



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 29 of 2007

ELIJAH NTAIYIA PLAINTIFF

VERSUS

LEKININI KULALE

PETER KULALE

KASHAU KULALE

OLE MOI KULALE DEFENDANTS

RULING

This ruling is in respect of an application for summary judgment that was filed by the plaintiff on 7th May 2007. The application was brought under order **XXXV rule 1(1) and 8** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** and **29(1)** of the **Land Adjudication Act**.

The application was supported by the plaintiff's affidavit. He deposed that a property known as **Land Parcel No.3, Nkararo** Adjudication Section, herein after referred to as "**the suit land**" was allocated and registered in his name. He annexed to his affidavit a copy of a letter dated 30th November 2006 from the District Land Adjudication and Settlement Officer, Trans Mara. He also exhibited a letter of consent from the aforesaid officer authorizing him to institute civil proceedings over the suit land. The plaintiff further deposed that upon allocation of the suit land to him, the 1st defendant, who is also the father of other defendants, filed an objection vide cause No.96 of 1990 which was heard and disposed of and a judgment delivered on 15th October 1996. Thereafter the 1st defendant filed an appeal to the Minister vide case No.630 of 1996, which was heard and disposed of on 20th May 2003. The appeal was dismissed and the boundary of the suit land confirmed.

That notwithstanding the 1st defendant had refused to concede and together with the other defendants had excised and seized a portion of the suit land measuring about 17 acres without any lawful cause.

In his suit, the plaintiff sought a declaration that he was the registered proprietor of the suit land and a permanent injunction to restrain the defendants by themselves, agents and/or servants from cultivating, grazing, leasing, interfering with and/or in any other manner dealing with the suit land.

The defendants filed a joint statement of defence and denied the plaintiff's claim over the suit land. They stated that they were in rightful occupation of the suit land which they said was part of land parcel No.5 Nkararo Adjudication Section. They added that the plaintiff had fraudulently acquired a portion thereof measuring 17 acres and had it registered as part of the suit land. The defendants set out particulars of fraud on the part of the plaintiff. They urged the court to dismiss the plaintiff's suit.

The defendants filed a replying affidavit to the plaintiff's affidavit and reiterated the contents of their statement of defence. They did not dispute the fact that the 1st defendant had filed objection proceedings and thereafter an appeal to the Minister, which were all decided in favour of the plaintiff. They however contended that in the two rulings aforesaid it was not established that they had trespassed into the suit land. They challenged the plaintiff to prove the allegation of trespass, violence and unlawful interference by themselves with the suit land. In their view, their statement of defence raised serious triable issues and therefore summary judgment ought not be entered.

Mr. Oguttu for the plaintiff submitted that by virtue of the ruling given in the objection proceedings and the appeal to the Minister, the defendants had no right to continue trespassing on the suit land. He added that the allegations of fraud made by the defendants were legally untenable. Any claim touching on fraud could only have been made within three years from 20th May 2003 when the Minister gave his judgment, he added. He further submitted that the allegations of fraud made against the plaintiff could not hold any water as he was not working in the Lands office and neither was any officer working at the Lands registry joined as a party to the suit. Moreover, the defendant had not filed any counter claim. In his view, the defence did not disclose any triable issue.

In support of his submissions, Mr. Oguttu cited **MELIKA VS. MBUVI** [2001] 1E.A. 124. In that case, the appellant filed a suit before the High Court seeking a declaration that a judgment in a subordinate court awarding a suit property to the respondent was a nullity. He averred that the decision in the case had been reached after the Land Disputes Tribunals Act had come into force and removed jurisdiction to hear land cases from magistrates' courts. The respondent submitted, inter alia, that the matter was res judicata and that the issue regarding the Magistrates' Courts' jurisdiction should have been made the subject of an appeal. He went on to argue that the appellant, having failed to file any such appeal, the present suit was an abuse of the court process. The respondent applied for the plaint to be struck out on the grounds that the matter was res judicata and that the Minister had awarded the suit property to him under the provisions of section 29 of the Land Adjudication Act. In addition, he claimed that the appellant had made an application to quash the Minister's decision which he later withdrew. The application to strike out the suit was granted. The appellant appealed on grounds, inter alia, that the High Court had misdirected itself in presuming that the minister's decision was a bar to a declaratory suit.

The Court of Appeal held that by withdrawing his High Court suit against the minister, the appellant had denied himself the only means permitted by the Land Adjudication Act of challenging that decision.

