REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Civil Case 16 of 2009

MUTITU RURAYA……..……..PLAINTIFF

VERSUS

WILSON MUGWE WERU…….DEFENDANT

RULING

This dispute has had a chequered, protracted and acrimonious history. That history is best captured by Lady Justice Koome's ruling delivered in this very matter on 25th June, 2009. It can however be summarized as follows:

Before filing this suit, the plaintiff had previously filed Nakuru H.C.C.C.NO.188 of 1974 in which the dispute was about the sale of the suit property around 1967. It is alleged that the defendant had offered to sell to the plaintiff the suit property, NYAHURURU/KANYAGIA/13 for valuable consideration of Kshs.13,500.00; that in 1974 a dispute arose over the payment of the balance of the purchase price prompting the plaintiff to file the said Nakuru H.C.C.C. No.188 of 1974. That suit was dismissed on 15th November, 1980 for non attendance of the plaintiff.

In 1983, the plaintiff brought another suit in the subordinate court, Nakuru S.R.M.C.C.No.563 of 1983. The hearing proceeded *exparte* and judgment given in his favour. In the suit, the plaintiff's claim was for a refund of the purchase price from the defendant. A decree and a warrant of attachment were issued and the defendant's tractor attached and sold in execution of the decree. That matter having been so concluded, the plaintiff has once again instituted the present suit last year (2009) against the defendant for a declaration that the defendant having transferred the suit property to him, any registration in the name of any other party including the defendant is null and void. He seeks also an order that the suit property be transferred to him and a permanent injunction to issue against the defendant restraining him from selling or interfering with the plaintiff's quiet possession. The defendant filed a statement of defence and a counter-claim disputing the plaintiff's claim and asserting that the plaintiff having recovered part of the purchase price paid to him through attachment and sale of the latter's tractor, he has no other claim against him. The defendant has also deposed that this suit is an abuse of the court process as it is both time barred and *res judicata.* It is this averment that is the basis of this ruling hence I say nothing about the court-claim at this stage.

I have observed that this matter has been extremely acrimonious. It has seen the defendant arrested by the police, committed to civil jail for contempt of court and so on. However, it has seen the filing of several applications, two applications dated 22nd July, 2009 and 27th October, 2009 were set to be heard by Mugo, J on 3rd November, 2009. They were not heard and fresh date, 16th November, 2009 taken. On 16th November, 2009, both counsel agreed that a preliminary objection raised in the statement of defence be argued instead of the two applications. Mugo, J then directed counsel to file written skeleton arguments on the issue of limitation and the matter be mentioned on 16th December, 2009.

By this time when the matter came up for mention as directed, Mugo, J had been transferred from this court and it fell upon me to consider the objection and the written submissions. Only the defendant has filed submissions while counsel for the plaintiff indicated that he did not intent to file submissions on behalf of the plaintiff. The preliminary objection raised relate to two points – limitation of action and *res judicata*, both being pure points of law, capable of disposing the suit, if argued successfully. See Mukisa Biscuits Co. Ltd. Vs. West End Distributors Ltd. (1969) 696.

Is this suit caught up by the Limitation of Actions Act?

The plaintiff filed Nakuru H.C.C.C.No.188 of 1974 in which he sought four (4) reliefs namely; the transfer of this very suit property to himself by the defendant, that in the event the defendant refused to transfer the property, the court to direct the court's Executive Officer to sign transfer documents, that should court find that the defendant was entitled to the suit property, an order to compel the defendant to refund the full purchase price received by him with interest and the costs of the improvements on the suit property.

Finally he sought damages for the defendant's failure to transfer the suit property plus costs. That was in 1974 and the basis of the action was an agreement allegedly entered into in 1966. That suit was dismissed for non attendance on 15th November, 1980. It has been averred without being controverted that following the above dismissal the plaintiff brought Nakuru S.R.M.C.C.No.563 of 1983 and obtained a decree which was executed in recovery of the part payment made to the defendant for the purchase of the suit property. If that be so, I find that the plaintiff elected to pursue a claim, for damages and was fully compensated. It is on record that the plaintiff had paid only Kshs.6,000.00 out of the purchase price of Kshs.13,000.00.

