



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 65 OF 2009

GILGIL DISTRIBUTORS

LTD.....PLAINTIFF

VERSUS

**GRACE RWAMBA NJERU.....1ST
DEFENDANT**

**VIRGINIA NJERI & ESTHER WANJA (Sued as the Administrators
of the Estate of the late**

**JOHN MAINA KAMANGARA).....2ND
DEFENDANT**

RULING

By a plaint dated 20/2/2009, Gilgil Distributors Ltd filed this suit against Grace Rwamba Njeru (1st defendant) and Virginia Njeri and Esther Wanja (sued as the administrators of the estate of the late John Maina Kamangara) the 2nd defendant, seeking two prayers, that the plaintiff be declared the owner of the Land Parcel No. LR No. 1317/540 situated at Gilgil and a permanent injunction restraining the defendants from interfering with the plaintiff's quiet enjoyment of the suit plot.

Filed simultaneously with the plaint is a Chamber Summons brought pursuant to **Order 39 Rules 1, 2 and 3** of the **Civil Procedure Rules** seeking a temporary injunction to restrain the defendants, their servants or agents from developing or evicting and interfering with the plaintiff's possession of the suit land. The application was supported by grounds found on the face of the application and in an affidavit sworn by Leah Wangui Mburu, a director of the plaintiff. The 1st defendant opposed the Chamber Summons by her replying affidavit dated 31/3/2009.

On 4/3/2010 the 1st defendant filed a Notice of Motion pursuant to **Section 7** of the **Limitation of Actions Act** and **Order 50 Rule 1** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, in which she sought orders that the suit be struck out for being statute barred. It was based on grounds found in the application and her own affidavit. Leah Wangu Mburu and John Mburu filed replying affidavits in opposing the application.

On 26/7/2010 J. Maraga directed that both application dated 20/2/2010 and 4/3/2010 be disposed of by way of written submissions. Mr. Matiri, the plaintiff's counsel and Mr. Kimatta for 1st defendant filed and exchanged written submissions which they highlighted in court. The 2nd defendant represented by Mr. Aminga did not file any submissions or reply.

A brief background of this case is that the plaintiff by a written agreement dated 16/7/1991, bought the suit land from the late John Kamangara (2nd defendant). She was given the original title deed after she paid the full purchase price. She then took possession of the premises where she has been parking her vehicles. She noticed that the 1st defendant was depositing building materials on the same plot about 19/2/2009 and upon inquiry, learnt that the 1st defendant had a claim to the same land and that is why she filed this suit and sought interim orders by the application dated 20/2/2009.

On the other hand the 1st defendant claims to have purchased the land from the deceased (2nd defendant) vide a written affidavit dated 21/1/1996 and that therefore, by July 1996 when the 2nd defendant purported to sell the suit land to the plaintiff, he had no title to pass to another purchaser.

In support of the application dated 4/3/2010, Mr. Kimatta submitted that the suit has been filed outside the 12 years period allowed by law. This is because though both parties paid for the suit land in 1996, the 1st defendant was the one who paid for it first and the plaintiff did so later. As a result, the 1st defendant filed NKU CMCC No.2128/96 challenging the second sale and the plaintiff applied to be joined to these proceedings as a 2nd defendant which he did. A judgment was delivered in July 1998 (Clause 5). Counsel submitted that once the plaintiff discovered that the 1st defendant was claiming a purchaser's interest in the same property, his cause of action came alive and that the time started to run in 1996. The suit should have been filed between 1996 and 2008 when the 12 years lapsed. He further urged that if the plaintiff was convinced that he had a better title than the 1st defendant, then he should have challenged it within the 12 years. Counsel relied on **CHESHIRE'S BK ON REAL PROPERTY 3RD ED**, in which the Author says that once a vendor executes a sale agreement in favour of a person, an equitable interest passes to the purchaser and the equity recognizes who purchased the land first. The 1st defendant alleges to have been in possession since 1996 but not 2009. Counsel also relied on the cases of **JOHN KIPROTICH LANGAT V SAMUEL MAIYWA (KERO CA 6/00)** where J. Kimaru dismissed a preliminary objection based on section 7 of the Limitation of Actions Act as there was need for evidence to be adduced in support thereof. In **PHILIP KIMUTAI LANGAT V JOB KIBET MAINA (CA 100/2005)** in which the court observed that Section 26 of the Limitation of Actions Act provided that where fraud, mistake or ignorance of material facts is pleaded, time starts to run from the moment a litigant discovered the fraud or mistake. He also relied on **GITHU V NDEETE (KSU)KLR 776**.

In response, Mr. Matiri submitted that the plaintiff is an owner who has been in actual possession of the suit land until 19/2/2009 when the 1st respondent invaded it and purported to evict the plaintiff by digging trenches. He urged that it is the actions of 19/2/09 that triggered this suit and that under **Section 9(1) of Limitation of Actions Act**, the right of action accrued on the date of dispossession or discontinuance. Counsel also submitted that they seek an order of declaration and there is no harm to one seeking declaratory judgment and even if a time limit was assigned, the effective date is 19/2/09.

I have considered the rival arguments made by parties in this suit. Both the plaintiff and 1st defendant claim to have purchased the land sometime in 1996, each has a written sale agreement entered into with the 2nd defendant over the same suit land and sale price fully paid. Whereas the 1st defendant claims to have entered into a sale agreement in January 1996, the plaintiff is said to have entered into the sale agreement with the 2nd defendant in July 1996. It also seems that none of the parties has had the land transferred into their name. The plaintiff however, claims to be holding the title documents, having been given by the 2nd defendant but they are not transferred into any of the purchasers' names. The title that was exhibited to the affidavit dated 20/2/2009 is still registered in the name of John Kamangara Maina.

