



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT NO 72 OF 2003
MUCHENDU PLAINTIFF
VERSUS
WAITA.....DEFENDANT

RULING

By a Chamber Summons dated 7th April, 2003, the plaintiff sought to have the defendant restrained from removing and/or in any manner interfere with the use and enjoyment of all the items distressed until the hearing and determination of this suit. The plaintiff also prayed for distress levied to be lifted. The plaintiff filed two affidavits in support of the application, one was sworn on 7th April, 2003 and the other on the 12th day of May, 2003. There are two grounds raised in the Chamber Summons, one being that the plaintiff is a *bona fide* purchaser of the suit premises as opposed to a tenant and secondly, that the items distressed are household items without which the plaintiff's life will be adversely affected.

The defendant opposed the application by filing grounds of opposition and a replying affidavit sworn on 30/4/2003 by the defendant. The first ground is that the plaintiff's application lacks merit and that there were no sufficient grounds adduced. Secondly, that the plaintiff has not established that he has an interest whatsoever capable of being protected by way of an injunction. Thirdly, that the remedy of an injunction is not available to the plaintiff as against the defendant. And finally, that the plaintiff has not satisfied the well settled principles for the granting of injunctions.

The plaintiff's case is set out in the affidavit and by the amended plaint dated 10th April, 2003. The plaintiff claims from the defendant in his plaint:

- (i) Specific performance of the sale agreement and transfer of the property to the defendant in his plaint.
- (ii) Declaration that the plaintiff is a purchaser and not a tenant.
- (iii) A permanent injunction restraining the defendant her agents and/or servants from demanding rent and/or carrying any distress, interfere with the possession and/or enjoyment of the suit premises.
- (iv) In the alternative general damages for breach of contract
- (v) Costs of this suit and interest on above.

According to the plaintiff he purchased plot no 3209/1/MN Nyalii for Kshs 5,000,000/- in which he made

a deposit of Kshs 2,000,000/- by 11th November, 1995 to Mr Francis Waite Mbaki, now deceased, the defendant's husband. The vendor, Francis Waite Mbaki died in April 1996 and the defendant has since then failed to facilitate the transfer to the plaintiff despite numerous pleas from the plaintiff.

The plaintiff further avers that he has never been a tenant to the suit premises. The defendant on the other hand states that the plaintiff is a tenant and that he has been in arrears of rent since her husband died in 1996. As a result she admits that she levied distress for rent to recover a total sum of Ksh2,832,943.40. The defendant has annexed her affidavit a copy of the certificate of title to indicate that she is the registered proprietor of the suit premises. It also emerges from the affidavit of the defendant that she is one of the administrators of the estate of her deceased husband.

It is the defendant's assertion that the plaintiff is a tenant to the suit premises paying rent at a rate of Kshs 30,000 per month but since her husband died she did not pay even a single penny for rent. It also appeared that the plaintiff issued a cheque for Kshs 100,000/- as payment for arrears of rent but when the aforesaid cheque was presented on its due date and the same unfortunately returned unpaid with remarks "refer to drawer". It is the view of the defendant that the plaintiff annexed to his affidavit documents which were forged. The defendant has submitted that the action is time-barred by virtue of section 4 of the Limitation of Actions Act, cap 22 of the Laws of Kenya. It is alleged that time lapsed in the year 2001 and no leave to extend time has been obtained. The defendant submits further that there is no privity of contract between the defendant and the plaintiff. The defendant has been sued in her personal capacity and not in her representative capacity. The defendant also avers that her title is indefeasible by virtue of section 23 of the Registration of Titles Act, cap 281 of the Laws of Kenya, in that a litigant must plead and prove fraud on the part of that opponent.

The defendant has raised very weighty and serious questions of law that calls my attention to dispose of them before considering the merits of the plaintiff's application. First, the defendant has stated that the verifying affidavit of Peter Kinyua Muchendu sworn on 7th April, 2003 is incurably defective. The defendant's main contention over this affidavit is that it is not properly deponed. I have perused the said affidavit. I have also perused the provisions of order XVIII of the Civil Procedure Rules and the provisions of the Oaths and Statutory Declarations Act, cap 15 of the Laws of Kenya. I find that the affidavit is not fatally defective as such.

The same is properly before this Court. The defendant's objection on the issue is overruled.

