



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 550 OF 2018

ALEX NGUGI MWAURA

(Suing as the Legal Representative of the Estate of Mwaura Gichuru (Deceased)).....1ST PLAINTIFF

MIHARATI DEVELOPMENT COMPANY.....2ND PLAINTIFF

- VERSUS -

GIKUMB A INVESTMENTS LIMITED.....1ST DEFENDANT

OFFICIAL LIQUIDATOR- NGUNDU FARMERS COOPERATIVE SOCIETY.....2ND DEFENDANT

THE CHIEF REGISTRAR OF LAND.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The plaintiffs brought this suit on 20/9/2018 through a plaint dated 18/12/2018. They contended that the 1st plaintiff was the legal representative of the estate of **Mwaura Gichuru** also known as **George Mwaura Gichuru (the deceased)**. They added that the deceased died on 20/10/1990. Their case was that, the deceased was an original Shareholder/Member of **Ngundu Farmers Co-operative Society Limited (the 2nd defendant)**. Having made all the requisite payments to the 2nd defendant, the deceased was allocated **Share Certificate Number 366** by the 2nd defendant in 1984. Following a balloting exercise carried out in or about 1989, the deceased was allocated **Land Title Number Nairobi Block 126/189** measuring approximately 2.338 hectares (**the suit property**). Beacons were pointed out and the deceased took possession and started cultivating the land. The deceased subsequently died in 1990 before the title to the suit property was issued. Subsequent to that, on 11/1/2012, the 1st defendant was issued with a title to the suit property. They added that prior to his death, the deceased sold the suit property to the 2nd plaintiff

2. The plaintiffs contended that the title issued to the 1st defendant in 2012 was procured fraudulently and/or illegally because the 2nd defendant had no right or capacity to sell, allocate or transfer the suit property to the 1st defendant. They itemized various particulars of fraud and or forgery on part of the 1st and 2nd defendants. They sought the following verbatim orders against the defendants:

a. A declaration that the plaintiff's (sic) father is the legal and beneficial owner/rightful allottee of LR NAIROBI/ BLOCK/ 126/ 189 Ngundu Farmers Cooperative Society Limited by virtue of Share Certificate Number 366.

b. An order compelling the 3rd defendant to cancel Certificate of Lease Number LR NAIROBI/ BLOCK/ 126/ 189 registered in the name of the 1st defendant and re-issue the same in the name of the 2nd plaintiff the beneficial owner of the land.

c. An order of permanent injunction restraining the 1st and 2nd defendant, their agents and or employees or anybody claiming through them from selling, transferring, alienating and or in any other manner interfering with LR NAIROBI/ BLOCK/ 126/ 189.

d. General and aggravated damages for trespass.

e. Costs of this suit.

f. Any other remedy that this court may deem fit to grant.

3. The 1st defendant filed a statement of defence dated 6/3/2019 in which it denied the allegations of fraud and/or forgery. It added that before it was registered as the proprietor of the suit property, the suit property was registered in the name of the 1st defendant. It further averred that it acquired the suit property from the following five brothers: **Dishon Ngunjiri Waithaka, Joseph Michira Waitheka, Joseph Waithaka Mwariri, Francis Maina Waithaka and Felix Mugo Waitha**. The five brothers had acquired the land from **John Gichani Kimari, Fredrick Njenga Chege and Alex Gichinga Mwangi**. The 1st defendant added that at the time it acquired the suit property, the 2nd defendant had not processed titles to the sub plots in the Scheme. The 1st defendant contended that the suit against it was misconceived, bad in law, and statute-barred under the Limitation of Actions Act.

4. The 2nd defendant filed a notice of appointment dated 25/2/2020 and a notice of preliminary objection dated 27/7/2020. Through the notice preliminary objection, the 2nd defendant objected to this suit on the following verbatim grounds:

1. That the suit is a nullity under the Insolvency Act, 2015.

2. That the suit is time-barred under the Limitation of Actions Act, Cap 22 Laws of Kenya

3. The plaintiffs lack the requisite locus standi under the Law of Succession Act Cap 160 Laws of Kenya

5. The 3rd and 4th defendants filed a statement of defence in which they pleaded that they were strangers to the allegations made in the plaint. They denied the allegations made in the plaint in their entirety. They denied liability.

6. Together with the plaint, the plaintiffs brought a **notice of motion** dated **18/12/2018** in which they sought interlocutory injunctive orders against the 1st defendant. On its part, the 1st defendant brought a **notice of motion** dated **31/10/2019** in which it sought an order striking out the suit against it on the principal ground that no cause of action was disclosed against it.

7. The preliminary objection by the 2nd defendant, the plaintiff's application dated 18/12/2018, and the 1st defendant's application dated 31/10/2019 are all the subject of this ruling. Because the preliminary objection raises the question of legal validity of this suit, I will dispose it before dealing with the two applications.

