



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 8 OF 2019

PRISCILLA KIPTOO KAREI DAGOME & JOSEPH KENTO

(SUING AS LEGAL REPRESENTATIVES OF KAREI OLE DAGOME).....PLAINTIFFS

VERSUS

SPORTS CHAMPION LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Motion application dated the 14th October, 2020 where it seeks for the following orders:

- a) Spent
- b) The Honourable Court be pleased to and hereby dismiss or strike out the suit in limine and with costs to the Defendant.
- c) The Plaintiffs be condemned to pay the costs of this application.

The application is premised on the grounds on the face of it and the supporting affidavit of JOHN NGANGA who is an official of the Defendant where he deposes that the Defendant is the registered proprietor of land parcel number KJD/ KAPUTEI NORTH/ 1653 hereinafter referred to as the 'suit land', from 30th July, 1991 to date. He claims before the death of the late Karei Ole Dagome, he acknowledged the Defendant as the owner of the suit land. Further, between 30th July, 1991 and 6th January, 2004, the Plaintiffs herein did not make any claim over the suit land. He insists the Defendant has enjoyed quiet possession of the suit land. He contends the Plaintiffs' claim is statute barred as there is no reasonable cause of action they can maintain against the Defendant. Further, they cannot have a better claim than the deceased. He reiterates that the entire suit is based on hearsay and inadmissible evidence as the Plaintiffs were not parties to the transaction. He explains that in 2007, the 1st Plaintiff instituted a claim against the Defendant vide the Kajiado Land Disputes Tribunal Case No. 40 of 2007 but the said claim failed. Further, in 2014, the said Plaintiff reported matter to the Chairman, Land Task Force, County Government of Kajiado and to the Deputy County Commissioner Kajiado Central Sub County alleging the deceased had sold the suit land without consent. He insists the claim by the Plaintiffs concerning the suit land is intended to vex and harass the Defendant. Further, they have misrepresented to the court that there were no previous proceedings over the subject matter. He reiterates that the suit is an abuse of the court process and the reliefs sought are statute barred.

The application is opposed by the Plaintiffs who filed a replying affidavit sworn by the 1st Plaintiff PRISCILLA KIPITO NDUGUME who deposes that her husband was the registered owner of the suit land. She contends that she has been residing on the suit land continuously to the exclusion of the Defendant and only discovered in 2007 that it is the registered owner. Further, she moved to the Land Disputes Tribunal to challenge the ownership of the Defendant to the land. She explains that since the discovery that the title to the suit land is in the name of the Defendant, she has sought assistance from various offices to have the land revert back as her husband never sold it. Further, in August, 2014 she placed a restriction on the land by the assistance of the Deputy County Commissioner by way of a letter dated 27th August, 2014. She avers that upon further interrogation, she discovered the Defendant had allegedly obtained the land from her late husband as a gift and never paid any consideration. She claims though the suit land was registered in the name of her husband on 30th July, 1991, she has continued to be on the land and the Defendant has never been on it. She insists that if indeed the Defendant has been legally registered as owner of the suit land since 1991, the reason they have never been thereon raises more questions than answers. She states that time did not start to run before they discovered the fraud. Further, that her husband died in 2004 in Nanyuki and when undertaking succession, they discovered that despite being on the land, its title was in the name of the Defendant. She states that her late husband spent most of his time in Nanyuki but since they were on the land, they never thought the Defendant had the title. She reaffirms that this application should be dismissed and the hearing proceeds on merit.

The Defendant filed a further affidavit sworn by JOHN NGANGA its official who reiterated its claim as above. It disputes the Plaintiffs have been on the suit land. It insists the suit is statute barred. Further, that the legal representatives of the deceased cannot have a better claim than the deceased over the suit land. It contends that the two crucial witnesses to the transaction herein are deceased and this will cause grave prejudice to it. Further, the hearing of the case cannot ensue based on hearsay evidence and speculative statements.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 14th October, 2020 including the rivaling affidavits and submissions, the only issue for determination is whether this suit is statute barred and should be dismissed with costs to the Defendant.

The Defendant in its submissions reiterated its claim and relied on section 7 of the Limitation of Actions Act. It insisted this suit is statute barred as time begun to run in 2004 when the Plaintiffs discovered the alleged fraud. It further submitted that this suit was filed fifteen (15) years late. It also submitted that the doctrine of laches and inordinate delay defeated the Plaintiffs' claim. Further, that there must be plausible reason for the delay. It was their submission that proceeding with the hearing of the main suit in the absence of the material witnesses with knowledge of the transfer due to the Plaintiffs' delay and indolence in filing this suit is prejudicial to them. It contended that the Plaintiffs' suit is an abuse of the court process as they waited for eleven (11) years after the Tribunal case to file this suit. It relied on the following authorities: **Margaret Wairimu Magugu V Karura Investment Limited & 4 Others (2019) eKLR**; **Nelson Machoka Keraro V Land Registrar Kisii & 3 Others (2019) eKLR**; **Eldoret Express Limited V Tawai Limited, National Land Commission (Interested Party) (2019) eKLR**; **Daniel Kibet Mutai & 9 others V Attorney General (2019) eKLR**; **Muchanga Investments Ltd V Safaris Unlimited (Africa) Ltd & 2 Others (2009) eKLR** and the Nigerian Case of **Sarak V Kotoye (1992) 9 NWLR 9 pt 264) 156 at 188 – 189 (e)** which I deem relevant to buttress its averments.

The Plaintiffs in their submissions claim to have been continuously residing on the suit land and only discovered that the Defendant was registered as its owner in 2007. They relied on section 26 of the Limitation of Actions Act. They insist the fraud was only detected when they were applying for succession in respect to the deceased estate. They reiterate that where fraud has been pleaded the provisions of section 26 of the Limitation of Actions Act apply. To support their arguments, they relied on the following decisions: **Tecla Cheronno Sirma V Peter Kiplangat Kimetto & Another (2018) eKLR**; **Ishmael Ithongo V Geoffrey Ithongo Thindiu (1981) eKLR** and **Justus Tureti Obara V Peter Koipeitai Nengiso (2014) Eklr**, which I considered relevant.

I note the Plaintiffs at paragraph 9 of the Plaintiff claimed the Defendant unlawfully and fraudulently caused the suit land to be transferred into their names and proceeded to particularize their allegations of fraud as against it. The Plaintiffs have sued as legal representatives of the estate of KAREI OE DAGOME who initially owned the suit land which is now registered in the name of the Defendant. They claim they have resided on the suit land and only discovered the Defendant as its registered owner in 2007. The Defendant insists the Plaintiffs claim is statute barred, they have not provided plausible reason for the delay and the hearing of this matter will prejudice it since all the witnesses are deceased. I wish to make reference to various legal provisions governing limitation of actions in respect to claim over land.

Section 7 of the Limitation of Actions Act provides that: **'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.'**

The provisions are clear in terms of the period within which a party can bring forth a claim to recover land and indicates it is 12 years.

While section 26 of the Limitation of Actions Act provides an extension of time to bring an action to recover land on certain circumstances, and stipulates thus: **'Where, in the case of an action for which a period of limitation is prescribed, either—**

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or**
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or**
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:**

Provided that this section does not enable an action to be brought to recover, or enforce any mortgage upon, or set aside any transaction affecting, any property which—

- (i) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or**
- (ii) in the case of mistake, has been purchased for valuable consideration, after the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.'**

In the case of **R. G. Patel v. Lalji Makanji [1957] EA 314** the former Court of Appeal for Eastern Africa stated thus:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

While in the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows: '**that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit**'.

In the case of **Justus Tureti Obara v Peter Koipeitai Nengiso (2014) eKLR** Okongo J held that the inquiry as to when discovery of fraud is made is a matter to be ascertained at the trial.

The Plaintiffs claim to have resided on the suit land from 1991 when the Defendant was registered as its owner and no one had ever claimed it. Further, that after investigation, they discovered the Defendant claimed to have been given the suit land as a gift. They explained that the deceased used to reside in Nanyuki and they were not aware the land had been transferred to the Defendant. The Defendant insists the deceased acknowledged them as owners of the suit land which it acquired in 1991. I however, note in their affidavit, the Defendant has not furnished in court any single document to prove how it acquired the suit land nor controverted the Plaintiffs' averments that they are the ones on the land. They have further not controverted the Plaintiffs' averments that the deceased was resident in Nanyuki most of the time and they are the ones residing on the suit land. The Defendant contends that their witnesses are deceased and the hearing of this suit is prejudicial to it. They have not explained that if it was registered as owner of the suit land in 1991, why did it let the Plaintiffs reside thereon from the said date without staking a claim. The Defendant has mainly relied on the case of **Margaret Wairimu Magugu v Karura Investment Limited & 4 others** which I wish to distinguish from the facts herein. I note in the said matter there was proof the 1st Respondent had taken possession of the suit land during the deceased lifetime while in the instant case, this is not proved. Further, I note the Plaintiffs claim that they discovered the fraud in 2007 and instituted the Tribunal's case has not been denied.

Based on the facts at hand while associating myself with the decisions cited above, I find that the Plaintiffs have provided plausible reasons for the delay. Further, the allegations of fraud has stated in the Plaint cannot be proved unless viva voce evidence is adduced. I note section 7 as read together with section 26 of the Limitations of Actions Act provides a reprieve to the Plaintiffs. In the circumstance, I find that the averments that the suit is statute barred premature and direct that this matter should proceed to full hearing instead of being dismissed at this interlocutory stage.

It is against the foregoing that I proceed to disallow the Defendant's Notice of Motion application dated the 14th October, 2020.

The costs will be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 15TH DAY OF MARCH, 2021.

CHRISTINE OCHIENG

JUDGE