According to a copy of a warrant of sale annexed to the defendant's replying affidavit of 29th January, 2009, the decretal sum was Kshs.15,625.50. It has been averred by the defendant that the claim was recovered through attachment and sale of his tractor Registration No.KSC 854 – STYE in Nakuru S.R.M.C.C.No.563 of 1983.

It may be asked, the tractor having been sold, what is left of the plaintiff's claim against the defendant? In view of the attachment and sale of the defendant's property and bearing in mind that the plaintiff did not pay the full purchase price, can the court declare that the defendant had sold the suit property to the plaintiff? Can the court order that the suit property be transferred to the plaintiff or even permanently restrain the defendant from dealing with it? The answer to these questions is obviously that the plaintiff has fully been compensated and has no interest or claim in the suit property.

Regarding limitation of time, I reiterate that the first suit was filed by the plaintiff in 1974 in Nakuru H.C.C.C. No.188 of 1974. It was subsequently dismissed for non-attendance on 15th November, 1980. Order 9B of the Civil Procedure Rules provides that where a suit has been dismissed for non-attendance, the aggrieved party may apply to the court by summons to set aside the order of dismissal. The plaintiff did not follow this route and chose instead to bring a fresh suit – this suit, based on the very claim that had been dismissed in 1980. This suit was brought last year, (2009), twenty nine (29) years after the dismissal of the initial suit.

Two issues arise from this, was the plaintiff within the limitation period to bring the present suit? The second question is whether he could infact bring a fresh suit following the dismissal of the initial suit.

I start with the last question. Order 9B rule 4(1) of the Civil Procedure Rules provides as follows:

> "4(1) If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court."

Rule 7(1)(2) goes on to state that:

> "7. (1) Subject to *sub-rule (2)* and to any law of limitation of actions, where a suit is dismissed under this order the plaintiff may bring a fresh suit.
>
> (2) When a suit has been dismissed under *Rule 4* no fresh suit may be brought in respect of the same cause of action."

It is clear that a party whose suit has been dismissed for non attendance can bring a fresh suit subject to the law of limitation of actions. However, if the suit has been dismissed because only the defendant has attended court and does not admit the claim or part of it, no fresh suit based on the dismissed action can be brought. In this matter, it is the defendant who was before the court (although the plaintiff's counsel was present). Mead, J found that there was no sufficient ground to grant an adjournment sought by the plaintiff's counsel (as the plaintiff was not in court). The Judge then proceeded to dismiss the suit *"for want of prosecution"* (should have been for non attendance). In the circumstances and in terms of sub-rule (2) aforesaid, the plaintiff was precluded from bringing a fresh suit although the word used in the subsection is "may".

Again Rule 7(1) provides that only subject any law of limitation of actions can a suit dismissed for non-attendance be brought afresh. Section 7 of the Limitation of Actions Act provides that an action for the recovery of land cannot be brought after the end of twelve (12) years from the date the right of action accrued. It is not in dispute that the right of action accrued to the plaintiff in 1974 when it is alleged that the defendant reneged on the sale agreement. Once Nakuru H.C.C.C.No.188 of 1974 was dismissed, the date of the cause of action remained 1974.

The plaintiff has waited for thirty five (35) years to bring this action. He has neither brought himself within the exceptions for the extension of limitation period in Part 111 of the Limitation of Actions Act nor sought leave before bringing the present suit. Koome, J in her ruling to which I have referred came to a similar conclusion when she said;

> "Under *Order XVI rule 6*, if a matter is dismissed for want of prosecution, the plaintiff can, subject to the law of limitation, bring a fresh suit. The plaintiff's suit was dismissed in 1980. This suit is being brought after about 28 years. This is obviously outside the parameters of Limitation of Actions Act."

Like Mead, J, Koome, J believed that the matter was dismissed for want of prosecution of prosecution. I have already stated that it was dismissed for non-attendance of the plaintiff. But of significance is that the plaintiff had been warned in that ruling that his suit was a non starter. For the reasons stated, this suit is clearly an abuse of the process of the court, brought after the claim had been settled, out of the limitation period and without leave.

The objection is sustained and the suit is struck out with costs. The defendant's counter-claim, may be listed for hearing at the registry on a priority basis.

Dated, Signed and Delivered at Nakuru this 5th day of February, 2010.

W. OUKO
JUDGE