8. I have considered the submissions made in support of the preliminary objection. The gist of the preliminary objection is three pronged: (i) that the suit herein is a nullity and fatally defective by dint of the fact that it was brought without leave of the High Court as required under **Section 432 of the Insolvency Act, 2015**; (ii) that the suit herein is statute-barred under the **Limitation of Actions Act**; and (iii) that the plaintiffs lack the requisite *locus standi* under the **Law of Succession Act** to bring this suit. I will make brief pronouncements on the preliminary objection in the order in which the three limbs of the preliminary objection are itemized.

9. Mr Werre, counsel for the 2nd defendant, submitted that the 2nd defendant is a co-operative society under liquidation yet the plaintiffs did not obtain prior leave of the High Court to initiate this suit. Counsel argued that under **Section 432 of the Insolvency Act, 2015**, leave of the High Court is mandatory before a suit against a body under liquidation is initiated.

10. Mr Mwangi, counsel for the plaintiff responded that leave was sought and obtained in the Magistrate Court. He added that the leave which was obtained related to Dumville Farmers Co-operative Society and did not relate to the parties to this suit. Counsel submitted that there was an error when seeking the said leave but the said error was curable. He urged the court to grant the plaintiff time to cure the error.

11. I do not agree with counsel for the plaintiffs in his contention that failure to obtain leave is curable at this stage. **Section 432 (2) of the Insolvency Act** is worded as follows:

“432 (2) When a liquidation order has been made or a provisional liquidator has been appointed, legal proceedings against the company may be begun or continued only with the approval of the court and subject to such conditions as the court considers appropriate.”

12. My interpretation of the above legal framework is that any party wishing to initiate a suit against a body which is under liquidation is required to obtain leave of the court prior to initiating the suit. [See **Bisai & another v Kenya Commercial Bank Limited [2002] 2 EA 346**]. Secondly, the court contemplated by the Act is specified in Section 2 of the Act. That court is the High Court as established by the Constitution, not the Magistrate Court. I therefore agree with counsel for the 2nd defendant that without leave, the suit against the 2nd defendant is untenable.

13. What remains to be answered is whether the claim against the 2nd defendant can be legally severed from the claims against the other defendants. My answer to that question is in the negative. I say so because, from the pleadings and from the materials before court, it emerges that at all material times, the suit property was registered in the name of the 2nd defendant. Secondly, the 2nd defendant was responsible for the transfer of the share and for the conveyance of the suit property to the 1st defendant. In the circumstances, without the 2nd defendant, the suit against the other defendants is untenable.

14. The second limb of the preliminary objection is that the plaintiff's suit is statute-barred. The 2nd defendant relies on paragraph 12 of the plaint in which the plaintiffs have itemized particulars of fraud and/or forgery. They also rely on paragraph 7 of the 1st plaintiff's affidavit in which the 1st plaintiff deposed that in October 2009, he went to the office of the 2nd defendant and established that the deceased's share number 366 had been declared "empty" and had been transferred to the 1st defendant in June 2009.

15. I have examined the pleadings in this suit. The plaintiff's suit is essentially a suit for recovery of land. The relevant limitation framework is **Section 7 of the Limitation of Actions Act** which provides as follows:

7. An action may not be brought by any person to recover land after the end of twelve 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.

16. In my view, particularization of fraud and/or forgery under paragraph 12 of the plaint does not remove the claim from the ambit of **Section 7 of the Limitation of Actions Act**. The gist of the plaintiffs' suit is that they seek to recover the suit property which is land. Secondly, the limitation period for a suit seeking recovery of land is twelve years. In the present suit, it is contended that the 1st plaintiff discovered the alleged fraudulent transfer of the deceased's share (which represented the suit property) to the 1st defendant in October 2009. This suit was filed in December 2018. That was within the 12 year limitation period. Consequently, the second limb of the preliminary objection fails.

17. The third limb of the preliminary objection relates to the *locus standi* of the plaintiffs. Canvassing the objection, Mr Werre conceded that the plaintiffs had exhibited a Limited Grant of Letters of Administration obtained for the purpose of initiating a suit. Counsel argued that the exhibited Grant did not give the 1st plaintiff authority to preserve the estate of the deceased. Without saying much, I do not think Mr Werre has demonstrated that the initiation of this suit does not fall within the authority granted through the Limited Grant. I therefore reject that limb of the preliminary objection.

18. Because the first limb of the preliminary objection has succeeded and the rest of the suit remains untenable in the absence of the 2nd defendant, it follows that the entire suit herein stands to be struck out for non-compliance with the mandatory requirements of **Section 432 (2) of the Insolvency Act, 2015**.

19. Having come to the above finding, I will not consider the merits of the parallel applications by the plaintiffs and by the 1st defendant.

20. In the end, it is ordered that the suit herein be and is hereby struck out for non-compliance with the mandatory requirements of **Section 432 (2) of the Insolvency Act 2015**. The plaintiffs shall bear costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4TH DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the presence of:-

Mr Mubea Kimondo for the 1st Defendant

June Nafula - Court Clerk