of shs. 100,000 was to be paid upon the production of a Letter of Allotment. He sued the respondents as the next kin of the deceased and pleaded that he sued the respondents as there was no administrator of the estate with whom he could deal.

The respondents filed a defence denying the agreement of sale. They averred further that if there was an agreement of sale it was only enforceable within six years and thus the cause of action was time barred.

The respondent's advocates subsequently filed and prosecuted a notice of preliminary objection to

the suit claiming that the cause of action was time barred. The appellant opposed the preliminary objection contending that limitation period did not run as the contract has no limitation clause (sic). He relied on **section 39** of the limitation of Actions Act.

By a Ruling dated 2nd October 2008 the Senior Resident Magistrate Taveta upheld the preliminary objection and struck out the suit.

The appellant appealed to the High Court contending that the trial magistrate erred in law in ignoring **section 39 A** of the Limitation of Actions Act. The High Court made a finding thus.

“The appellants suit was founded on contract and should have been commenced within 6 years from the year 1998. So by 31st December 2004 the applicant should have commenced his suit. When he did so on 28th/7/2008 the limitation period of six (6) years had already lapsed. That conclusion was inevitable from the appellants plaint. No fact needed to be ascertained.”

The learned judge further observed that as the appellant had pleaded that there was no administrator of the estate at the time of the plaint, the respondents had no *locus standi* to be sued and said:

“It is in the premises doubtful if the suit would have survived even if the plea of Limitation had not succeeded.”

The appeal was dismissed as unmeritorious.

As stated earlier, the appeal is against that decision. In a nutshell, the appellant' complains that the High Court misconstrued the law.

The facts on which the preliminary objection was based were derived from the plaint filed by the appellant. The preliminary objection raised a pure point of law. The defence of limitation was raised in the Defence as required by the Civil Procedure Rules. As the High Court correctly observed the appellant did not file a reply to the defence. Thus he did not plead either that there was an agreement not to plead limitation or that the respondents were estopped from pleading limitation. Thus **section 39** of the limitation of Actions Act which stipulates that the period of limitation does not run if there is a contract not plead limitation or where a party is estopped from pleading limitation could not be properly invoked. By dint of section **s. 4(1) (a)** and **4(1) (e)** of the Limitations of Actions Act, actions founded on contract or actions claiming equitable relief for which no limitation period is provided respectively had to be brought within six years.

The cause of action having arisen in 1996 and suit having been filed in 2008 the cause of action was undoubtedly time barred.

Accordingly the appeal has no merit and we dismiss it with costs to the respondents.

Dated and delivered at Malindi this 7th day of October, 2013.

E. M. GITHINJI

.....

JUDGE OF APPEAL

ASIKE- MAKHANDIA

.....

JUDGE OF APPEAL

F.SICHALE

.....

JUDGE OF APPEAL

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

REGISTRAR

.....snk