



REPUBLIC OF KENYA

High Court at Meru

Civil Case 70 of 2012

**OFFICIAL RECEIVER & LIQUIDATOR
OF RURAL URBAN CREDIT FINANCE.....PLAINTIFF
VERSUS**

SIMON KANARIO KARIUKI & 2 OTHERS.....DEFENDANTS

RULING

Two notices of Preliminary Objection were filed in this matter by the 1st defendant and the 2nd defendant. The one filed by the 1st defendant is dated 11th May, 2012 and the other one filed by the 2nd defendant is dated 14th May, 2012.

The objection by the 1st defendant argues that this Court has no jurisdiction to entertain the suit herein and the plaintiff's application dated 20th April, 2012 on the following grounds;

- 1. The applicant's claim is barred by the provisions of the Limitation of Actions Act.**
- 2. This suit is res judicata in view of H.C.C.C. No. 2242 of 1993 at Nairobi.**
- 3. The Applicant's claim is not enforceable in view of the provisions of the registered Land Act Cap 300 of the Laws of Kenya.**
- 4. The plaint and the application are a total abuse of the court process and ought to be struck out as they are a waste of judicial time.**

The 2nd defendant's opposition is predicated upon grounds:

- 1. That the plaintiffs' application and the suit are incompetent as they contravene the mandatory provisions of Section 13A of the government Proceedings Act, cap 40 Laws of Kenya.**
- 2. That the plaintiffs' application and th entire suit contravene section 16 of of the government Proceedings Act, Cap 40 of the Laws of Kenya whereby the party cannot seek injunctive orders against the government.**
- 3. That the plaintiff's suit is incompetent or it contravenes section 7 of the Limitation of Actions Act, cap 22, Laws of Kenya.**
- 4. That the plaintiff's application and the suit are frivolous, vexatious and an abuse of the**

court process and a waste of precious judicial time.

For these reasons, the 2nd defendant prays that the application together with the suit should be dismissed with costs. The plaint in this suit is dated 20th day of April, 2012. The plaintiff prays for judgement jointly and severally against the defendants for:

(a) A permanent injunction restraining the defendants jointly from transferring, selling, taking or remaining in possession, dealing with, charging or in any way whatsoever alienating or interfering with the suit properties otherwise known as Title No. Nyaki/Mulanthakari/2765 (originally known as Title No. Nyaki/Mulanthakari 1071; 1072; 1075; 1076; 1079 and Nyaki/Mulanthakari/1080; 1083; 1084; 1088 and 1089).

(b) An order that the Defendant by themselves, their employees, agents servants and or workers be permanently restrained from disposing, selling, transferring, dealing with, charging, taking possession or in any way whatsoever alienating or interfering with the suit properties otherwise known as Title No. Nyaki/Mulanthakari/1088, Title No. Nyaki/Mulanthakari/2764 and Title No. Nyaki/Mulanthakari/2765 (originally known as Title No. Nyaki/Mulanthakari/1071; 1072; 1075; 1076; 1079 and Nyaki/Mulanthakari/1080; 1083; 1084; 1087; 1088; 1089).

(c) An order directing the 2nd Defendant to cancel and expunge from the records registration of Title No. Nyaki/Mulanthakari/2764 and Title No. Nyaki/Mulanthakari/2765 forthwith and in its place thereof revert to the register or it was on 26th May, 1989.

(d) An order directing the 2nd Defendant to reinstate or register the Charge dated 26th May, 1983 over Title No. Nyaki/Mulanthakari/1071; 1072; 1075; 1076; 1079; and Title No. Nyaki/Mulanthakari/1080; 1083; 1084; 1087; 1088; 1089 forthwith.

(e) Costs and interest.

(f) Any other or further relief that the court may deem fit to grant

The plaintiff's application by Chamber Summons under a Certificate of Urgency is dated 20th April, 2012. it sought Orders:

1. That this application be certified as urgent, service be dispensed with and the same be heard exparte in the first instance.

