



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 15 OF 2018

(Formerly Kisii ELC case No. 114 of 2014 (O.S))

BENSON OKETCH OKELLO.....PLAINTIFF

VERSUS

BENSON NYANDIGA ONGURU.....DEFENDANT

RULING

1. This ruling is in respect of a preliminary objection on points of law raised at paragraph 12 of the defendant's statement of defence dated 7th April 2014, wherein the defendant who is represented by M/s Oguttu, Ochwangi and Ochwal, Company Advocates states that :-

- a. **The instant suit is barred and/or prohibited by dint of section 6 of the Land Control Act, Chapter 302, Laws of Kenya.**
- b. **The instant suit is barred and/or prohibited by dint of section 4 of the Limitation of Actions Act, Chapter 22, Laws of Kenya.**
- c. **The sale agreement at the foot of the instant suit was contrary to section 35 of the Law of Succession Act, Chapter 160 Laws of Kenya.**
- d. **The instant suit does not disclose nor capture any reasonable cause of action.**
- e. **The plaintiff is non-suited.**
- f. **The instant suit amounts to and/or constitutes an abuse of the due process of court.**

2. At the heart of the controversy is a portion of land measuring 150 feet by 150 feet of the suit land, LR NO. Kamagambo/Kabuoro/489 (the suit premises).

3. The present suit was originated by way of a plaint dated 19th March 2014 and filed on 19th March 2014. The plaintiff who is represented by Khalwale and Company Advocates has sued the defendant seeking the following reliefs:-

- a. **A declaration that the refusal by the Defendant to transfer a portion of the suit premises to the plaintiff is illegal and unlawful and in breach of the contract.**
- b. **General damages for breach of contract.**
- c. **The defendant be and is hereby directed to transfer to the plaintiff the agreed portions of land by measurement 150ft X 150ft forthwith.**
- d. **The defendant be and is hereby directed to facilitate the transfer of the suit premises to the plaintiff by signing the transfer forms and obtaining the necessary consent to transfer.**
- e. **Costs of the suit.**

f. Interest at court rate on (b) and (e).

4. Briefly the plaintiff's allegations are that on 28th September, 1999, he bought the portion of the suit premises from the defendant who had inherited the same from his father, Onguru Migano at a consideration of **Kshs. 100,000/=** which he paid in full to the defendant. That the plaintiff gave the defendant additional money to assist the defendant to petition for grant of letters of administration in respect of the estate of the defendant's father. However the defendant obtained the said grant, but he declined to transfer the portion of the suit premises to the plaintiff hence precipitating the instant suit.

5. The defendant denied the plaintiff's claim and sought dismissal and or striking out of the plaintiff's suit with costs in his statement of defence. He stated that he agreed to sell the portion of the suit land at a consideration of **Kshs. 70,000/=** only. That the plaintiff occasioned the family to have the said portion of suit premises transferred and registered in the defendant's favour.

6. The preliminary objection was canvassed by written submissions further to directions and orders given on 26th September 2018.

7. By submissions dated 2nd November 2018, learned counsel for the defendant termed the suit statute barred and that the plaintiff has no legal capacity to originate his claim for the recovery of the portion of suit premises. That the suit is an abuse of the due process of the court thus should be dismissed with costs to the defendant.

8. Counsel analysed the preliminary objection on points of law and cited sections **6 and 8 of the Land Control Act (Cap 302) as well as sections 35 of the Law of Succession Act (Cap 160) and section 4 of the Limitation of Actions Act (Cap 22)**. Reliance was made on three (3) authorities namely;-

a. Richard Gachwe Kahia –v- Edward Kamau Nganga Civil Appeal No. 16 of 2001 at the Court of Appeal, Nairobi.

b. Charles Ratemo Nyambati –v- Jacton Ocharo and 4 others Kisii ELC Petition No. 33 of 2013.

c. Law Society of Kenya –v- Commissioner of Lands and 2 others (2001) KLR 706.

9. In their submissions dated 4th December 2018, learned counsel for the plaintiff highlighted the case for the respective parties and the applicable law namely **Article 159 of the Constitution of Kenya, 2010, the Land Control Act (Cap 302), the Limitation of Actions Act (Cap 22)** and the law of Succession Act (Cap 160). In support of the plaintiff's position, counsel relied on the Court of Appeal case of **Kinyanjui and another –v- Thander and another (1995-98) 2EA 159** and the case of **D. T. Dobie and Company Limited –v- Muchina (1982) KLR** on rescission of contract and hearing of a suit on merits respectively.

