



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISII

Civil Case 63 of 2009

ABUYA OMWERI.....APPLICANT/PLAINTIFF

-VERSUS-

KELYIAN GROUP RANCH.....RESPONDENT/DEFENDANT

RULING

Abuya Omweri, “*the plaintiff*” on 22nd May, 2006 filed the instant suit against Kelyian Group Ranch, “*the Defendant*”. In the suit the plaintiff prayed for a declaration that the defendant held a portion of land measuring approximately 10 acres in land parcel Trans-mara/Keiyian/5, “*the suit premises*” in trust and for his benefit and use and that the defendant be ordered to transfer the same to the plaintiff.

The facts that informed the suit are that the defendant is the current registered proprietor of the suit premises measuring 816.4 Ha. Approximately. During land adjudication and Registration, the defendant according to the plaintiff fraudulently and wrongfully caused the plaintiff’s land measuring 10 acres to be annexed into and registered as part of the suit premises. As a result the plaintiff was wrongfully and fraudulently dispossessed and deprived of his said piece of parcel land. It is the case of the plaintiff that despite the registration aforesaid the defendant holds the 10 acres incorporated in the suit premises, in trust and for his benefit and use.

The defendant was duly served with the summons. It subsequently entered appearance and filed a defence. Its defence was to the effect that the suit was misconceived, a non-starter and ought to be struck out peremptorily. It denied fraud in the acquisition of the 10 acres claimed by the plaintiff. The plaintiff’s recourse, if any, was to invoke the provisions of *section 26 of the Land Adjudication Act*. Having failed to do so the plaintiff according to the plaintiff was estopped from pursuing this suit. Accordingly the defendant did not hold the 10 acres out of the suit premises or any portion thereof in trust for the plaintiff. Finally the defendant averred that the plaintiff’s suit was statutorily barred vide the provisions of *section 7 of the Limitation of Actions Act*.

On 14th November, 2006, the defendant filed an application to have the plaintiff’s suit struck out on the grounds that it was the

registered proprietor of the suit premises. That the plaintiff's claim to the same and for an order for transfer to him was time barred under *section 7 of the Limitation of Actions Act*. Prayer for a declaration that the defendant held a portion of 10 acres out of the suit premises in trust for the plaintiff was also not available to the defendant in view of the provisions of *section 4(1) (e) of the Limitation of Actions Act* and finally that the plaintiff ought to have exhausted the avenues provided under the *Land Adjudication Act* instead of coming to court in this manner nearly 40 years after the completion of the Adjudication exercise.

As expected the application was opposed. In a replying affidavit filed in court on 17th January, 2007, the plaintiff deponed that there were other reliefs sought in the suit which were not time barred. The suit disclosed reasonable cause of Action and was not frivolous or vexatious.

From the record that application came up for hearing several times only to be adjourned for reasons which are not clear nor apparent. However the last adjournment was on account of the applicant's counsel being indisposed. Subsequent thereafter on 17th November, 2009, the main suit and not the application was fixed for hearing. The only assumption I can make in the circumstances is that parties agreed not to proceed with the application. Instead they opted to have the main suit heard.

On 16th February, 2010, the hearing of the suit commenced before me. However, *Mr. Sengendo*, learned counsel for the defendant took up a preliminary objection on account of the provisions of *section 7 of the Limitation of Actions Act*. That the claim herein was for the recovery of land. The suit was filed on 22nd May, 2006. However the defendant was issued with the certificate of title on 4th November, 1980. That being the case the plaintiff's suit was time barred and ought to be dismissed with costs to the defendant as it was a claim to recover land which ought to have been made before the expiry of 12 years. In support of this submission counsel relied on the case of *Joseph*

Marisin V. Joseph Kibilat. Bargaliet, C.A.No. 306 of 1997.(UR),

Mr. Soire learned counsel responded for the plaintiff. His rebuttal was to the effect that the suit premises were registered in the name of the defendant on 5th November, 1998. Thus this suit was filed in time. Further the remedy sought is a declaration of trust which is not caught by limitation.