2. That the defendants by themselves, their employees, agents, servants and or workers be restrained from disposing, selling, transferring, dealing with, charging, taking possession or in any way whatsoever alienating or interfering with the suit properties otherwise known as Title No. Nyaki/Mulanthakari/1088, Title No. Nyaki/Mulanthakari/2764 and Title No. Nyaki/Mulanthakari/2765 (originally known as Title No. Nyaki/Mulanthakari/1071; 1072; 1075; 1076; 1079; and Nyaki/Mulanthakari/1080; 1083; 1084; 1087; 1088; 1089) pending the hearing and determination of this suit or further Orders of the Court.

3. That costs of this application be provided for.

I will first deal with the 1st defendants Preliminary Objection. The first ground is that this Court lacks jurisdiction to entertain the suit and the application as the plaintiffs claim is barred by the provisions of the Limitation of Actions Act. I have considered the submissions made by the parties and all the authorities they have adduced. In view of the fact that there is a nexus between this ground and the second ground, I will consider them jointly. The second ground is that the suit herein is res judicata in view of the H.C.C.C. no.2242 of 1993 at Nairobi.

In paragraph 12 of its plaint, the plaintiff has stated that there is no suit pending and there have

been no other proceedings in any Court between the plaintiff and the defendant over the same subject matter. The 1st defendant has produced evidence that Civil Suit No.2242 of 1993 involved the plaintiff and the 1st defendant. The 1st defendant's replying affidavit has annexed exhibit "SK-3" showing that the High Court in Nairobi issued an order in the following terms on 31st 10.2000:

"Order:

As no step has been taken by either party since 11.7.95 which is a period of 5 years, this suit is hereby dismissed under Oder XVI Rule 6 of the Civil Procedure Rules"

On 25th June, 2011, the Honourable Justice Mulwa reaffirmed the Order.

O. XVI r 6 provided as follows:

"In any case not otherwise provided for in which no application is made or step taken for a period of three years by either party with a view to proceeding with the suit, the court may order the suit to be dismissed, and in such case the plaintiff may, subject to the law of limitation, bring a fresh suit.

In this case, the plaintiff did not bring a fresh suit. The order dismissing the plaintiff's suit remains a valid Court order. By virtue of the provisions of the Limitation of Action Act, he is barred from instituting a fresh suit.

There is the issue of whether Civil suit 2242 of 1993 and the present suit have a nexus. Civil Suit No. 2242 was instituted to recover a loan which formed the basis of the 1st defendant offering his land (which is the subject of this suit) as security. Without that loan the suit lands would be of no relevance. I find that when the plaintiff's suit was dismissed, it did not have any other claim against the 1st defendant, unless if it instituted a fresh case. I, accordingly, find that the suit herein is res judicata. I am not inclined to think that section 26 of the Limitation of Actions Act is applicable at all, after finding that this suit is Res Judicata. Sections 4, 7 and 19 of the Limitation of Actions Act will constitute veritable bars.

Having found that the suit is both res judicata and time barred I will not consider the 1st Defendant's ground number 4. I will also not consider grounds 1, and 2 of the 2nd Defendant's preliminary objection. His ground 3 is based on the provisions of the Limitation of Actions Act, which ground the Court has already adopted. It is not necessary to say much with regard to ground 4. I also do not find the necessity of considering the issue whether injunctions can be issued against the government.

In the circumstances I agree with counsel for the 1st defendant that the suit herein and the application dated 20th April, 2012 are statute barred and are res judicata. I also agree with the 2nd defendant's counsel that the suit herein and the application dated 20th April, 2012 are statute barred. I, therefore, strike out the plaintiff's suit and the plaintiff's application dated 20th April 2012 and award costs thereof to the 1st and 2nd defendants.

DATED AND SIGNED AT MERU THIS 31ST DAY OF DECEMBER, 2012.

**P. M. NJOROGE
JUDGE**

**RULING DELIVERED IN OPEN COURT IN MERU ON THE 19TH DAY OF FEBRUARY, 2013
IN THE PRESENCE OF :**

**P. M. NJOROGE
JUDGE**