



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**LAND & ENVIRONMENT NO.6 OF 2012**

LUCAS HAWALA MAHINYA

JOHN OTIENO HAWALA.....PLAINTIFF

VERSUS

JAMES ODUOR ODURE

JOSEPH AMOS OCHWEDA.....DEFENDANT

**R U L I N G**

This ruling follows the hearing of the Notice of Motion filed here on 30/7/2012 and dated 27/7/2012. The application is brought under order 2 Rule 15a of Civil Procedure rules and Section 3a of Civil Procedure Act.

It asks that the 2nd plaintiff's case against the 2nd defendant be struck out with costs for disclosing no cause of action against the defendant. Letting it pend would amount to abuse of the court process and would defeat the overriding objective of the Court, it was said.

It is also asked that the suit be struck out against the 2nd defendant on the basis that the Court's jurisdiction has been ousted by Section 18 of the Land Registration Act.

Both plaintiff's responded by filing grounds of opposition in which they stated, interlia, that the application is misconceived and bad in law; that the matter concerns cancellation of the title deed and not a boundary dispute; that the application is meant to delay fair trial of the suit; that the suit concerns title held by 2nd defendant; and that the application lacks merit and should be dismissed with costs.

During hearing, Otieno PJ for 2nd defendant/Applicant gave a brief history of the matter as it emerges from pleadings. The 1st plaintiff was the original proprietor of the land. The 1st plaintiff then sold a portion measuring 0.08ha to 1st defendant who allegedly duped him and increased the size to 0.27Ha. Sub division subsequently took place resulting into reparation of the land to **L.R NO.EAST ALEGO/KARAPUL/RAMBA/3757, 3755 and 3756**. The 1st defendant has taken Parcel No.3757.

That was said to have occurred in 1994.

Sometime on 20/8/2010 the 1st defendant's portion (3757) was secretly transferred to 2nd defendant but when it was done it swallowed, or took wholly, the 2nd plaintiff's portion, which was no.3756. This was in contravention of what was the 1st defendant's demarcated portion on the ground. The result was that the 2nd plaintiff was denied use and occupation of his entire portion. This was discovered, it was pleaded, when the 1st defendant fenced the land. The position of the plaintiffs is that the defendants connived in order to do what they did.

Counsel for applicant contends that Para 9 of the plaint does not disclose a reasonable cause against the 2nd defendant from 2nd plaintiff.

Counsel also said that under Limitation of Actions Act a claim has to be brought within 3 years while a claim based on land has to be brought within 12 years. Fraud here, the counsel argued, took place in 1994 or before. The claim then is statute barred. Counsel also cited S18(2) of Land Registration Act which divests the Court of jurisdiction in a matter concerning disturbance of a boundary. This suit is about boundary, he said.

It was also pointed out that the 2nd defendant was a purchaser for value without notice. The suit cannot lie against him, it was argued, in light of provisions of s.80(2) of Land Registration Act.

The 2nd plaintiff therefore was said to have no maintainable claim against the 2nd defendant.

Olel for plaintiffs asked the court to look at the sequence of events as stated in the plaint. That sequence, she said, shows clearly that the 2nd defendant is part of what happened. All this was discovered in 2010. She also said that the matter between 2nd plaintiff and 2nd defendant raises triable issues. This is so because the 1st defendant was a party in the contract between himself and 2nd defendant.

The 2nd plaintiff, Olel said, is seeking cancellation for title deed of 2nd defendant which was issued on the basis of contract between 1st defendant and 2nd defendant. The main issue, M/s Olel said, is cancellation of title, not boundary. The issue of boundary is only incidental to such cancellation.

In reply, Otieno reiterated some of the arguments he had made at the start of hearing. For instance, according to him, the plaint talks of 1994 as the time when fraud was committed and not 2010. He also said the 2nd defendant's title cant be cancelled as she was not party to the fraud.

I have considered the application, the grounds of opposition and the arguments and contra-arguments advanced by both learned counsel.

This is a claim based on fraud. It is fraud leading to denial of use and occupation of land by 2nd plaintiff. It was discovered by the plaintiffs in 2010. The fraud is said to have led to issuance of title to 2nd defendant. That title and the subsequent fencing of land on its strength led to dispossession of land from 2nd plaintiff to 2nd defendant. It was discovered in 2010. the plaintiffs allege the two defendants connived to cause such dispossession.

The whole scheme started way back in 1994 or earlier **BUT** its discovery was in 2010.

When did time begin to run? Section 9(1) of Limitation of Actions Act states as follows:-

***“Where the person bringing an action to recover land, or some persons through who he claims, has been in possession of the land, and has while entitled to the land been dispossessed***

***or discontinued his possession, the right of action accrues on the date of dispossession or discontinuance”.***

The 2nd plaintiff has brought this action to get land that he has lost to 2nd defendant. His position is that the 2nd defendant connived with 1st defendant to perpetrate all this against him. The end result was loss of possession when title was issued and his land was fenced. All this was discovered in 2010 and took place the same year.

Quite clearly, according to S.9(1) (Supra), time began to run at the time of dispossession – year 2010. Otieno is therefore wrong on this score. This suit is also said to be about boundary. And Section 18(2) of land Registration Act, 2012 was said to divest the Court of jurisdiction. That would be true if the matter is a boundary dispute. BUT is it? The 2nd plaintiff wants his land back. He would like the 2nd defendant's title to be cancelled. The land was sold to 2nd defendant by 1st defendant and the argument advanced is that the 1st defendant's portion didn't include the 2nd plaintiff's portion.

Quite clearly, the matter is not a boundary dispute. The issue of boundary is only incidental and can only arise if the other prayers are granted. On this score too, Otieno is completely wrong. The matter is essentially not one of boundary dispute.

The suit as brought is also said to violate S.89(2) of the Land Registration ACT, 2012. It is so alleged because it would involve rectification of register leading to issuance of title to 2nd defendant. The 2nd defendant is said to be an innocent purchaser for value without notice. His title therefore is said to be indefeasible and sacrosanct. It is true that S.80 (2) protects such a purchaser. **BUT** it is also true that it allows rectification where such a person has knowledge of omission, fraud, mistake that may have taken place concerning the register. The 2nd plaintiff alleges that the 2nd defendant connived with 1st defendant and fraudulently got title to the land.

In short, to the 2nd plaintiff, the 2nd defendant is not an innocent purchaser and was in fact party to underhand dealings leading to issuance of title. Otieno P.J ignores this aspect of pleading which is clearly at para 11 of the plaint. Once again, Otieno fails to convince the Court.

I have looked at this matter entirely, the picture that emerges is that the two plaintiffs believe that the two defendants acted in concert in a nefarious scheme to get land they were not entitled to. If you separate one from the other you throw the plaintiff's case into disarray.

I also think it is very undesirable to try to score on technical points aimed at thwarting hearing on its merits. The 2nd defendant first filed a defence but later changed tact to try, through this application, to score on technicalities.

It is lost on me what the 2nd defendant would have done had he waited and raised these issues during hearing or submissions.

It is clear that the application, looked at in light of what I have highlighted and also considering the input of the opposing side, is one without merit.

The application is therefore dismissed with costs.

**A.K. KANIARU – JUDGE**

**25/6/2013**

A.K. Kaniaru – Judge

Dianga G. - C/C

No party – Present

Yogo for defendant/applicant

M/s Olel (absent) for plaintiff/respondent

**COURT:** The application dated 27/7/2012 read and delivered in open Court.

Right of Appeal – 30 days.

**A.K. KANIARU – JUDGE**

**25/6/2013**