



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Miscellaneous Civil Suit 282 of 2009

**1. KHAIRUNISA HUSSEIN LADHA
2. SHEHNAZ HUSSEIN LADHA.....PLAINTIFFS
VERSUS
1. THE ESTATE OF ABDULREHMAN HAJI LADHA
2. THE ESTATE OF ALI MOHAMED HAJI LADHA
3. ISMAIL HAJI LADHA
4. FIRST BURTON DEVELOPMENTS LTD.....DEFENDANTS**

RULING

I have before me an application to strike out the Originating Summons. It is expressed to be under sections 13 (1) and 39 of the Limitation of Actions Act and Order VI Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules. The 4th defendant challenges the jurisdiction of the court to hear and determine the Originating Summons. In the grounds on the face of the application, the 4th defendant lists 11 grounds upon which the Originating Summons is attacked. Of all those grounds the grounds that challenge the jurisdiction of the court are 8 and 9. The rest of the grounds attempt to show why the Originating Summons is frivolous, vexatious, and a gross abuse of the process of the court. The application is supported by an affidavit sworn by one Ismael Gulamah, a director of the 4th defendant applicant. The affidavit elaborates the above grounds.

The application is opposed on the basis of Grounds of Opposition and a replying affidavit sworn by the 1st plaintiff Khairunissa Hussein Haji Ladha. In the affidavit, the plaintiff gives the basis for seeking relief by way of the Originating Summons.

When the application came up for hearing on 8th October 2009, counsel agreed to file written submissions which were duly in place by 15th April 2010. In his submissions, counsel for the 4th defendant contends that the period of limitation did not run in favour of the plaintiff and no right of adverse possession accrued to the plaintiffs for various reasons. It is for those reasons that the 4th defendant argues that the court has no jurisdiction to entertain the Originating Summons and that the Originating Summons is frivolous, vexatious and an abuse of the process of the court and that it may embarrass or delay the fair trial of the action.

In response to those submissions, counsel for the plaintiffs argues that this court has jurisdiction to entertain the Originating Summons. In his view the period of limitation has not only run in favour of the plaintiffs, but it has also run against the 1st and 3rd defendants who had no interest to transfer the suit property to the 4th defendant. Counsel saw nothing prejudicial or embarrassing with the filing of the Originating Summons. Having been filed earlier, counsel did not see how the Originating Summons could delay the hearing of HCCC No. 175 of 2008.

I have considered the application, the affidavits and the submissions of counsel. Having done so, I take the following view of the matter. On the issue of jurisdiction, the 4th defendant has contended that the period of limitation has not run at all. It has given reasons for that contention. The plaintiffs disagree and have given their reasons for their disagreement. The issue of the period of limitation and when it commenced and ended is an issue of fact to be proved by evidence. The belief by the 4th defendant that the period has not run cannot be the basis of its contention that this court has no jurisdiction. The 4th defendant may have a strong case. However, the strength or weakness of a case has nothing to do with the jurisdiction of the court. In my view the objection to the jurisdiction of the court has not been well taken.

Is the Originating Summons frivolous and vexious? A pleading which is frivolous is not serious and one which is vexatious would tend to vex or annoy. I have perused the affidavits filed in support of the Originating Summons. I detect no averment in the supporting affidavit and the further affidavit which can be described as not serious or annoying.

Does the Originating Summons prejudice, embarrass or delay the fair trial of HCCC No. 175 of 2008? How can that be when the Originating Summons was filed prior to the filing of HCCC No. 175 of 2008? In any event I have not detected any embarrassing or prejudicial averments in the Originating Summons. Is it a gross abuse of the process of the court? The plaintiffs allege to have been in an open and uninterrupted possession of the suit property since 1953 and that by the time the suit property was transferred to the 4th defendant, they had acquired rights over the property by adverse possession and there was therefore no interest to be transferred to the 4th defendant. As to whether they will succeed in establishing those averments is not for determination at this stage. What is clear however is that their pleading cannot be described as a gross abuse of the process of the court.

With regard to the contention that the plaintiffs are estopped from pleading limitations because of statements made in previous proceedings or documents, I note that directions on the Originating Summons have not been taken. An exhaustive consideration of the impugned documents and proceedings is not possible in his application. Estoppel cannot therefore be the subject of a conclusive decision on the basis of submissions made to me. The documents founding the plea of estoppel should be discovered in the Originating Summons and parties given an opportunity to testify thereon or otherwise comment thereon. The authenticity purport and veracity of the documents and proceedings may even call for cross-examination on the same. In the premises the plaintiffs' Originating Summons cannot, at this stage, be defeated on the basis of estoppel.

I have refrained to say more least I prejudice the Originating Summons or the said HCCC No. 175 of 2008.

In the result the 4th defendant's application dated 4th September 2008 is dismissed with costs to the plaintiffs.

It is so ordered.

DATED AND DELIVERED AT

MOMBASA THIS 10TH DAY OF MAY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kinyua for the 4th Defendant/Applicant and Khatib for the Plaintiff.

F. AZANGALALA

JUDGE

10TH MAY 2010