



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 229 of 2008

STANLEY KAMANDE REGERU & ANOTHER.....1ST PLAINTIFF
MARY MUGURE MIGWI2ND PLAINTIFF
VERSUS
MWAURA MIGWI1ST DEFENDANT
NJOGU WA MBACIU2ND DEFENDANT
THE ATTORNEY GENERAL3RD DEFENDANT

RULING

1. This ruling is in respect of a Preliminary Objection filed by the 1st Defendant against the whole of the Plaintiffs' suit on the grounds that (a) the Plaintiffs claim by operation of the law is time barred and (b) the Plaintiff's suit is thoroughly incompetent as it offends the provisions of the Civil Procedure Rule (sic). The Preliminary objection is dated 11/07/2009 and was filed in court on 21/07/2009.

2. The suit herein was commenced by way of a plaint filed on 15/05/2008, but which is otherwise undated. It is brought by Stanley Kamande Regeru and Mary Mugure Migwi with the consent of the following:—

- *Ngugi Regeru*
- *Kang'ethe Regeru*
- *Kihuyu Regeru*
- *Kimani Regeru*
- *Lucy Wanjiku Regeru*

The consent by the above named persons is also undated. The Verification (sic) affidavit is sworn jointly by Stanley Kamande Regeru and Mary Mugure Migwi the Plaintiffs herein. All the parties are family members disputing over LR No. Ndeiya/Ndeiya/922.

3. In the plaint, the Plaintiffs aver that on 29/05/1985, the 1st Defendant, Mwaura Migwi caused the family land being LR No. Ndeiya/Ndeiya/922 originally registered in the name of Paul Thuo Migwi to be transferred to his (1st Defendant's) name. From the plaint, Paul Thuo Migwi (deceased) was an uncle to the two Plaintiffs and the 1st Defendant; and that he (deceased) died heirless. The Plaintiffs claim that the family land was registered in the name of the 1st Defendant in trust for other members of the Wanja family, and that the 1st Defendant transferred the family land without obtaining consent to do so from the Plaintiffs and other family members.

4. The Plaintiffs further aver that on or about 5/09/1990, the 1st Defendant again transferred the family land to himself and one Maria Nduta Mbaciu, mother of the 2nd Defendant Njogu wa Mbaciu. That the 1st Defendant effected the said transfer without the consent of the Plaintiffs and other family members. The Plaintiffs allege that as a result of the acts of the 1st Defendant, they have suffered loss and pray for judgment severally and individually (sic) for:—

- (a) *That this Honourable Court do give orders to the Third Defendants to cancel the transaction dated 5th September, 1990 so that the title in the said land reverts to the First Defendant to be held*

by himself and in trust for the Plaintiffs.

(b) That the First Defendant be ordered to immediately transfer one third of the said land to each of the Plaintiffs and that if he fails to do so within a specified period determined by this Honourable Court, the Registrar of this court be authorized to do so.

(c) That the Second Defendant or anyone else claiming through him or his late mother be ordered to vacate the said land and pay the Plaintiffs for the use of the land for the period they have been in occupation.

(d) That the Plaintiffs be awarded costs and interest as well as general damages and any other order or relief this Honourable Court might deem necessary.

(e) General damages

(f) Costs and interests hereof.

5. On the 30/06/2008, M/s Mbugua Icharia filed their Notice of Appointment to act for the Plaintiffs in the matter. Following his appointment, Mr. Icharia filed an ex-parte Chamber Summons Application dated 7/09/2008 seeking orders :—

1. **THAT** this application be certified urgent, service do be dispensed with and the same be heard ex-parte.

2. **THAT** this Honourable Court do deem it just and convenient to grant order of inhibition against parcel of land registered as LR. Ndeiya/Ndeiya/922 at Kiambu Land Registry which inhibition should subsist until the case hereof is finally heard and determined.

3. **THAT** this Honourable Court grant such other or further orders it may deem just and convenient.

4. **THAT** costs of this application be provided for in any event.

6. All the Defendants filed their respective defences. The 1st and 2nd Defendants filed a joint Statement of Defence dated 11/02/2009 on the 17/02/2009. While admitting that the 1st Defendant caused the family land to be transferred and registered in the same of the deceased, they aver that the succession was done with the blessings of all parties concerned. The 1st Defendant however denies that the said registration was done in trust for other members of the Wanja family. At paragraph 6 of the defence, the 1st and 2nd Defendants aver that the Plaintiffs' suit is time barred. It is this averment that forms the basis of the Preliminary Objection on a point of law.

