



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 257 OF 2009

WAITHIRA MWAURA.....PLAINTIFF

VERSUS

IKERE GITAU.....DEFENDANT

RULING

This Ruling relates to a Preliminary Point of Law raised by the Defendant against the Plaintiff, claiming that the Plaintiff's suit is time-barred by virtue of Section 7 of the Limitation of Actions Act, (*Cap. 22, Laws of Kenya*) which requires any action for the recovery of land to be brought within a period of 12 years.

Mr. Rabera learned counsel for the Defendant argued that the Defendant herein acquired title to the land on 2nd March 1996 and that, that is when time commenced to run against any claim to the land, and that the 12 year limitation period therefore expired on 1st March 2005. The suit herein having been commenced on 3rd September 2009, it was filed 16 years after the Defendant acquired title, and some 4 years after the limitation itself expired.

Counsel for the Defendant also argued that the Plaintiff had not sought any extension of time under Section 9 of the Act, a window against such limitation of time.

Mr. Rabera relied on the well known principles regarding Preliminary Objections-a pure 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 case - **MUKISA BISCUIT MANUFACTURING CO. LTD. VS. WEST-END DISTRIBUTORS LTD [1969] E.A. 696**, followed in **WILLIE VS. MUCHUKI & 2 OTHERS [2004] 2 KLR 357**, and many other cases.

In opposition to the Preliminary Objection, Mr Njihia, learned counsel for the Respondent submitted that the issues in question in the suit cannot be determined on a technicality of law. There are issues of fact which can only be determined by way of evidence. The Plaintiff's claim, counsel submitted is that she was allocated the suit land by the Settlement Fund Trustees, a body corporate established under Section 167(1) of the Agriculture Act (*Cap. 318, Laws of Kenya*).

Therefore counsel submitted, the acceptance of the allotment, charge, loan repayment and discharge of the charge and transfer of land in a settlement scheme are matters of evidence, and it is not possible on a technical point of law to determine who was or was not the allottee, or whether there was a case of double allocation.

Counsel submitted that under Section 174 of the Agriculture Act, the Settlement Fund Trustees are

prohibited from repossessing land which they have assisted to finance. Counsel relied on the case of **OTIENO VS. MATSANZA [2003] K.L.R. 310**. Counsel therefore concluded that it was unclear how the Defendant obtained title to the land.

Counsel further submitted that the Defendant had not pleaded limitation in his Defence, and that in any event, under Section 175 of the Agriculture Act, time does not run against the Settlement Fund Trustees, as the suit land was still charged to the Settlement Fund Trustees as upto 10th May 1996, and that the said Trustees are still the registered owners of the plot.

Counsel also argued that as the Plaintiff's suit is merely declaratory, and is not for recovery of land, Section 7 of the Limitation of Actions Act does not apply. It is after all, only 4 years from the date when the Trustees transferred the land to the Defendant. In this regard Mr. Njihia relied upon the provisions of Order II, rule 7 which says -

"7. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not."

Further, counsel argued, these are issues which can only be established by evidence, including whether or not the Defendant's title is a first registration within the provisions of Section 143 of the Registered Land Act, (*Cap. 300 Laws of Kenya*). For this submission counsel relied upon the case of **KIPLAGAT ARAP BIATOR VS. ESTHER TALA CHEPYEGON** (*Nakuru H.C.C. No. 70 of 2004*).

Finally counsel submitted, the issues of fraud, mistake or illegality on the issuance of title are matters which can only be proved by way of evidence.

For those reasons, counsel submitted that the Preliminary Objection is ill-conserved, and is intended to bar and obscure from the court's purview, the illegalities committed by the Defendant towards the acquisition of the alleged title, and asked that the Preliminary Objection be dismissed.

I have considered counsel's respective submissions. The first leg of the definition of a Preliminary Objection, as already stated above, 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.

The second leg of a Preliminary Objection is predicated upon the proposition that it raises a pure point of law which is argued on the assumption that all the facts pleaded by the 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.

This Preliminary Objection falls into the latter category. There is no acceptance of when time started to run, is it when the title was obtained, 2nd March 1996, or when the Settlement Fund Trustees transferred the land to the Defendant in 2005? Was the land still charged to the Trustees when title was issued to the Defendant? If so does time run against the Settlement Fund Trustees? Are said Trustees still the registered owners of the suit land? Is a declaratory suit relating to ownership not subject to limitation of actions law? Was there any fraud, mistake or illegality on the issuance of title to the Defendant?

These are all issues which can only be ascertained by further inquiry into the acquisition of title, and can only be proved by way of a trial and production of documents in oral evidence.

There is an additional reason why I am unable to determine this matter on a Preliminary Objection. There is the judgment of Hon. Mr. Justice J. B. Ojwang in Nairobi HCCC No. 395 of 1997, also relating to L.R. No. NYANDARUA/SOUTH KINANGOP/43 by which the court in effect vested title in the Defendant herein as against one KAMAU TICHU the defendant therein. This is also an issue which the Plaintiff herein will need to look into as it may well affect her case.

In summary, there are issues of both fact and law which need to be gone into, and for those

reasons, I am unable to uphold the Defendants' Preliminary Objection, and the same is dismissed with costs to the plaintiff.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 10th day of June 2011

M. J. ANYARA EMUKULE
JUDGE