

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Case 17 of 2008

EMMY KHANGU MAJENGO PLAINTIFF

V E R S U S

JOSEPH MADEGWA AMWOGA1ST DEFENDANT

EPAINITO GAYLORD AVEDI2ND DEFENDANT

R U L I N G

The defendants herein filed the notice of motion dated 6th May 2008 seeking orders that the plaintiff's suit be struck out with costs. The application is supported by the affidavit of **EPAINITO GAYLORD AVEDI**, the 2nd defendant sworn on 6th May, 2008.

Mr. Musiega, counsel for the defendants/applicants submitted that the plaintiff's claim is statutory time barred. The 1st defendant became the registered owner of plot No. **KAKAMEGA/SHAMAKHOKHO/776** in 1985 and the suit herein was filed in 2008. This is about 23 years later and outside the twelve (12) year statutory period. Counsel also submitted that the plaintiff's suit has been the subject of adjudication by the Vihiga Magistrate's Court in Miscellaneous Application No.53 of 2006 as well as by the Tiriki East Land Disputes Tribunal.

Counsel for the applicants further submitted that the 1st defendant became the registered owner of the suit property through Kakamega Succession Cause No.77 of 1984. The property was initially jointly registered in the names of the 1st defendant's father and the plaintiff's father. The 1st defendant became the administrator of both registered proprietors after their demise and is therefore the lawful owner of the suit property. A grant was issued in his favour and the same has not been revoked. Counsel urged the court to strike out the suit herein.

Mr. Kundu, counsel for the plaintiff/respondent relied on the replying affidavit of the plaintiff sworn on 29th May, 2008. Counsel submitted that the plaintiff's claim is based on fraud and seeks cancellation of the title deed for the suit property. The issue of fraud has not been the subject of deliberation before a court of law. Counsel further submitted that the decision of the Lands Dispute Tribunal has not been adopted by a magistrate's court and therefore the proceedings are not complete.

Annexure EM2 annexed to the plaintiff's replying affidavit is an extract of the land register in reference to plot **KAKAMEGA/SHAMAKHOKHO/776** popularly known as the "green card." The proprietorship section indicate that the title was opened on 8th April 1975 and registered in the names of **MUSA MAJENGO** and **JOTHAM MADEGWA SHIBEKA** each entitled to ½ undivided share. On 3rd September, 1985 the applicant was registered as the Administrator of the late **JOTHAM**

MADEGWA SHIBEKA. Although the specific entry does indicate that the 1st defendant was registered as the administrator of the deceased without it does not indicate the name of the deceased. It is clear from entry Number 3 of the record that the unnamed deceased was **JOTHAM MADEGWA SHIBEKA** as the said entry No.3 indicate that the new proprietors as at 24.4.1985 were **JOSEPH MADEGWA AMWOGA** and **MUSA MAJEGO**.

On 30-4-1985 a Land Certificate (title) was issued. This is the title exhibited by the defendants as annexure EGA 2(b). Unfortunately the title only bears the name of **JOSEPH MADEGWA AMWOGA** only. On 24th May, 2005 **JOSEPH MADEGWA AMWOGA** transferred the property to the 2nd defendant **EPAINITO GAYLORD AVEDI** and a fresh title deed was issued in the 2nd defendant's name. the record does not show how the name of **MUSA MAJENGO** disappeared from the entries in the proprietorship section.

The main issue is whether the plaintiff's suit is time barred and whether the issues raised in the suit have already been deliberated upon. The transaction giving rise to the 2nd defendant's ownership was made on 24th May 2005. This is a transfer by the 1st defendant. The plaintiff contends that she is the daughter of the late Musa Majengo and that no succession cause for her late father was filed. The cause of action arose from 2005 as the records at the Vihiga District Land Registry show that the plaintiff's father was still one of the registered proprietors in 1985 and his name was removed in 2005. It is therefore my finding that the plaintiff's suit is not time barred having been filed in 2008.

The proceedings before the Tiriki East Division Land Disputes Tribunal did not relate to fraud. The jurisdiction of the Land Disputes Tribunals as provided by section 3 of the Land Disputes Tribunals Act, Act No.18 of 1990 does not include disputes based on fraud. It follows that the plaintiff's claim has not been deliberated upon by any tribunal or court and the same is not res-judicata.

In the end, I do find that the defendants' application dated 6th May, 2008 lacks merit and the same is dismissed with costs.

Delivered, dated and signed at Kakamega this 17th day of September, 2009

SAID J. CHITEMBWE

J U D G E