7. The Attorney General's defence is dated 19/06/2008. The A.G. denies all the allegations made against him and also avers at paragraph 7 of the defence that the Plaintiff's suit is statute – barred as it offends the provisions of the Public Authorities Limitation Act and the Government Proceedings Act.

8. There is yet another defence filed by M/S R.W. Muhuhu & Co. Advocates on behalf of the 2nd Defendant, Njogu wa Mbaciu. The 2nd Defendant alleges that he is wrongly and improperly enjoined in the suit as he is not seized of any capacity to be sued on behalf of the estate of Maria Nduta Mbaciu (deceased). The 2nd Defendant avers at paragraph 7 of his defence that the suit herein is bad in law, unprocedural and an abuse of the due process of the court.

9. The Preliminary Objection was argued before me on 28/09/2009. Mr. Ocharo for the 1st Defendant submitted that this whole suit is defective on the grounds that the affidavit which purports to verify the averments of the plaint is defective and ought to be struck out. Mr. Ocharo cited **Nairobi HCCC No. 211 of 2004 – Mulusiah Land Consultants & Another –vs- Industrial Development Bank Ltd.** Mr. Ocharo argued that the purported Verifying Affidavit is titled "*Joint Affidavit of Verification*". He said that an affidavit must be sworn by one person who must take responsibility for all the averments contained in the affidavit. (see Nairobi **HCCC No. 1307 of 2003 – Joe Njuguna Wakaba & Another on behalf of 64 Others –vs- Kenya Ports Authority**). In the **Mulusiah case**, both the Verifying Affidavit and Supporting Affidavits were undated and for that reason the Defendant submitted that the same were fatally defective and should be struck out. The court, in deciding the issue referred to section 5 of the

Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya which reads:—

“Every Commissioner of Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

The Verifying Affidavit in the **Mulusiah case** was therefore struck out for failure to comply with the requirements of section 5 of Cap 15 Laws of Kenya.

10. For the present case, Mr. Ocharo submitted that apart from the fact that the Verifying Affidavit is made jointly by the two Plaintiffs, it is also commissioned by the very same advocate who has drawn it and is representing the Plaintiffs. Counsel submitted that the affidavit is invalid on that ground.

11. Mr. Ocharo also argued that this suit, which is said to be a representative suit was brought in contravention of Order 1 Rule 8 of the Civil Procedure Rules namely that the Plaintiffs have not exhibited the authority from the other interested parties to come to court.

12. Further, Mr. Ocharo submitted that the Plaintiff’s suit is time barred. He said that the cause of action having arisen in 1990 makes the claim time barred. He relied on the case of **Bulali –vs- Charles [1988] KLR p 1**.

13. In reply to Mr. Ocharo’s submissions, Mr. Icharia for the Plaintiffs submitted that the cause of action herein arose after 22/02/2008 when the Plaintiffs made an official search on the suit property and found that the same had been registered in the name of the 1st and the 2nd Defendant. Mr. Icharia urged the court to let the suit stand so that the parties can adduce evidence on when the cause of action arose.

14. Regarding Mr. Ocharo’s submissions that the Verifying Affidavit was invalid, Mr. Icharia submitted that the said Verifying Affidavit is valid and that given a chance, the Plaintiffs will prove all the averments in the plaint at the hearing of the suit. He also submitted that there was nothing wrong with him commissioning the Verifying Affidavit because he did not come on record until 27/06/2008 while the Verifying Affidavit is dated 12/05/2008.

15. In response, Mr. Ocharo contended that it is not for the court to fill in the gaps in the Plaintiff’s case; and that according to the plaint, the cause of action arose in 1990 and not on 22/02/2008. Mr. Ocharo submitted that if indeed the issue of trust was at stake in this case, then the worse for the Plaintiffs who have not brought the suit in the proper way by Originating Summons.

16. The above are the facts, the submissions and the law. Should the Defendant’s Preliminary Objection be sustained? I think so. I shall start right from the beginning. The plaint which was filed in court on 15/05/2008 is not dated. As was stated by Mutungi J (as he then was) in the **Mulusiah case**,

“Dating of such documents is not a cosmetic requirement. The purpose for such requirement is very clear. Situations and circumstances do change leading to different legal positions. In the absence of such dates, the court is left to guess as to when the affidavits [or other document] were made, and hence their worthiness in both law and fact.”