Secondly, the defendant has averred that this suit is statute barred and therefore it is not competent. The plaintiff's suit is based on an agreement between him and one Francis Waite Mbaki entered on 31st August, 1994, as per the copy of the agreement exhibited by the plaintiff as annexure 'PKM 1'. I will reproduce paragraph 2 and 3 of the annexure as follows:-

"(2) The purchaser to continue to pay rent of Kshs 25,000/- upto the date of adding upto Kshs 2,000,000/
- being the deposit agreed at which time he takes up possession.

(3) The vendor will hand over a clear title free from any encumbrance upon completion of the said deposit."

In paragraph 4 of the plaintiff's plaint the plaintiff indicates that the deposit of Kshs 2,000,000/- was realised on 11.11.95. Hence what was remaining was for Mr Francis Waite Mbaki to hand over the premises to the plaintiff with a clear title. This was not done and as a result, the plaintiff now comes to court to enforce his right. The plaintiff indeed admitted that the basis of his action was the aforementioned agreement. It is important to establish when the cause of action accrued. It is stated in *Chitty on Contracts*, 23rd Edition, Vol 1 page 732, that the cause of actions accrued when the breach takes place and not when the damage is suffered. In this case going by the plaintiff's pleadings, the cause of action accrued on 11th November, 1995. Of course the plaintiff will argue that the alleged seller, Mr Francis Waite Mbaki passed away before completing the transaction..

It should be pointed out that time does not stop at the death of a party. It is stated so in *Halsbury's Laws of England*, 4th Edition, Vol 28 at page 281:

“Thus, if time has begun to run against a person entitled to sue, or in favour of a person capable of being sued, the fact of his death and that there is an interval between his death and the grant of administration does not prevent time from running against, or in favour of the administrator, as the case may be.”

Under section 4(1)a of a Limitation of Actions Act, cap 22 of the Laws of Kenya, an action founded on contract cannot be brought up after 6 years from the day it accrued. The basis of the plaintiff's action is a contract which accrued on 11th November, 1995. The time to sue lapsed on 11th November, 2001. I have perused at the court file and I have not seen any order of extension of time to file an action out of time. The defendant's objection therefore has merit. That is, that the plaintiff has not established a *prima facie* case with prospect of success to enable him be granted the orders of an injunction. The suit has not been heard so I will leave it at that to avoid prejudicing the plaintiff's case.

The third issue which the defendant raised is that even if there was a valid contract, there is no privity of contract between him and the defendant. It is clear from the pleadings that the defendant was sued in her personal capacity and not as the legal representative of the estate of Francis Waite Mbaki, deceased. There was no contract between the defendant and the plaintiff over the suit premises. Hence she is a stranger to the plaintiff's claims arising out of a contract which she was not a party. I am convinced also that the plaintiff on this issue has no claim against the defendant. To me the plaintiff has not established a *prima facie* case with a hope of success at this preliminary stage. A contract cannot confer right or impose obligations arising out of it on any person except the parties to it.

The fourth issue which the defendant raised is that, she is the registered owner of the suit premises under the provisions of the Registration of Titles Act cap 281 of the Laws of Kenya. The plaintiff had of course sought for specific performance against the defendant without laying the basis of his claim against the defendant. The defendant has exhibited a copy of the certificate of title to prove ownership. The provisions of section 23(1) of the Registration of Titles Act reads:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of the land is the absolute and indefeasible owner thereof. Subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The plaintiff has not pleaded misrepresentation and fraud in his pleadings against the defendant henceforth the defendant is a *bonafide* legal owner of the suit premises. Hence to me the plaintiff has not proved that he has a *prima facie* case with a probability of success against the defendant.

The Court of Appeal of Kenya interpreted the provisions of section 23(1) of cap 281 of the Laws of Kenya in the case of *Dr NK Arap Ng'ok v Justice Moiyo Ole Keiwa and 5 others* Nairobi C App No 60 of 1997(27/ 97 UR) where it was stated:

“section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of the title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

What claim does the plaintiff have over the defendant's title? It is stated in the plaint that he is a purchaser. I am not convinced at this stage that he has a legal claim against the Defendant under the law. The plaintiff may have to reframe his pleadings but at this interlocutory stage he has failed to prove his case. Consequently and for reasons I have stated above the plaintiff's application is devoid of merit and is

therefore dismissed with costs to the defendant.

Dated and delivered at Mombasa this 26th day of June, 2003

J.K. SERGON

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JUDGE