



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC NO.387 OF 2016

MUKURU MUNGE PLAINTIFF/APPLICANT

-VS-

GILIAD MWANYASI..... DEFENDANTS/RESPONDENTS

RULING

This plaintiff/applicant has filed a Notice of Motion dated 7/12/2016. It is brought under order 40 Rule 1(a) and 4, Order 51 Rule (1) of the Civil Procedure Rules 2010 Section 1A, 1B and 3A of Civil Procedure Act.

He seeks orders of injunction against the respondent restraining him whether by himself, his agents and/or servants, whoever from disposing, selling, leasing or interfering with the applicant's property at plot Number 4118/148 in Taveta Town.

The grounds are relied upon are that the applicant entered into a sale agreement with the respondent in 1996. The application is supported by the affidavit of Mukuru Munge the plaintiff/applicant herein sworn on the 7/12/2016 upon being served with the application the respondent through his advocates M/s Stephen Oddigaga and Company Advocates files a memorandum of appearance defence and a preliminary objection dated 3/2/2017. The preliminary objection raised by the defendant/respondent is premised on two grounds.

1. That the claim herein is time barred and cannot be instituted against the defendant as per the judgment of this court in Civil Appeal No.76 of 2008 and the judgment of the court of appeal in civil appeal no.191 of 2011 where the plaintiff had brought a suit against the same party and same property.
2. The right to file a suit to recover the property subject matter of this suit is now res judicata and this court cannot revisit it.

The plaintiff/applicant on an answer to the preliminary objection filed a reply.

I have considered the submissions of counsel for the defendant/respondent and the plaintiff/applicant. As to whether this is indeed a preliminary objection the parameters were set on the case of **MUKISA BISCUIT COMPANY –VS- WEST END DISTRIBUTORS LIMITED (1969)EA 696** where it was stated at page 701 as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of

law which argued on an assumption that all facts pleaded by 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”.

Going by the above I am satisfied that what is raised here is a preliminary objection.

The plaintiff’s claim is based on a land sale agreement entered into in the year 1996 between James Mawana , deceased, as the vendor and himself as the purchaser. He filed a suit in the Senior Resident Magistrates court at Taveta being Civil Case Number 16 of 2008. The suit was against Florence Shighi Mwawana, Gilied Mwanasi muhimwana and Joseph Wanganga Mwawama, the widow and sons of the deceased respectively.

In that court a preliminary objection was raised by the defendants on the grounds that the suit was time barred. The said preliminary objection was upheld and the suit struck out. The plaintiff appealed to the High Court in Mombasa vide Civil Appeal Number 1760 of 2008. The ruling of the lower court was upheld and the appeal dismissed. He went to the court appeal vide civil appeal number 191 Of 2011 and the decision of the High Court was upheld.

In the above suit the defendant was named as the second defendant.

I have considered the pleading herein. The plaintiff still relied on the agreement entered into in 1996 between himself and the defendants father who is now deceased.

In the plaint dated 7/12/2016 the plaintiff seeks”

i) That the defendant be evicted from my plot

ii) That pending the hearing and the disposal of this case the respondent be restrained from doing any work on that plot.

iii) Cost of the suit.

iv) Any other relief the court may grant.

It is clear that the plaintiff seeks ownership of plot Number 4118/148 m Taveta town

Section 7 of the Civil Procedure Act states”

“No court shall by any suit on issue in which the matter directly and substantially in issue has been directly and substantially in a former suit between the same parties under whom they or any of them claim litigation under the same title in a court competent to try such subsequent suit or the suit in which issue has been subsequently raised and has been heard and finally decided by such court.

I find that the issue of ownership of plot Number 4118/148 cannot be revisited as it has previously gone up to the court of appeal and dealt with.

The defendant herein was one of the parties in the previous cases.

The subject matter is the same, LR Number 4118/148 situated in Taveta town.

Any attempt by this court to deliberate on the issues afresh would amount to setting an appeal over the court of appeal decision. I agree with counsel for the defendant/respondent that litigation must come to an end.

I find that the plaintiff’s application and the entire suit is an abuse of the court process.

I find the preliminary objection herein merited and the same is upheld. The upshot of the matter is that

the plaintiff's application and the entire suit is hereby stuck out with costs to the defendants.

Orders accordingly

L. KOMINGOI

JUDGE

20/4/2017

Ruling dated and delivered in open court on the 20th day of April 2017 in the presence of the plaintiff, Mr. Oddigaga for the defendant and the court assistant Koitamet

L. KOMINGOI

JUDGE