10. I have examined the entire preliminary objection, pleadings and submissions herein. Is the preliminary objection on points of law sustainable in the circumstances? The answer is found in the analysis that follows herebelow.

11. On the first and second points of law of the preliminary objection, I am very conscious of **section 6 of the Land Control Act (Cap 302) and section 4 of the Limitation of Actions Act (Cap 22)** with regard to transactions affecting agricultural land particularly on consent in respect of the transactions and actions of contract, tort as well as certain other actions, see the case of **Kariuki –v- Kariuki (1983) KLR 227** on the recovery of any money paid in the course of the transaction under **section 7 of the Land Control Act (Cap 302)** and also **Richard Kahia, Ratemo Nyambati and Kinyanjui cases (supra)**.

12. It was asserted by the defendant's counsel that the land transaction between the plaintiff and defendant allegedly made on 28th September 1999 is void and of no legal consequence. That the purported sale agreement can not be enforced by dint of **sections 6 and 8 of the Land Control Act (Cap 302)**.

13. It was further asserted that the said contract was entered into between the parties herein on 28th September 1999 and that the suit was filed on 19th March 2014. That the suit is barred pursuant to **section 4 of the Limitation of Actions Act (Cap 22)**.

14. The plaintiff contended that it was upon the defendant to obtain the necessary consents and subdivision of the suit premises as observed in **Kinyanjui case (supra)**. That the preliminary objection in the defence is a sham in the circumstances.

15. The plaintiff further contended that due to the friendship between the plaintiff and the defendant, the former had no reason to doubt the latter in the transaction relating to the suit premises. That the plaintiff came to learn of the defendant's fraudulent conduct when the defendant sought to sell the suit land to a 3rd party. That therefore this suit should be heard on its merits.

16. In the light of the agreement dated 28th September 1999 and the plaint dated 19th March 2014 and filed on the even date. It is clear that plaintiff took close to fifteen years to file the instant suit. Quite plainly, the suit is barred by dint of **section 7 of the Limitation of Actions Act (Cap 302)** which provides:-

“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 who he claims, to that person.”

17. With regard to the third point of law in the preliminary objection, the plaintiff contended that the sale agreement at the foot of the present suit is contrary to **section 35 of the law of succession Act (Cap 160)**. That the suit land was previously registered in the name of the

deceased, Onguru Migano and it was only registered in the name of Benson Nyandiga on 1st October 2012 as shown on a certificate of official search dated 5th February 2014 and green card/register as at 11/5/1972. It is common ground from paragraphs 3,6 and 7 of the plaint and paragraphs 8 of the statement of defence that the suit premises were registered in the name of the deceased, Onguru Migano as at 28th September 1999 when the agreement was made.

18. It is trite law that the estate of deceased is vested in the legal representative of the deceased as provided for under **section 79 of the law of Succession Act (Cap 160)**; see also the Court of Appeal decision in the case of **Trouistik Union International and another –v- Mbeyu and another (1993) eKLR** relied upon in **Ratemo Nyambati case (supra)**.

19. It emerges from the foregoing analysis that the plaintiff had no legal capacity to enter into the agreement dated 28th September 1999. The instant suit is barred by dint of **sections 4 and 7 of the Limitation of Actions Act (Cap 22) and sections 6 of the Land Control Act (Cap 302)**. I concur with the defendant counsel that the suit is non suited. It discloses no reasonable cause of action and constitutes an abuse of the due process of the court.

20. Wherefore, I find the preliminary objection on points of law as discerned at paragraph 12 of the defendant's defence dated 7th April 2014, cogent and merited. I up hold the same. The plaintiff's suit by way of a plaint dated 19th March 2014 is hereby struck out with costs to the defendants.

DELIVERED, DATED and SIGNED at MIGORI this 9th day of JULY 2019.

G.M.A. ONGONDO

JUDGE

In the presence of: -

Ms. Okota holding brief for Khalwale learned counsel for the plaintiff.

Mr. Ochwangi learned counsel for the defendant.

Tom Maurice – Court Assistant.