



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 140 OF 2012

LASET LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JANE NYAMBURA MWANGI &

JANE WAIRIMU MWANGI (the administrators

of the Estate of Wilson Mwangi Karogo).....2ND DEFENDANT

RULING

1. The Plaintiff's application dated 11th April 2013 and filed on 12th April 2013 was brought under the provisions of Order 40 Rules 1, 2, 3, 4 9 and 10 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. Prayer Nos (i) and (ii) are spent and the court will therefore not deal with the same. The application sought the following remaining orders;-

- i. **Spent**
- ii. **Spent**
- iii. **THAT pending the hearing and determination of this suit an order for injunction restraining the Defendants/Respondents whether by themselves, employees, servants and/or agents or otherwise assigns and/or any other person whatsoever acting on their behalf and/or their mandate and/or instructions from alienating, advertising for sale, offering for sale, selling, taking possession of, leasing, transferring, charging or otherwise in any manner interfering with Title No Kajiado/Ololoitikosh/Kitengela/185 (hereinafter referred to as "the suit premises").**
- iv. **THAT costs of this application be provided for.**

2. The application was premised on several grounds. The Plaintiff averred that it was presently and was at all material times the registered proprietor of the subject premises. It created a third Charge by way of guarantee over the suit premises whereupon the 1ST Defendant advanced one Mary Anne Wangai, then an employee of the Plaintiff a guarantee facility not exceeding Kshs 75,000/=. On 20th March 2013, the Plaintiff was informed that unknown persons had attempted to fraudulently transfer the suit premises without its knowledge. It was the Plaintiff's contention that the purported sale on 30th June 1992 was totally illegal, irregular, null and void and tainted with fraud and misrepresentations.

3. Based on the aforesaid grounds and a Supporting Affidavit which was sworn by Prof Nathan

Kahara on 11th March 2013, the court granted interim injunctive orders on 12th April 2013 and fixed the matter for *inter partes* hearing on 23rd April 2013. When the matter came up for hearing on the said date, the 1st Defendant's advocates indicated that they had filed a Defence and a Notice of Preliminary Objection which they wanted heard first as it was on a point of law.

4. The 1st Defendant's Replying Affidavit was sworn by Donald Oseko on 22nd March 2013. It was the 1st Defendant's contention that the delay in transferring the subject premises to the purchaser of the same, Wilson Mwangi Karogo (hereinafter referred to as "the deceased") arose after he passed away. Both the 1st and 2nd Defendants were emphatic that the Plaintiff was aware of the sale of the suit premises by way of public auction.
5. The said Notice of Preliminary Objection was premised on the following grounds:-

- a. **THAT the right of action on the debt under the Charge alleged in the Plaint did not accrue within six (6) months from the date of 20th March 2013 as alleged by the Plaintiff in Paragraph 10 of the Plaint. It accrued on or about 30th June 1992 when the suit premises were sold in pursuance of a public auction.**
- b. **THAT by reason of the aforesaid matters the Plaintiff's claim against the 1st Defendant was barred by Section 4 of the Limitations of Actions Act (Cap 22).**

6. On 6th June 2013, the 1st Defendant filed its written submissions dated 5th June 2013. It submitted that the Plaintiff had failed to disclose that it had given proper notice under the applicable provisions of the Registered Land Act Cap 300 (since repealed) and that the auctioneers proceeded under Section 16 of the Auctioneers Act Cap 536.