I agree. To my mind, the undated plaint cannot be said to be a pleading fit for the court. It is a worthless piece of paper which should not be allowed to see another day in the court. I am aware that counsel for the Defendants did not address this issue of the undated plaint, but I would be failing in my judicial duty if I did not raise the issue, even if *suo motu*.

17. The second issue that has arisen and which calls for the striking out of the plaint is the Joint Affidavit of Verification”. As stated by Ojwang J in the **Joe Njuguna Wakaba case**, it is

“a matter of law that swearing of an oath in court is always an individual affair and the deponent takes responsibility which is enforceable under the law relating to perjury of an identifiable individual. The requirements of truth in a sworn statement cannot be reconciled with the negotiated or rehearsed avowals of a group whether of two or more individuals.”

18. The learned Judge’s sentiments in the **Wakaba case** are in line with the provisions of Order XVIII Rules 3 and 5 of the Civil Procedure Rules. Rule 3(1) requires that affidavits “shall be confined to such facts as the deponent is able of his own knowledge to prove” save in interlocutory proceedings where by leave of the court, “an affidavit may contain statements of information and belief showing the sources and grounds thereof”. Rule 5 requires every affidavit to be made in the first person and as such a joint

Verifying Affidavit or any joint affidavit like the joint affidavit in support of the Chamber Summons does not meet the test of rule 5 of Order XVIII of the Civil Procedure Rules.

19. It follows therefore that both the Joint Affidavit of Verification and the Joint Affidavit in support of the Plaintiff's Chamber Summons application dated 7/09/2008 are fatally defective and are unreliable as the evidentiary basis for both the plaint and the application. On this account, I strike out both the Joint Affidavit of Verification and the Joint Affidavit in support of the application. The result of the striking out of the two affidavits is that the averments of the plaint which is undated are now not verifiable by an affidavit as is required by the rules. Further, the Plaintiff's application is also now unsupported by an affidavit and thus lacks the foundation upon which it can stand. For these reasons, both the plaint filed in court on 15/05/2008 and the application dated 7/09/2008 and filed in court on 7/10/2008 are both struck out, and with them all the reliefs sought in the plaint and the orders sought in the application are refused as they cannot be granted.

20. There is one final issue that has been raised by all the Defendants against the Plaintiffs' case and that is that the Plaintiffs' suit is time barred. The Plaintiffs contend that the cause of action arose on 22/02/2008 while the Defendants say that the cause of action arose in 1990. At this point, it is worth noting that a party is bound by its pleading. Paragraph 7 of the plaint is clear that the cause of action arose on 5/09/1990 when the 1st Defendant is alleged to have transferred the suit land to himself and to Maria Nduta Mbaciu (deceased mother to the 2nd Defendant. There is no basis for the Plaintiffs to allege that the cause of action arose on 22/02/2008 when the Plaintiffs' carried out a search on the suit land. It is also scandalous for the Plaintiffs to say that they want time during the hearing of the suit to say when the cause of action arose. The court has read the pleadings and confirmed that the cause of action arose on 5/09/1990. As the subject matter is land, the suit should have been sought within 12 years of the date of the cause of action and not later. In the result, this suit is time barred as against the 1st and 2nd Defendants.

21. As regards the Attorney General, the Plaintiffs have attached to their plaint a "*Notice to sue the Attorney General*" dated 8/05/2008 and served on the Attorney General on the 12/05/2008. Section 13 of the Government Proceedings Act Cap 40 Laws of Kenya requires that such notice shall be given for 30 days before commencement of the suit and not simultaneously with the filing of the suit. On this score, the Plaintiff's suit against the Attorney General cannot stand and the same must be and is hereby struck out.

22. Further, Section 32 of the Public Authorities Limitations Act, Cap provides that a suit against a public authority shall not be brought after the expiry of 12 months from the date of the cause of action. In this case, the Plaintiffs filed suit against the A.G. some 18 years after the cause of action arose. There is no way the Plaintiffs can argue that their suit is not time barred; or that when they are eventually given a chance to testify, they will explain when the cause of action arose.

23. The sum total of what I have said above is that on all fours, the Plaintiffs' suit is bad in law, it is incompetent and is by operation of law time barred. The suit together with the application dated 7/09/2008 be and are hereby struck out with costs to the Defendants/Respondents.

Orders accordingly.

Delivered and Dated at Nairobi this 21st day of January, 2010.

R.N. SITATI
JUDGE

Delivered in the presence of:-

Mr. Icharia (present) for the Plaintiff

No appearance for the Defendant

Weche – court clerk