



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. NO. 269 OF 2011(OS)

TIMOTHY NDUVI MUTUNGI.....PLAINTIFF

- V E R S U S -

DAIMA BANK LIMITED (IN LIQUIDATION).....1ST DEFENDANT

DEPOSIT PROTECTION FUND BOARD.....2ND DEFENDANT

TRAVEL CONCEPTS LIMITED.....3RD DEFENDANT

JONATHAN MUIA NZIUKO.....4TH DEFENDANT

IDAH NDUVA.....5TH DEFENDANT

MUSAN ENTERPRISES LIMITED.....6TH DEFENDANT

JUDGEMENT

1) Timothy Nduvi Mutungi, the plaintiff/applicant took out the originating summons dated 20th June 2011 in which he sought for the following orders inter alia:

i. THAT this honourable court be pleased to grant the plaintiff/applicant leave to file suit out of time against the defendants/respondents in terms of the annexed draft plaint marked "TNM 13".

ii. THAT this honourable court be pleased to grant the plaintiff/applicant leave to commence proceedings/suit against the 1st defendant bank and/or the 2nd defendant.

iii. THAT pending the hearing and determination of the application herein this honourable court be pleased to issue a temporary injunction restraining the defendants jointly and/or severally, their agents, and/or servants from selling, transferring, alienating, charging and or dealing in any manner whatsoever with land reference number 20149.

iv. THAT 1st and 2nd defendant and/or 6th defendant be ordered to deposit in court all the proceeds from the sale transaction between the 1st, 2nd and the 6th defendants pursuant to the sale agreement made in 2008 and the transfer by charge dated 30th December 2009.

2) The plaintiff/applicant filed an affidavit he swore in support of the summons. When served with the originating summons, Daima Bank Ltd, (In Liquidation) and Deposit Protection Fund Board, the 1st and 2nd defendants/respondents respectively filed the replying affidavit of Daniel Leparany Ng'atunyi to oppose the application while Idah Ndumba Nziuko, the legal representative of the Estate of Jonathan Muia Nziuko, deceased, the 4th defendant/respondent filed a replying affidavit she swore to resist the summons.

3) Musan Enterprises Ltd, the 6th Defendant/respondent filed the replying affidavit of John Musyoka Annan to also oppose the summons. The 3rd and 5th defendants filed grounds of opposition to also resist the motion.

4) When the Originating Summons came up for interpartes hearing, learned counsels appearing in the matter were invited to file written submissions which they did. I have considered the grounds stated on the face of the originating summons and the facts deponed in the affidavits filed in support and against the summons. I have further taken into account the rival written submissions. Though the plaintiff has sought for four main prayers, it is apparent that prayer (ii) was granted and prayer (iii) has been overtaken by events therefore this decision relates to only prayers (i) and (iv) herein. The first two prayers seeks for leave to file an action out of time while the third prayer is for an

order directing the 1st, 2nd and 6th defendants to deposit the proceeds of sale between the 1st, 2nd and 6th defendants/ respondents and the transfer by the charge dated 30th December 2009.

5) The background of this dispute appear to be short and straightforward. The plaintiff/applicant was at all material times the registered owner of the parcel of land known as LR no. 20149 in Mavoko in Machakos County. The plaintiff/applicant offered the aforesaid title to Daioma Bank Ltd (now in liquidation) as a collateral to enable Travel Concepts Ltd, Johathan Muia Nziuko and Idah Nduva the 3rd, 4th and 5th defendants/ respondents respectively to secure an overdraft facility in the sum of ksh.700,000/= in the year 1996 granted by the 1st defendant/respondent. It would appear that the plaintiff mutually agreed with the 3rd – 5th respondents/defendants that they would deposit the aforesaid title with the 1st defendant/ respondent temporarily as the two sourced for an alternative collateral to enable the 1st defendant substitute with L.R no. 20149. It is said that an alternative title was eventually found but the 1st defendant/respondent declined to substitute the title and release it to the plaintiff. It is further argued that despite the 3rd, 4th and 5th defendants repaying the entire loan amount neither the 1st defendant nor the 2nd defendant agreed to release the title to the plaintiff.

6) It is the averment of the plaintiff that he learned in May 2011 that his title was fraudulently transferred to Musan Enterprises Ltd thus prompting him to file this action. The main prayers by the plaintiff/applicant which commends itself for determination is for leave to file an action out of time against all the defendants. It is the plaintiff's/applicant's submission that he donated a power of attorney to the 3rd, 4th and 5th defendants allowing them to pledge L.R no. 20149 as a security to obtain an overdraft facility in the sum of ksh.700,000/= from the 1st defendant on condition that the donees of the power of attorney would secure an alternative collateral so that his title is released to him. The applicant averred that on 20.3.2003, the 1st defendant agreed to release the title to him after the 3rd, 4th and 5th defendants repaid the loan amount or received an alternative security but did not happen since the 1st defendant was subsequently placed under statutory management and later under liquidation.