7. Firstly, the 1st Defendant argued that the Plaintiff's claim had been barred by Limitation of Actions Act on the following grounds:-

- a. **The law did not permit the Plaintiff to bring up the case twenty one (21) years after the fact. This was to prevent a Plaintiff from prosecuting its claim which had become stale and protecting a defendant who may have lost his evidence. (This was a holding by Bosire J (as he then was) in Rawal vs Rawal (1990) KLR 275). The 1st Defendant contended that its advocates had since destroyed the documents it would have relied upon.**
- b. **The Plaintiff's claim was barred by virtue of Section 4 of the Limitations of Actions Act.**
- c. **If the suit was for recovery of land, then the same was barred under Section 7 of the Limitations of Actions Act as it ought to have been brought within twelve (12) years after the cause of action arose.**
- d. **The Plaintiff ought to have sought leave of the court before filing the suit herein so as to protect the sanctity of the rule of law.**

8. The second argument was that the Plaintiff had failed to disclose material and pertinent facts. These related to the sum of money that was advanced, the amount of money the public auction fetched, that proper Statutory and advertisement notices were issued. It was its case that the Plaintiff had come to court with unclean hands and was therefore not entitled to an equitable relief.

9. To support its case that the Plaintiff had been guilty of laches, the 1st Defendant relied on the case of **Rachel Mwikali Mwandia vs Ken Maweu Kasinga HC Misc 378 of 2008** in which Ogola J said as follows:-

"...It is trite law that equity aids the vigilant and that the plaintiff or her advocates should have known better..."

10. The Plaintiff referred the court to the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696** in which the Court of Appeal, while addressing the issue of preliminary objections stated thus:-

"... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point

may dispose of the suit. Examples are an objection to the jurisdiction of the court, a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

11. As regards the law on the principle of non-disclosure of material and pertinent facts and circumstances, the 1st Defendant relied on several cases to wit **R v Kesington Income Tax Commissioner E.p Princess Edmond De Polignac [1971] I KB 486**, which was quoted with approval in the case of **Rose Wakuthii Njunu (Administrator of the Estate of the late Julius W Mwangi Njunu, Lloyds Bowmaker Ltd vs Britania Arrow Holdings p/c (Iarens, third party) [1983] 3 All ER 178, Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1 and Brink’s Mat Limited vs Elcombe [1988] 3 All ER 188**. The common thread in all the said cases was that a party who did not make the fullest disclosure of all material facts within his knowledge could not obtain advantage from the proceedings but rather he would be deprived of any advantage that could already have been obtained by him.
12. It was also the 1st Defendant’s submissions that the issue of the Land Control Board Consent was time barred. In any event, it argued, the same was between the 1st and 2nd Defendants and it could only make the sale voidable but not void. It argued that, in any event, it was not estopped from seeking any exemption of seeking the consent from the President. In this regard, it relied on the case of **Leonard Njonjo Kariuki vs Njoroge Kariuki alias Benson Njonjo Civil Appeal No 66 of 1977** where the Court of Appeal granted a stay of execution of the orders to enable a party apply for Presidential exemption of the consent under Section 24 of the Land Control Act
13. The 1st Defendant stated that the present application was an abuse of the court process and therefore prayed for the dismissal of the Plaintiff’s suit.
14. In their submissions dated and filed on 18th June 2013, the 2nd Defendant associated themselves fully with the 1st Defendant’s submissions.
15. On 20th June 2013, the Plaintiff filed its written submissions dated 19th June 2013. It argued that the Plaintiff had demonstrated a *prima facie* case with overwhelming probability of success, that the 2nd (sic) Respondent did not possess the power of sale over the suit property, that the value of the subject premises was Kshs 95,000,000/= and that the 1st Defendant had shown serious disregard and contempt of the law that guides the disposal of charged properties.
16. The Plaintiff stated that it only became aware of the fraud, illegality and irregularity on 20th March 2013 and having never been served with any Statutory Notice of Sale for the sale of the subject premises, the suit had not been barred by limitation. It was its argument that the time of a claim founded on fraud, illegality and irregularity accrues from the time a person becomes aware of the said grounds and having become aware of the same on 20th March 2013, there is no way the Plaintiff would have moved the court before then. The Plaintiff relied on the cases of **Bernard Alfred Wekesa vs John Muriithi Kariuki & 2 others (2000) eKLR, Joseph Eshisila & Another vs Abraham Keya Kigamu & Another (2006) eKLR and Humphrey Kiruingi Njagi vs Aga Khan Health Services Ltd (2005) eKLR** where the various courts held that the limitation period starts running from the time a party becomes aware of the particulars, facts or circumstances in a matter.
17. It was the Plaintiff’s further submission that time could also not start accruing as it was in possession of the subject premises which were still registered in its name. It referred the court to the case of **Langat vs Maiywa (2004) eKLR** where the court held that a person in possession of land could not be barred by the provisions of the Limitation of Actions Act from bringing a suit in court. It averred that the 2nd Defendants were not truthful when they said that the deceased took possession of the subject premises because it had not been transferred to him.
18. The Plaintiff argued that if the deceased had taken possession of the subject premises before obtaining the consent of the Land Control Board, then he was clearly in breach of the provisions of Section 22 of the Land Control Act. It thus urged this court to disregard such notion as had been rejected by the Court of Appeal in **Joseph Boro Ngera vs Wanjiru Kamau Kaime & Another (2010) eKLR** where a party had taken possession of land without such consent having been obtained.
19. It was the Plaintiff’s further submission that the issue of whether or not the deceased had taken

- possession of the subject property was a matter to be resolved by way of trial and not by way of a preliminary objection.
20. The Plaintiff also averred that time could not have started running as it had not been served with the Statutory Notice of Sale which was fundamental. It opined that assertions by the 1st Defendant that its documents had been destroyed could not assist the 1st Defendant. It relied on the cases of **Gitau Muiruri vs Standard Chartered Bank Limited (K) Limited (2005) eKLR**, **Martha Khayanga Simiyu vs Housing Finance Co of Kenya & 2 others** and **Delphis Bank Limited vs Praful Natwarlal Shavdia & 2 others (2005) eKLR** where the courts were clear that Statutory Notice had to be given to a Chargor to avoid the Charged property from being sold without his knowledge.
21. The Plaintiff contended that the 1st Defendant did not obtain consent from the Land Control Board within six (6) months of the purported sale of 30th June 1992 which was contrary to the provisions of Section 6 of the Land Control Act. In addition, the 1st Defendant did not appear to have sought extension from the court, of that period as was provided for in Section 8 of the Land Control Act. The Plaintiff therefore submitted that the purported transaction was null and void and the only remedy that was open to the 2nd Defendant was to seek a refund of the monies from the 1st Defendant.
22. The Plaintiff relied on the decisions of **Onyonka vs Migwalla (2005) eKLR**, **Fred C. Fedha & Another vs Edwine E. Asava Majani (2010) eKLR**, **Joseph Boro Ngera vs Wanjiru Kamau Kaime** (Supra) where the courts were in agreement that the absence of the consent of the Land Control Board rendered a transaction voidable.
23. It was the Plaintiff's argument that the subject property did not form part of the estate of the deceased as could be seen in a copy of the Certificate of Confirmation annexed to its Originating Summons and marked "NK 3". Further it averred that the administrators had no capacity to claim the subject premises as the Succession Cause was concluded and that in any event, they were not listed as beneficiaries and heirs of the deceased's estate. They relied on the case of **Hasalon Mwangi Kahero (2013) eKLR** to support its arguments. The citation of the said case was incomplete making it difficult for this court to rely on the same. The court will therefore not attach any weight to the same.
24. It was the Plaintiff's submission that this was not a good case where a Preliminary Objection on the ground of limitation could be sustained as there were so many issues that needed to be resolved by way of a full trial. It listed the said issues as follows:-
- a. **Whether the 1st Defendant issued a Statutory Notice to the Plaintiff and whether Messrs Crown Auctioneers issued notification of sale to the Plaintiff. The Plaintiff's position was that no such notices were issued and the Plaintiff came to learn of the matters the subject of this suit after 20th March 2013. On the other hand, the 1st Defendant contends such notices were issued and the relevant file containing the notices was destroyed. These facts were in dispute and evidence would have to be called to resolve the same.**
 - b. **Whether the 1st Defendant had notified the Plaintiff of the default by the principle borrower, Mary Anne Wangai and whether the 1st Defendant had made any attempt to recover the money from the said borrower.**
 - c. **Whether in the circumstances, the purported sale was null and void and whether it ought to be rescinded and/or set aside.**
 - d. **Whether the purported sale was null and void for failure to obtain the consent of the Land Control Board within the prescribed time.**
 - e. **Whether the 1st Defendant was in law entitled to purport to transfer the Plaintiff's property to the 2nd Defendant when the suit premises did not constitute the estate of the deceased as evidenced by the grant.**
 - f. **Whether the 2nd Defendant had capacity to claim the Plaintiff's property when the same did not constitute the estate of the deceased as evidenced by the confirmed grant and whether the 2nd Defendant can in law purport to transfer the Plaintiff's property to persons other than as authorised by the Succession Cause.**
25. The court has carefully considered the written submissions by the parties and observes that the

