



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 280 of 2006

BAKARI MOHAMED MWATETE.....PLAINTIFF

VERSUS

1. MARTHA WANGUI MURITHI

2. FRANCIS WAIGANJO KIMANGA

3. COAST COCONUT FARMS LTD.....DEFENDANTS

RULING

By his amended plaint dated 31st January 2007, the plaintiff seeks three main reliefs namely a declaration that the process of ownership of the suit property by the 1st, 2nd and 3rd defendants is irregular, null and void; an order that the title deed in the names of the 3rd defendant be revoked and general damages. The foundation of the plaintiff's claim is fraud which he said he discovered in the year 2000.

The 1st defendant filed an amended defence on 4th November, 2009, and pleaded that the plaintiff's suit is statute barred by virtue of the provisions of the Limitation of Action Act. On 16th March 2010, counsel for the 1st defendant filed a Notice of Preliminary Objection on the following grounds:-

- (a) **That the plaintiff suit is fatally defective as it offends the express provisions of the law and specifically sections 2, 27, 28 and 38 of the Limitation of Actions Act.**
- (b) **That the plaintiff's suit is fatally defective as the plaintiff seeks damages and/or rectification of the register without enjoining the Registrar of Titles.**
- (c) **That further the plaintiff's suit offends the provisions of section 143 of the Registered Land Act.**

Counsel agreed to file written submissions on the Preliminary Objection which were duly in place by 10th May 2010. Counsel for the 1st defendant submitted that his client was registered as proprietor of the suit property in the year 1975 and by the time this suit was filed on 31st January 2007 it was way out of time and was filed without leave. Counsel further submitted that the 1st defendant's registration was a first registration and was therefore protected by section 143 (1) of the Registered Land Act. In any event, so counsel argued, the property had now been transferred elsewhere and was now in the name of a party who has now been removed from these proceedings.

Lastly, it was argued for the 1st defendant that the Registrar of Titles is better placed to answer the plaintiff's complaints yet he has not been joined.

In his response counsel for the plaintiff submitted that, the plea of Limitation cannot defeat the plaintiff's claim because he did not discover the fraud until the year 2005. Counsel further contended that on the 1st defendant's admission in a previous affidavit, the plaintiff was the 1st registered proprietor of the suit property. In that event section 143 (1) of the Registered Land Act could not aid the 1st defendant. Counsel also submitted that the 1st defendant had in a previous application raised the same objections which had been dismissed and cannot

reiterate the same issues in a preliminary objection. In counsel's view evidence would show that the entire chain of events from the 1st defendant to the 3rd defendant was fraught with illegality and the plaintiff will be able to show that he has a better title.

I have considered the Preliminary Objection and the submissions of counsel thereon. I have also considered the cases cited to me. Having done so, I take the following view of the matter. An objection in limine is based on what used to be a demurrer. The case of **Mukisa Biscuit Manufacturing Company Limited – v – West End Distributors Limited [1969] EA 696** is the locus classicus on the subject. The court at page 701 stated as follows:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of Law which is argued on the assumption that all the facts being 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.....”

It is plain therefore that a preliminary objection must raise a pure point of Law. In the matter at hand, the objections raised in paragraphs (a) and (c) are pure points of Law and can be the subject of a preliminary objection. The objection raised in paragraph (b) is however not a pure point of Law and has not been well taken. The plaintiff is entitled to choose against whom he seeks relief. Objections raised in paragraph (a) and (c) have however not been argued on the assumption that all the facts pleaded by the plaintiff are correct. There is indeed no agreement on the facts as they are hotly contested. In any event the objection could not be determined without ascertaining facts. In my view the 1st defendant's objection should have taken the form of an application supported by an affidavit in which facts relied upon and in opposition would be given. The documentary evidence to which both counsel referred would then be introduced.

Striking out a claim is a drastic remedy and the jurisdiction to do so must be exercised with extreme caution. Having said that, I am not sure that if the court had been properly moved the plaintiff's claim in respect of the suit property would have survived in view of the fact that the registered property is no longer a party to these proceedings. Be that as it may, for now the preliminary objection is overruled with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 3RD DAY OF JUNE 2010.

F.

AZANGALALA

JUDGE

Read in the presence of:-

Ms Kithikii holding brief for Oddiaga for the Plaintiff and Mr. Wandera holding brief for Mr. Kanyi for the 1st Defendant.

F.

AZANGALALA

JUDGE

3RD JUNE 2010