



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 2150 OF 2000

LAWRENCE MWANGI PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION..... 1ST DEFENDANT

WILSON NGINGA KIMOTHO2ND DEFENDANT

RULING

This is the 2nd defendant's application for an order that plaintiffs claim against 2nd defendant be struck out with costs on the grounds that:-

- (a) The plaint does not disclose any reasonable cause of action.
- (b) The suit as filed is incompetent.

The application is brought under Order VI Rule 13(1)(a) Civil Procedure Rules. Mr. Oluoch for the 2nd defendant contends that the suit was filed out of time and therefore plaintiff does not show a reasonable cause of action. He further contends that suit is incompetent because there is alternative claim to use land by adverse possession which claim is pleaded in a plaint.

I have perused the amended plaint filed on 26.6.2001 and the original plaint filed on 21.12.2000. It is clear that plaintiff pleads two sales of the suit land which he claims to be fraudulent. The first sale was in 1984 by Agricultural Finance Corporation (AFC) to itself. Plaintiff avers in paragraph 9 of the amended plaint that that sale was illegal and fraudulent. He has pleaded the particulars of fraud. That claim is directed to the AFC the first defendant. AFC has filed a defence to the original plaint.

It does not plead Limitation. By Order VI Rule 4(1) Civil Procedure Rules if AFC wishes to rely on the defence of limitation the statute of limitation must be specifically pleaded. By S.26, where the action is based on fraud of the defendant the period of limitation does not begin to run until the plaintiff has discovered the fraud.

The second sale is pleaded in paragraph 11A of the Amended plaint. That is the sale from the first defendant to the second defendant in March or April 2001. The copy of the official search annexed to plaintiff's affidavit sworn on 22.6.2001 shows that the land was transferred to 2nd defendant on 3.4.2001. Plaintiff pleads in paragraph 11 B of the Amended plaint that that sale was fraudulent.

He has pleaded the particulars of fraud. He pleads in paragraph 11 © of the Amended plaint that the 2nd defendant was party to the fraud and/or illegality and/or was aware of their perpetration. So as

pleaded, the cause of action against the 2nd defendant arose in the year 2001 when the land was transferred to him. Prima facie the cause of action as pleaded against the 2nd defendant is not time barred.

It is apparent from the plaint that the success of the claim against 2nd defendant will depend on the success of the challenge of the first sale.

But I have indicated above, first defendant has not pleaded statute of limitation as a defence as required. The 2nd defendant has not filed his defence and has not therefore pleaded the defence of limitation in his defence. If 2nd defendant intends to rely on the defence of limitation then it is required by Order VI Rule 4(1) Civil Procedure Rules to specifically plead that defence. As there is no such plea, then the 2nd defendant has raised the issue prematurely.

In any case the point at which plaintiff became aware of fraud and therefore when time started to run is a matter of evidence.

I am satisfied that the plaint as framed does not show prima facie that plaintiff's action against both defendants is time barred. I am however satisfied that the relief sought that plaintiff is entitled to the land by adverse possession is incompetent.

The law is well settled and Order XXXVI Rule 2D Civil Procedure Rules makes it clear, that a claim to land by adverse possession under S.38 of the limitation of Actions Act must be brought by an originating summons.

For the foregoing reasons I allow the application only to the extent that I strike out the alternative prayer (b) in the amended plaint with costs to 2nd defendant.

E. GITHINJI

JUDGE

21.2.2002

Mr. Oluoch present

Mr. Sitimei for 1st defendant present

Mr. Njaramba absent