- issues raised by the Plaintiff are very pertinent. It would be a travesty of justice for the Plaintiff to be shut out from presenting its case when fundamental issues such as whether indeed Statutory Notice and Notification of Sale were issued by the 1st Defendant or whether consent had been obtained from the Land Control Board as is mandated by the law.
26. It is true as the 1st Defendant submitted that twenty one (21) years is a long time to retrieve documents which it stated were destroyed by its advocates after the requisite period. However, the court notes that the transaction was not completed as the transfer has never been effected in favour of the administrators of the deceased twenty one (21) years later. It would have therefore been taking a great risk for the 1st Defendant's advocates to have destroyed crucial documents when the matter was still on-going. The court would, however, have taken a different view if the transfer had been completed and the said number of years had lapsed without the Plaintiff having taken any action.
27. If the court were to accept the 1st Defendant's submission that its advocates had destroyed all its records as the requisite time for keeping the same had expired, it would be expected that the 1st Defendant and Messrs Crown Auctioneers would still be having copies of their documents. The court has taken judicial notice that at all material times, advocates are expected to forward copies of correspondence to their clients and in the circumstances, it would be expected that the 1st Defendant should be having copies of letters that were issued to the Plaintiff by its advocates, if at all.
28. The court has given due consideration to the 1st Defendant's arguments that the Plaintiff cannot be seen to be seeking reliefs from the court almost twenty one (21) years after the sale of the subject premises by public auction. However, the 1st and 2nd Defendants have taken a similar number of years to conclude the transaction herein. The court is of the view that the 1st and 2nd Defendants cannot approbate and reprobate and that it would be in the interests of justice that the Plaintiff be given an opportunity to present its case.
29. The court is therefore satisfied that the issues raised by the Plaintiff were very fundamental. The Plaintiff has successfully demonstrated that there are matters that need to be canvassed during trial and that the same cannot be resolved by way of a preliminary point of law. This is not a matter that should be disposed of by way of a preliminary objection on the basis of limitation or non-disclosure as had been sought by the 1st Defendant.
30. The court will, however, not address its mind to the other aspects of the arguments advanced by the parties because doing so could result in a real possibility of it creeping into the merits and demerits of the Plaintiff's Notice of Motion application dated 11th April 2013 and filed on 12th April 2013. At this juncture, the court is only concerned with establishing whether or not the 1st Defendant's Preliminary Objection will be upheld.
31. Bearing in mind all the arguments advanced by the parties in their respective submissions, the court finds that the 1st Defendant's Notice of Preliminary Objection dated 22nd April 2013 and filed on 23rd April 2013 is not merited. In the circumstances, the same is hereby dismissed with costs to the Plaintiff.
32. Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of August 2013

J. KAMAU

JUDGE