I have carefully read and considered the pleadings, application, respective affidavits and the annexures thereto, rival oral submissions and the law. My take on the preliminary objection is that under *section 7 of the Limitation of Actions Act*, no action may 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. In the circumstances of this case there is no doubt at all that the suit premises were transferred and registered in the name of the defendant on 4th November, 1980 going by the certificate of title annexed to the affidavit by *Murero Ole Yiampoi* dated 13th November, 2006 and filed in court the following day.

This would seem to fly in the face of the submission by the plaintiff that the suit premises were registered in the defendant's name on 5th November, 1998. He brought forth no evidence documentary or otherwise to back up his claim. I also note that in his replying affidavit dated 6th December, 2006 and filed in court on 17th January, 2007, the plaintiff gave a wide berth to the issue. Much as it was raised the plaintiff categorically opted not to counter and or challenge that deposition for reasons best known to himself. Accordingly and in the absence of any other evidence to the contrary, I would hold that the defendant was registered as proprietor of the suit premises way back on 4th November, 1980. In any case, the plaintiff in his plaint has averred that during Land Adjudication and Registration process, the defendant fraudulently and or wrongfully caused his land measuring 10 acres to be annexed into the suit premises. It is common ground and the documents in the court record bears out this fact that the process of Adjudication commenced in August, 1972 and was concluded in February, 1973. This suit was however filed on 22nd May, 2006. So that whichever way one looks at it, the suit was filed long after the expiry of 12 years Statutory Period.

The plaintiff too has claimed the parcel of land on the basis that the defendant during land adjudication and registration process fraudulently caused his portion of land to be incorporated in the suit premises. The plaintiff has gone further and given particulars of fraud. Fraud for all intents and purposes is a tort. *Section 4(2) of the Limitation of Actions Act* specifically provide that "*an action founded on a tort may not be brought about at the end of three years from the date on which the cause of action accrued.....*". Here again the plaintiff is caught in time warp. By virtue of *section 26(a) of the same Act*, the period of limitation aforesaid however does not begin to run until the plaintiff has discovered the fraud. Though the plaintiff does not specifically state in his plaint when he discovered the fraud, it can be savely assumed that he did not make the discovery at the time of filing the suit.

Perhaps I would have been more than willing to bend backwards to accommodate the plaintiff's claim on the basis of a trust. As correctly observed by *Mr. Soire*, the remedy sought is recovery of land based on trust. That being the case it is probable that it may not be amenable to limitation of time. However, as I sat down to craft this ruling and as I read through the pleadings, it occurred to me that strictly speaking there was no proper or valid suit in court. Why do I say so? The plaint filed herein is neither dated nor signed by the plaintiff and or his advocate as required by the rules *Order VI rule 14 of the Civil Procedure rules* is specific and mandatory. It provides interlia:- "*Every pleading shall be signed by an advocate , or recognized agent (as defined by Order III, rule 2), or by the party if he sues or defends in person.....*" The plaint is a pleading. However since it was not signed by the advocate, recognized agent and or the plaintiff himself as mandatorily required by the provisions of the law, there is no proper and or valid suit before court. The purported suit is liable to be struck out. I am not oblivious however to the fact that this issue was neither raised nor canvassed by the parties before me. However it is a matter which goes to jurisdiction which I cannot close my eyes to. I cannot think of any reason that the plaintiff would advance that would turn an unsigned plaint into a signed one.

For all the foregoing reasons, I am satisfied that the preliminary objection was well taken. Accordingly, I allow it with the consequence that the suit is struck out on the basis of limitation as well as the plaint being unsigned. The defendant shall have the costs of the suit as well as the application.

Dated, signed and delivered at Kisii this 4th March, 2010.

ASIKE-MAKHANDIA

JUDGE