Regarding the limitation period for filing a claim based on the tort of the fraud, counsel cited the Court of Appeal decision in **JAVED IQBAL ABDUL RAHMAN AND ANOTHER VS BERNARD ALFRED WEKESA SAMBU AND ANOTHER**, Civil appeal No.11 of 2001 at Nairobi. In that matter, the plaintiff's claim against the defendants was based on the tort of fraud. The court held that the suit should have been filed within three years from the time when the plaintiffs realized that the suit land had been sold and transferred in a manner which they thought was fraudulent.

Mr. Minda for the defendants opposed the plaintiff's application. He pointed out that the defendants were not challenging the decision in the objection proceedings and the appeal to the Minister. He contended that the defendants had been in occupation of the suit land before the adjudication process commenced. They had not been ordered to vacate the land but were ordered to respect the boundaries as they existed. He added that the statement of defence did not state the date when the alleged fraud was discovered and therefore it could not be held that time began to run from 20th May 2003 when the Minister through the District Commissioner gave his decision.

Mr. Minda further submitted that the consent to file the suit that was given by the Adjudication Officer

did not include consent to file the suit against the 1st Defendant. It was in respect of the other defendants only. Lastly, he submitted that the statement of defence disclosed that there were triable issues and urged the court to grant the defendants leave to defend the suit.

Mr. Oguttu replied by stating that as early as 1990, the first defendant was aware that a portion of land that he was claiming to be his was chopped off and given to the plaintiff. He referred to the decision by the District Land Adjudication and Settlement Officer. There was also the Minister's decision made on 20th May, 2003. It was therefore obvious that the statutory period within which a claim based on fraud could be brought had lapsed.

Regarding the issue of consent to file the suit, Mr. Oguttu responded by saying that consent is given in respect of a parcel of land under adjudication and not for suing specified persons. The fact that the name of the first defendant was not stated in the consent did not negate the spirit of the consent.

I have carefully considered the submissions made by both sides. I have also gone through the proceedings that were before the District Lands Adjudication and Settlement Officer, (D.L.A.S.O.) Transmara District, as well as the appeal to the Minister and the decisions that emanated therefrom.

The D.L.S.A.O. heard the parties and visited the land in dispute. He decided the matter in favour of the plaintiff.

The first defendant appealed to the Minister and vide a decision that was delivered on 20th May, 2003, the appeal was dismissed. The parties were ordered to respect the boundaries as they existed then. At that time, the 17 acre parcel of land in dispute had already been awarded to the plaintiff.

Section 29(1)(b) of the **Land Adjudication Act** Cap 284 provides that the Minister's decision on appeal is final. The Minister is under an obligation to forward a copy of his decision to the Director of Land Adjudication and to the Chief Land Registrar.

The reason for so doing is that, following determination of all appeals in an adjudication section, the adjudication register is altered to conform with the determinations by the Minister and the adjudication register becomes final. What follows thereafter is issuance of title deeds.

It has already been determined that the suit land belongs to the plaintiff. That determination is final as provided by **Section 29(1)(b)** of the **Land Adjudication Act**.

The decision could only have been challenged by way of judicial review proceedings to quash the same but that was not done. Such proceedings cannot be instituted now. Even assuming the defendants could have challenged the decision by showing that the plaintiff had fraudulently acquired the suit land, the limitation period for an action founded on fraud is three years, see **JAVED IQBAL ABDUL RAHMAN & ANOTHER VS ALFRED WEKESA SAMBU & ANOTHER** (supra). The limitation period begins to run when the fraud is discovered. The allegations of fraud made in the statement of defence that was filed on 29th March, 2007 cannot salvage the defendants' case at all. Apart from the allegation of fraud in the statement of defence, the rest of the contents therein consist of mere denials.

In **EAST AFRICAN FOUNDRY WORKS (K) LTD VS KENYA RAILWAYS CORPORATION**, Milimani Commercial Courts, High Court Civil Case No.82 of 2000, it was held that a mere denial by a respondent cannot, in law, be treated as proper

defence.

In an application for summary judgment, the duty is cast on the defendant to prove that he should be given leave to defend by showing, prima facie, existence of triable issues, see **NAIROBI GOLF HOTELS (K) LTD VS BHINJI SANGHANI BUILDERS CONTRACTORS**, Civil appeal No.5 of 1997. In my view, the defendants have failed to show that there exists triable issues in their defence.

Consequently, I enter summary judgment for the plaintiff as prayed in the plaint. The defendants shall bear the costs of this suit.

DATED, SIGNED and DELIVERED at KISII this 16th day of May, 2008.

D. MUSINGA

JUDGE.

Delivered in the open court in the presence of:

Mr. Oguttu for the plaintiff

Mr. Minda for the defendants.

D. MUSINGA

JUDGE