REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS
Civil Case 115 of 2009

KAVOO NDETI ……...PLAINTIFF/APPLICANT

VERSUS

GEORGE L.M. NZIOKA…….....……....DEFENDANTS/RESPONDENT

RULING

1. The Applicant, Kavoo Ndeti instituted this suit on 22.4.2009 and from the Plaint his claim is predicated on the validity or otherwise of a contract of sale made on 30.11.1986 between the parties in respect of the sale and purchase of land parcels Nos Machakos/Ulu/472 and 473. It is his case that the contract was rendered void by operation of law and the decision of the Makueni Land District Tribunal in its Case No. 33 of 1999 was a nullity.

2. By his Chamber Summons dated 21.4.2009 premised on Order XXXIX Rule 2 of the Civil Procedure Rules, the Plaintiff seeks orders that the Defendant be restrained from executing the decree of the Kilungu Resident Magistrate's Court in LDT Case No. 3 of 2000 pending the hearing of this suit.

3. The suit and the Application before me were triggered by a letter dated 17.4.2009 written to the parties by the District Surveyor, Makueni informing them that on 23.4.2009, he would visit the disputed parcels of land and execute the order in Kilungu SRM's Court LDT 3 of 2000 which order reads as follows:-

"***According to the suit land namely, Machakos/Ulu/472 & 473 are the property of the Plaintiff George L.M. Nzioka(sic).***"

That order is dated 27.3.2000 and in his Supporting Affidavit sworn on 21.4.2009, the Applicant depones that the execution of the decree will occasion him irreparable harm because***;***

i. he has already instituted on appeal before the Eastern Province Appeals Committee and by letter dated 26.1.2009, the Committee ordered that the status quo in respect of the suit land be maintained until the appeal is heard and determined.

ii. that when the contract entered into with the Defendant could not be effected, he sold the disputed parcels of land to other persons and transfer to the Defendant will affect the rights of those other persons.

4. In his submissions, Mr. Makundi for the Applicant stated that a prima facie case with a probability of success has been made out because the consent obtained to transfer the land was made outside of the 6 months period envisaged by section 8(1) of the Land Control Act and therefore, the contract of sale became void for all purposes and cannot be enforced. He relied on the decision in Stanley Mbugua Gachie vs Lakeli Waitheri & 2 others C.A. 153/1996 to reinforce that argument.

5. The Defendant filed no affidavit in response to the issues of fact raised by the Applicant but filed grounds in opposition which are that;

a. the Applicant has not satisfied the grounds for grant of an interlocutory injunction.

b. the claim is statue time barred because it is founded on a contract dated 30.11.1986 and since the same was lodged more than 6 years after execution, ultimately it cannot succeed by dint of section 4 (1) (a) of the Limitation of Actions Act. Reliance on this point is placed on the case of Lucky Summer Estates Co. Ltd & 3 others vs Kariuki & Gatheca Resources Ltd HCCC 2587/1994 where the issues of enforcement of a contract within the limit of statute was discussed extensively.

c. that the Application is spurious and should be dismissed with costs.

6. In determining the present Application, I should state from the outset that the Applicant was the Respondent in the matter before the Land Disputes Tribunal and has preferred an appeal to the Provincial Land Appeals Committee which appeals is yet to be determined. The present suit is however predicated on two prayers.

a. a declaration that the Sale Agreement dated 30.11.1986 is null and void by virtue of operation of the law for want of Land Control Board consent and that the same is therefore null and void.

b. that an injunction do issue prohibiting the District Surveyor, Makueni District from in any away interfering with the Plaintiff's quiet possession of land parcels nos. Machakos/Ulu/472 and 473.

7. It is quite clear to my mind that the objection to the grant of prayer **(a)** above is prima facie merited. I say so because the validity or otherwise of any contract can only be challenged within 6 years of the date of its execution. Section 4(1) (a) of the Limitations of Actions Act Cap 22 provides as follows:-

" ***the following actions may not be brought after the end of six years from the date on which the cause of action accrued-***

a. actions founded on contract;

b. actions to enforce a recognizance;

c. actions to enforce an award;

d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture

e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

8. If the contract was made in 1986, any action with regard thereto could only be brought prior to the year 1992 and not in 2009 as the Applicant seems to have done. It is also instructive that the Applicant admits that Land Control Board Consent was indeed granted for the transaction sometime in 1987 or thereabouts and he only moved this court to nullify the transaction 22 years later. Even if one would call the claim one for recovery of land, and it is not, section 7 of the Limitation of Actions Act would preclude any such action because of the 12 year limitation period.

9. Having so said however, I started by pointing out the pending appeal. The Tribunal has ordered in its discretion that the status quo be maintained as regards the suit land. If the District Surveyor moves as he planned to, and enforces the award of the District Lands Tribunal, there would be the risk that the appeal may succeed and the action would cause injustice to the Applicant. That action is also the substance of prayer (b) above and therefore even if prayer (a) fails, prayer (b) may well succeed. That to my mind is an issue that prima facie may favour the Applicant.

10. I was not addressed substantively on the issue of damage to be suffered if the orders sought are not granted but I agree and following the principles set out in Giella vs Cassman Brown[1973] E.A. 358, that the balance of convenience must favour the Applicant for reasons set out above.

11. In the end therefore, I will exercise discretion and grant prayer 3 of the Application dated 21.4.2009 with a further order that the injunction will only last until the hearing and determination of the Provincial Appeals Committee Case No. 52/2000 which must be heard and finalized before the end of this year. This order to be extracted and served on the Committee.

12. Each party shall have liberty to apply and each shall bear his costs of the application.

13. Orders accordingly.

Dated and delivered at **Machakos** this **9th** day of **October 2009**.

Isaac Lenaola

Judge

In the presence of; Mr. Makundi for Applicant

Mr. Makau h/b for Mr. Sekento for Respondent

Isaac Lenaola

Judge