The issue at hand is when did the cause of action accrue and whether the suit is time barred. **Section 7** of the **Limitation of Actions Act** provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person.”

What is a cause of action? The **Black’s Law Dictionary 8th Edition pg 235** defines a cause of action as follows:-

“...jurists have found it difficult to give a proper definition. It may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be –

(a) A primary right of the plaintiff actually violated by the defendant, or

(b) The threatened violation of such right, which violation the plaintiff is entitled to restrain or prevent, as in case of actions, or suits for injunction; or

(c) It may be that there are doubts as to some duty or right, or the right be decided by some apparent adverse right or claim, which the plaintiff is entitled to have cleared up; that he may safely perform his duty, or enjoy his property.”

Mr. Matiri urged that explanation (b) that there is threat of violation of the plaintiff’s right, would apply to this case. If that be the case, the question to ask is, when was the plaintiff’s right to the land threatened, or violated, was it in 1996 when the plaintiff learnt of the double sale of the suit land or was it on 19/2/2009 when the plaintiff was allegedly threatened with eviction. In **GITHU V NDEETE** (supra) the Court of Appeal held that:-

“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”

Mr. Kimatta submitted that the plaintiff discovered that the 1st defendant had a claim to the suit land in 1996 and that is when the cause of action came into existence. I have seen the Chamber Summons application in Misc. No. 35/1997 dated 18/3/1997 in which the plaintiff sought to be enjoined to the proceedings before the CMCC No. 2128/1997, where the 1st defendant had sued the 2nd defendant for specific performance, that the 2nd defendant transfer the suit land to her. That is when the plaintiff alleged that the land had also been sold to her and therefore had an interest in CMCC No.2128/96. At paragraph 6 of Leah Wangui Mburu’s affidavit, she deponed that she had been served with an order dated 14/2/1997 restraining her from constructing any building or in any way interfering with the said parcel of land. The affidavit does not disclose exactly when the order was served nor did Mr. Kimatta avail any evidence to show when the order was served on the plaintiff. If the restraining order was served on 14/2/1997, then the discovery of the threat to the plaintiff’s right to the disputed land was therefore the date when the cause of action arose which would have been on 14/2/97. If that be the case, then the 12 years lapsed on 13/2/2009 and this suit would have been statute barred having been filed on 23/2/2009. However, if the court were to take it that the plaintiff learnt of the existence of the rival claim to the suit land when she filed her Chamber Summons dated 18/3/1997, seeking to be joined in CMCC No. 2128/1996, then the cause of action arose on 18/3/1997. In terms of the **NDEETE** case, that is when the plaintiff asserted her right. If that be the case, the 12 years lapsed on 17/3/2009. Since this suit was filed on 23/2/2009, it means that the suit is not filed outside the 12 years. Since the court has no other evidence of when the plaintiff actually learned of the existence of the 1st defendant’s claim to the land and challenged it, this court will take it that the cause of action arose on 18/3/1997 when the plaintiff filed the Chamber Summons dated 18/3/1997. I would therefore hold that the suit is not statute barred.

In respect of the Chamber Summons dated 20/2/09, in which the plaintiff seeks an order of injunction to issue restraining the defendants from interfering with the suit land, I have observed earlier in this ruling that neither the plaintiff nor the 1st defendant have been given the title deed to the suit land. It is still registered in the name of John Kamangara. Both claimants contend that they fully paid the purchase price with the 1st defendant having brought the land in January 1996 while the plaintiff entered into the sale agreement in July 1996.

I have also noted earlier that both the plaintiff and 1st defendant claim to be in possession of the suit land. This court is not able to ascertain who is actually in possession, if at all. That issue, in my view can only be canvassed and determined at the hearing of the suit when evidence will be taken and witnesses cross examined. The plaintiff claims to have been evicted on 19/2/2009 by the 1st defendant. It is not disclosed when the plaintiff took possession of the suit land taking into account that when the plaintiff made the application dated 18/3/1997, seeking to be enjoined to CMCC No.2128/1997, the director of the plaintiff, Leah Wangui, deponed that she had been served with a court order dated 14/2/1997, restraining her from constructing or building or in any way interfering with the suit land. Having been so restrained, the question is when did the plaintiff then take possession of the suit land. Those are questions that will need to be answered at a full hearing. Having so found, I find that the plaintiff has not demonstrated that she has a prima facie case with chances of success - (in **GIELLA V CASSMAN BROWN (1973) KLR**). If the court is in doubt it decides on a balance of convenience. As earlier noted this court is unable to tell who is in possession. At this stage this court will steer clear and not venture into the submissions of counsel on who has the preferred right over the suit land because that is to be determined at a later stage. The court therefore makes no finding on the submissions made by both counsel on when a contract of sale is capable of specific performance. At the hearing, there may be need for a visit to the site. For all the reasons stated above, this court declines to grant an order of injunction as prayed. It is not clear what the status quo is, maybe that is the best order to make at this stage so that neither of the parties is seen as being given rights to the land over the other before the matter is determined on the merits. It is therefore ordered that all of the parties to this suit should not in any way interfere with the suit land pending hearing and determination of this case.

Before I end, I think that the parties to this suit should endeavour to have this suit heard on the merits once discovery is complete, instead of filing one application after the other. I direct that each party bears its own costs on each of the applications.

DATED and DELIVERED this 11th day of March 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Naija for the plaintiff.

Mr. Kimatta for the 1st defendant.

Mr. Kamau for the 2nd defendant.

Kennedy – Court Clerk.