7) The plaintiff further argued that the 3rd, 4th and 5th defendants promised to retrieve his title from the 1st defendants and return it to him but have not fulfilled that promise. The plaintiff stated that he waited to the 3rd, 4th and 5th defendants to fulfil their promises until the time to file an action against them lapsed. It is also the submission of the plaintiff that his erstwhile advocate M/s Kipkenda Lilan & Co. Advocates misadvised him that his suit namely Nairobi H.C.C.C no. 1128 of 1999 would determine all the issues in dispute between him and the defendants thus leading to the release of his title.

8) The plaintiff argued that he had no fears that the 1st and 2nd defendants would sell his property since the 3rd, 4th and 5th defendants had repaid the outstanding loan of ksh.700,000/= to the 1st defendant who in turn is alleged to have agreed to release the aforesaid security. The plaintiff said that on 31.5.2011 he came to learn that the property was sold to the 6th defendant forcing him to file this suit. The plaintiff also argued that the issues arising from this dispute revolve around a banking contract that stretches from 1996 and for recovery of land.

9) It is argued that the six (6) years required to file an action based on contract and the twelve (12) years required to file an action for recovery of land have lapsed pursuant to the relevant provisions of the Limitation of Actions Act thus necessitating the need on the part of the plaintiff to file this action seeking for leave.

10) It is the submission of the 1st and 2nd defendants that the plaintiff executed a general power of attorney dated 29th July 1996 which empowered the 3rd defendant to do all manner of things over L.R. no. 20149 and that there were no limitations set out on the instrument.

11) The duo stated that the 3rd defendant through the 4th and 5th defendants obtained an overdraft facility from the 1st defendant in the sum of ksh.3,500,000/= using the aforesaid title as a collateral and a charge was registered against the title on 18th April 1997.

12) The 3rd defendant is said to have defaulted in settling the debt forcing the 1st defendant to issue statutory notices in the years 2003 and 2006 informing the plaintiff of its intention to realize the security if the outstanding sum of ksh.8,245,609/= was not settled, but the plaintiff defaulted.

13) The 1st and 2nd defendants further argued that the 1st defendant was brought under liquidation by the Central Bank of Kenya which appointed the 2nd defendant to manage its financial affairs.

14) The 2nd defendant avers that upon the lapse of the statutory notice it sold L.R no. 20149 by way of a private treaty to the 6th defendant.

15) The 1st and 2nd defendants are of the submission that this court has no jurisdiction to enlarge time to file an action for recovery of land and that based on contract.

16) The 3rd, 4th and 5th defendants raised near similar grounds as those of the 1st and 2nd defendants. The trio argued that the plaintiff did not give plausible reasons to explain the inordinate delay in filing the suit against them. They pointed out that the action based on contract lapsed in 2002 and that for recovery of land lapsed in 2008.

17) It is also the submission of the 3rd – 5th defendants that this court has no discretion to extend time in matters based on breach of contract unlike in torts.

18) The 6th defendant/respondent also argued against the summons stating that the delay to bring an action is inordinate hence inexcusable. The 6th defendant also pointed out that it is an innocent purchaser for value without notice hence the intended action will not see the light of the day.

19) Having considered the material placed before this court plus the rival arguments and the authorities cited, I think the preliminary issue which may dispose of this application is whether or not this court has jurisdiction or discretion to extend time to file an action based on contract and or recovery of land.

20) A careful reading of Section 4(1) and 7 of the Limitation of Actions Act, appears to suggest that the court has not discretion to extend time to file an action based on contract and recovery of land unlike to those actions based on tort. It would appear the legislature did not donate that discretion to the court.

21) With respect, I uphold the preliminary objection raised and argued by the defendants that this court has no jurisdiction to extend time to bring an action based on contract and for recovery of land.

22) The plaintiff/applicant's prayer for an order directing the 1st, 2nd and 6th defendants/respondents to deposit in court all the proceeds from the sale transaction between the 1st, 2nd and 6th defendants made in 2008 and the transfer by the charge dated 30th December 2009, is, in my humble view dependent on the outcome of the prayer for leave to file an action out of time. The prayer for extension of time to file an action having been refused means that the later prayer is not available to the plaintiff.

23) In the end the plaintiff's originating summons dated 20th June 2011 is found to be without merit. It is dismissed with costs being given to the defendants.

Dated, Signed and Delivered in open court this 28th day of February, 2019.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant