

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.346 OF 1993

NASSOR MOHAMED NAHDY PLAINTIFF

VERSUS

RAVJI RAMJI NANJI DEFENDANT

RULING

This application is seeking one main order and two alternative orders. The main order it is seeking is that the plaint be struck out or dismissed on the ground that the pleaded cause of action is caught up by Section 3 and 13 of the Land Disputes Tribunals Act 1990 (Act No.18 of 1990) as the right forum to investigate such disputes is the Land Disputes Tribunal and the alternative order sought is that the plaint be struck out as the cause of action is barred by Section 7 of the Limitation of Actions Act. The second alternative order sought is that this suit be stayed sine die until issues are settled and Discovery and Inspection is done. There is an Affidavit in support of the Application and there are annexures to the same Affidavit..

The Respondent has opposed the application and has filed six grounds of opposition which are that the application is bad in law; that it is mischievous and misconceived; that it is frivolous and vexatious and is an abuse of the court process; that the defendant's claim that he acquired the suit land by adverse possession is a matter that must be proved by way of evidence; that the application is brought in bad faith as the Applicant is not in the country and is trying to use the application to circumvent the court's order which stated that no more adjournments would be allowed. There is also an Affidavit in reply filed by the Respondent.

I have considered the application. First on whether or not this suit is caught up by Section 3 and 13 of the Land Disputes Act. I have my doubts. The first point that makes it difficult for me to accept that proposal is that it does not appear to me that the suit before me is based on trespass to land. It is certainly not for division of or determination of boundaries to land and it is not a claim to occupy or work on the land. I am thus not certain that it is covered by the provisions of Land Disputes Tribunals Act – Act No. 18 of 1990. It will be thus necessary for the court trying the suit to receive evidence on that aspect. Secondly, Section 13 (1) of the same Land Disputes Tribunal is talking of cases that were commenced before Magistrate's court and not High Court. These are the cases where proceedings were to be discontinued and referred to the Tribunal. It does not talk about cases that were already filed in the High Court before the commencement of the Act. Perhaps that is because of a good reason which I shall touch on herein. Thirdly, the Land Disputes Tribunals Act came into effect on 1st July 1993. This case was filed on 15th June 1993. It was therefore properly filed and Section 13 would have only affected it if it was filed in the Magistrates Court. Fourthly, in any event, the High Court's inherent jurisdiction cannot be taken away at any time by an act even by an act of Parliament as it draws that jurisdiction from the Constitution. In this case it has jurisdiction to here this case and it has fixed it for hearing in another three days time. I think it is because of the jurisdiction of the High Court that the act did not direct cases already filed before it to go to the Tribunal.

The above take care of the order sought to strike out or dismiss this suit because of the provisions of Section 3 and 13 of the Land Disputes Tribunals Act. The Answer is, it cannot be dismissed or even struck out on that score. In any event even if it was caught up by that act, the answer would still not lie in striking out or dismissing. That too draconian an action in the circumstances of this case. The answer should have been to stay it to allow Plaintiff take it to the Tribunal or allow the Plaintiff to withdraw it. In my mind to strike out a case which is so old and where the Defendant has also contributed to the delay in

finalizing it would not be just and fair.

I now consider the first alternative. That is that the suit be struck out as the cause of action is barred by Section 7 of the limitation of Actions Act. That again cannot succeed because whereas the Defendant says the time began to run as against the Plaintiff on 15.12.1969 when he alleges the last payment for sale of the property was made, the Plaintiff's stand is that by 1982 December, the Defendant's father was still a tenant in the premises paying rent at the rate of KShs.100 per month and he produced a receipt for the same. Plaintiff says that there was an agreement to sell a portion of the land to Defendant's father in 1969 November, but that same did not materialize meaning no sale took place. The Applicant/Defendant alleges sale but is unable to produce the sale agreement. The totality of all these is that the facts advanced by both parties is at variance. That scenario can only be resolved by the court receiving evidence. It is like a case of preliminary objection. I cannot resolve the contradicting allegations by the parties through Affidavit evidence. It must proceed to full hearing so that each party will be at liberty to advance evidence on its case before the court can decide. In my mind, no court can dismiss or strike out pleadings on the grounds of limitation where the dates when the cause of action accrued are different with one date being from 15.6.1969 which would show the suit is time barred and the other date being December 1982 which clearly shows the suit is not time barred. Let the parties face cross examination at a full hearing to prove their allegations on oath and through evidence in open court.

As to the last alternative, it is with respect unfortunate, and laughable. Unfortunate because no reasons were advanced as to why the Defendant wants the suit to be stayed sine die. Laughable because to propose that a suit filed in 1993 June should be stayed since die until the issues are settled and discovery and inspection done cannot be treated seriously. It, however shows clearly the intention of the Defendant. It appears to me that the Defendant is out to frustrate the hearing of this suit. If that is not so, then how can Defendant and his advocates make such an unfortunate proposal that the court should forget its supervisory powers and ignore the negligence of the parties and even encourage the same by staying the suit sine die till the Advocates will carry out discovery and inspection at their own good time. What about the parties? Are they also expected to wait till the advocates carry out discovery and inspection at their leisure time. That prayer is clearly an abuse of the court process and is with respect an insensitive prayer.

The sum total of the above is that this application is dismissed with costs to the Respondent. Let the entire suit proceed to hearing on 30.9.2002. Orders accordingly.

Dated and delivered at Mombasa this 27th Day of September 2002.

J.W. ONYANGO OTIENO

JUDGE