



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 339 OF 2000

ISSA MASUDI MWAMBUMBA PLAINTIFF

VERSUS

ALICE KAVENYA 1ST DEFENDANT

HASSAN HAMISI SAUTI..... 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

DIANI PROMOTION SERVICE LTD. 4TH DEFENDANT

LOITA DEVELOPMENT LTD. 5TH DEFENDANT

RULING

The Applicant LOITA DEVELOPMENT LTD. The 5th Defendant in the suit came before court by way of Chamber Summons under Order 6 Rule 13 (1) a-d, Order 6A Rules 1-2, 8 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. However at the hearing Ushwin Khanna for the Applicant did concede that the application should have been grounded upon Order 7 and not 6 of the Civil Procedure. The question is whether such an error would have caused any prejudice to the Respondents and whether the same is fatal to the application. Courts have held in various matters that where it is obvious that the parties were aware of the issues before the court, such an error would not occasion any injustice.

The application seeks to strike the suit as against the 5th Defendant as it doesn't disclose any or any reasonable action as against the said 5th defendant on the grounds that;

(i) The action is based on fraud and/or misrepresentation which is time barred by limitation and therefore unenforceable in law. (ii) No fraud and/or misrepresentation or other cause of action is pleaded.

(iii) The plaint is misconceived, bad in law and/or defective.

(iv) The plaint is otherwise frivolous or vexatious and an abuse of the court.

The application is supported by an affidavit sworn by Mr. Ushwin Khanna counsel for the Applicant. Mr. Chidzipha for the Plaintiff submitted that the said affidavit offended the provisions of the law as the deponent therein would not have had sufficient information. Mr. Ushwin Khanna however in his affidavit clearly states that he has had the conduct of all the matters on behalf of the 5th Defendant since the first suit herein was filed in 1991. From the gist of his argument, it is clear the points in issue are related and

indeed based on the history and the various suits that have been filed before court involving the same parties and same or related issues as well as the various provisions of the law that are applicable. In this regard, I find that the counsel is indeed competent to swear the said affidavit.

The current action was filed on 24.7.2000 together with a verifying affidavit sworn on the 13th July 2000. However various other actions had been filed either by the original Deceased Plaintiff JUMA HELEFU MWATSUMI or by the present Plaintiff ISSA MASUDI MWABUMBA the Administrator of his estate. The first suit HCCC 194/85 in which JUMA HELEFU MWATSUMI (Deceased) claimed ownership of the said land under customary law was dismissed. He then filed a Judicial Review by Misc. Application 72/81 which was dismissed for want of prosecution and immediately thereafter a similar application in Misc. Application 165/91 which was subsequently withdrawn with costs to the 5th Defendant who had been joined as a party.

In 1993 July, he lodged a complaint with the District Officer Msambweni who constituted a panel of elders to hear the dispute but the hearing did not take place as Mr. Khanna drew the District Officer's attention the fact that not only was a suit pending before court but also that since the 5th defendant being the First Registered owner under the Registered Land Act cap 300 the said panel of elders had no jurisdiction to hear the said dispute. However the deceased filed yet another miscellaneous application in 116/94 once again seeking to quash the award of the panel of elders made on 17.8.93. The court ruled in his favour but went further to point out that since the land was already Registered, the provisions of the Registered Land Act Cap 300 were operative and only the High Court had jurisdiction to entertain any matters pertaining to the suit land. This gave birth to suit HCCC 153 of 1995 which was withdrawn by Notice of withdrawal of suit dated 14th July 2000.

On 24th July 2000, the Plaintiff filed the current suit involving the same parties and raising the same issues as those in HCCC 153/95. As I pointed out earlier on the Notice of withdrawal was filed 17th July 2000 while the verifying affidavit in respect of the suit was sworn on 13.7.2000. This Mr. Khanna says rendered the whole suit defective and an abuse of the process of law as the Plaintiff swore the verifying affidavit to the effect that there was no other suit pending as between the parties when indeed there was one pending. It's obvious that indeed case No. HCCC 153/95 was pending at the time. Order 7 rule 3 does give the court the discretion to strike out any plaint that does not comply with the provisions of sub-rule 2 therein. In this case, the Plaintiff was represented by the same counsel and therefore no room to plead ignorance.

The parties are in agreement that the suit is based on fraud and/or misrepresentation but the 5th Defendant says that neither of the two have been specifically pleaded as against the 5th Defendant. Paragraph 9 of the plaint does plead fraud and misrepresentation and gives particulars therein as against the 1st and 2nd Defendants while paragraph 10 says the 5th Defendant had knowledge of the existing fraud. However no particulars are given as required. In fact in the prayers, the Plaintiff prays for a Declaration as against the 1st and 2nd Defendant that Registration was obtained fraudulently. The only specific claim as against the 5th Defendant is as regards return of land and/or cancellation of the Transfer in it's favour.

Assuming at this state fraud and misrepresentation are properly pleaded, can the action so based on fraud and misrepresentation be deemed time barred by limitation and therefore unenforceable? Mr. Khanna submitted that the issue of fraud was within the knowledge of Juma Helefu Mwatsumi as early as 1974 when he first lodged an objection with the Kwale District Land Adjudication office. This is not in dispute. The question is, by the time the deceased preferred these proceedings before the court was the suit barred by limitation? Section 7 of the Limitation of Actions Act states;

“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 him or, if it first accrued to some person through whom he claims, is that person.”

After deceased lodged objection in 1974, he later filed proceedings in HCCC 194/84 claiming ownership. Thereafter he has continued to file one action after the other and in total has filed 7 actions.

The period between 1974 and 1985 is about 11 years going by the years and since Mr. Khanna did not state the exact month the time began to accrue in 1994 and the last month in issue in 1985 I am unable to say for certain whether the 12 year period had indeed expired. However the claim according to the plaint is based on both tort and a claim for land. The limitation period of tort is 6 years.

Mr. Chitzipha however argued that in such a case time would start to run from the time letters of Administration were issued. However on the same breath he says time in an action based on fraud begins to run from the date of discovery and says it is as outlined in the plaint. I had earlier pointed out that the Plaintiff did lodge an objection in 1974 but it was not until the suit in HCCC 153/95 filed on 2.3.95 that fraud and/or misrepresentation was pleaded for the first time. That suit was however withdrawn when the counsel for the Plaintiff discovered the claim was unsustainable as letters of Administration had yet to be obtained. The current suit was then filed on 24.7.2000 by which time 6 years had not run out. Although Mr. Khanna put up a spirited argument that the fraud was first discovered in 1974 when the objection proceedings were preferred, he failed to show for certain that in those proceedings and others that followed the issue of fraud had indeed arisen.

The Plaintiff does not assist on this issue as he does not give particulars of fraud as against the 5th Defendant or when the issue was first discovered.

In all, I have considered the many authorities referred to by all counsels and the issues raised herein. In my view regardless of what my finding on the other issues raised is, I have already found that the suit is incompetent in that the provisions of Order 7 sub-rules 2 were not complied with. It is in light of this that I allow the application and strike out the plaint with costs to all the Defendants.

Dated at Mombasa this 2nd day of August 2001.

P.M. TUTUI

COMMISSIONER OF ASSIZE