



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 51 OF 2020 (OS)

ANDERSON OBIERO ONCHONGA & 84 OTHERS...PLAINTIFFS

VERSUS

ANNE WAIRIMU NDUNGU.....DEFENDANT

RULING

1. This Ruling is in respect to the Defendant's Notice of Preliminary Objection dated 28th September, 2020. In the said Notice of Preliminary Objection, the Defendant has averred that the suit is incompetent, misconceived and amounts to gross abuse of the process of the court; that the suit is caught up by the Limitation of Actions Act and that this court does not have the requisite jurisdiction to determine the dispute.
2. The Notice of Preliminary Objection proceeded by way of written submissions. The Defendant's/Applicant's advocate submitted that the suit property is registered in the name of Paul Njiriri and not the Defendant and that any orders by this court will not be enforceable.
3. According to the Defendant's counsel, the alleged sub-division sketch map is not registered with the survey of Kenya neither is it endorsed by the Defendant and that the said survey map is not conclusive evidence that it was authored by the Defendant.
4. The Defendant's advocate finally submitted that the deponent of the Supporting Affidavit is a stranger to the Defendant and has no *locus standi* to swear the Affidavit on behalf of the Plaintiffs and that if the plots in question were sold between the years 2002 and 2005, then the receipts which were purportedly issued in 2013 raise more questions than answers.
5. It is the Defendant's submissions that if the suit plots were sold between the years 2002 and 2005, then this suit is caught up by the provisions of Section 7 of the Limitation of Actions Act and as such, this court has no jurisdiction to grant the reliefs sought.
6. The Plaintiff's advocate submitted that the certificate of official search annexed on the Supporting Affidavit shows that the Defendant is the registered owner of the suit property and that when the Defendant sold the plots, issued certificates to the Plaintiffs and put them in possession, she created a constructive trust in favour of the Plaintiffs.
7. It was the Plaintiffs' advocate's submission that the Agreements for Sale did not provide a specific completion date; that the cause of action did not arise until when there was manifest refusal by the Defendant to process titles which was on 13th November, 2019 and that the Preliminary Objection should be dismissed with costs.
8. This suit was commenced by way of an Originating Summons dated 22nd November, 2019. In the said Originating Summons, the Plaintiffs have raised the following questions for determination:
 - a. *Whether in the year 2001 the Defendant sub-divided her land known as L.R. No. 7340/49 situated at Mavoko in Machakos County into seventy four (74) plots measuring 60ft by 30ft.*
 - b. *Whether the Defendant offered the said plots for sale and the Plaintiffs purchased the same on various dates between 2002 and 2005.*
 - c. *Whether the Defendant was paid the sale price in full for the plots by the Plaintiffs.*
 - d. *Whether the Defendant issued the Plaintiffs with Certificates of Ownership.*
 - e. *Whether the Defendant gave possession of the plots to the Plaintiffs.*

f. Whether it was a term of the contract of sale that the Defendant will facilitate issuance of title deeds to the Plaintiffs.

g. Whether the Defendant has failed, refused and or neglected to obtain the necessary clearances and consents and execute transfers in favour of the Plaintiffs in order for them to obtain titles.

h. Whether the Plaintiffs have demanded that the Defendant completes the conveyance of the plots.

i. Whether the Defendant should be ordered to complete the sale by obtaining the necessary clearances and consents and executing the transfers within a specified period.

j. Whether the Deputy Registrar of this Honourable Court should be mandated/ordered to execute the transfer instruments in the event the Defendant declines to do so.

k. Whether the Chief Lands Registrar should be ordered to issue title deeds to the Plaintiffs.

9. The Defendant is seeking to have the suit dismissed on the ground that the suit is caught by the Limitation of Actions Act and that in any event, the suit property is registered in the name of one Paul Njiriri and not the Defendant.

10. In the case of *Mukisa Biscuit Manufacturing Co. Limited vs. West End Distributors Ltd (1969) EA 696, Newbold P* defined what a Preliminary Objection is as follows:

“A Preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts 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...”

11. The Plaintiffs in this matter have pleaded that they purchased their respective plots from the Defendant, and that the Defendant is the registered proprietor of L.R. No. 7340/49 measuring 1.818 Ha. Whether the Defendant is the registered proprietor of the suit property or not is a matter that can only be ascertained at trial, and not on a preliminary point of law.

12. Indeed, the court will have to peruse the title document to ascertain the allegations raised by the Defendant, that she is not the registered proprietor of the suit property. That being the case, and the issue of ownership of the suit property having been contested, the same cannot amount to a preliminary point of law.

13. In any event, the copy of the title for L.R. No.7340/49 shows that the land was transferred to the Defendant on 27th March, 2009. Whether the Defendant had the *locus standi* to enter into any Sale Agreement with the Plaintiffs between the years 2002-2005 can only be answered after the testimony of the Plaintiffs and the Defendant.

14. The Plaintiffs have pleaded that they purchased the suit properties from the Defendant between the years 2002 and 2005. According to the provisions of Section 7 of the Limitation of Actions Act, an action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

15. Although the Plaintiffs have pleaded that they acquired the suit properties between the years 2002 and 2005, Section 25 of the Act provides that where a right of action to recover land has accrued, and the person in possession of the land acknowledges title of the person to whom the right of action accrues, the right accrues on and not before the date of the acknowledgement or payment.

16. The provisions of Section 25 will therefore come into play in the event the Defendant acknowledged any payment for the suit land, and when the said acknowledgment was made. Indeed, the Plaintiffs have pleaded that they continued making payments in respect of the suit property past the year 2005. That being the case, the issue of whether this suit is time barred or not can only be established after evidence has been adduced.

17. For those reasons, it is my finding that the Notice of Preliminary Objection dated 28th September, 2020 is not merited. The same is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE